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| **Costs Decision** |
| Inquiry opened on 9 April 2024 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 July 2024** |

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| **Costs application in relation to case ref:** **ROW/3306775** |
| * This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5). |
| * The application is made on behalf of Network Rail Infrastructure Limited (‘NR’) for a partial award of costs against the North Lincolnshire Council (‘NLC’) in relation to the inquiry. |
| * The inquiry was held in connection with the Definitive Map Modification (Restricted Byway 30A, Worlaby) Order 2021(1). |
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**Summary of Decision**

1. An award of costs is made.

###### Submissions on Behalf of NR

1. The application is now made on one ground which encompasses two distinct reasons for contending unreasonable behaviour arising from the conduct of NLC’s witness (‘CW’). CW is an experienced officer with experience of participation in public inquiries.

***Reason 1: persistent, unreasonable failure to answer questions on behalf of NR***

1. CW demonstrated an entirely avoidable, persistent and obvious refusal to answer the substantial majority of questions put in cross-examination, even when the questions were straightforward, or involved very little complexity. When CW did give what might be taken as an answer, he had to be asked the same question circa three times.
2. In particular:

* from the second day of the inquiry, there was a need to proceed on the basis that CW would be deemed to have refused to answer a question, after it had been put on at least three occasions;
* there were instances when Counsel for NLC openly encouraged CW to answer a question in a given way;
* on occasions, the Inspector intervened, in effect, to do no more than repeat the question previously put by NR’s Counsel;
* CW’s behaviour was such that Counsel for NR and NLC met twice, to discuss the matter, at no stage was it suggested that either meeting was unnecessary or unreasonable;
* the second of the meetings included the Inspector and the outcome of this meeting was that Counsel for NR did not continue with the conclusion of cross-examination. Had that decision not been made, it is very likely that the fifth day would have continued to a full day – which was not open to the parties, given the (usual) earlier completion scheduled for the Friday, owing to travel arrangements;
* not once during evidence-in-chief questions, or questions put to CW by the Inspector (both during and after cross-examination), did CW exhibit any appreciable difficulty in answering any questions. No question needed to be repeated. The only inference therefore is that the refusal by CW to answer questions was an entirely conscious action, and was not materially contributed to by some other external influence, or factor, other than CW’s plain choice – and which was maintained, despite many interventions and invitations (including from the Inspector and NLC’s Counsel);
* not once, reasonably, was it suggested to NR’s Counsel, either by NLC’s Counsel or by the Inspector, that any one specific question had been expressed in a way which rendered it unintelligible or remotely confusing or may render it unreasonable to expect CW to provide an actual answer to it;
* not once, reasonably, was it suggested, either by NLC’s Counsel or by the Inspector, that any one specific question had been expressed in a way which could reasonably have caused CW any other difficulty or disadvantage – of any kind – that might have prevented him from answering.

1. It has been calculated that in total around 7 hours and 30 minutes of wasted Inquiry time has been directly caused by this unreasonable behaviour. This is the equivalent of the whole of the fifth day of the Inquiry. In turn, this has meant also that a team was required to attend the Inquiry (with attendant overnight accommodation and travel costs, and expended professional time of NR’s witnesses) – a risk that must have been appreciated by CW.

***Reason 2: CW’s behaviour during witness purdah period***

1. A procedural irregularity arose by virtue of CW speaking (privately, and more than fleetingly) with two Council officers – being officers of his own department – during a period of CW’s witness purdah, when in cross-examination, and until such time that he was properly advised to immediately desist by NLC’s Counsel, once seen. CW confirms that he did not question this advice, having apparently recognised it to be entirely correct or properly prudent advice. That advice had been consistent with the Inspector’s own cautionary warning, properly given to all witnesses, including CW. It is therefore conscious behaviour. Even if not conscious, it was plainly unreasonable behaviour, especially for this senior and experienced officer.
2. Aside from CW’s very brief witness statement, NLC have chosen to make no observations to the Inquiry in relation to this matter. The witness statement is also unsupported by any other witness statement (including of either of the two officers involved).
3. Since CW has no legal accreditation or qualification, it must follow that he does not purport to inform the Inquiry in respect of any legal implications of his behaviour. Neither, more widely, does NLC. This includes its instructed legal officer(s) in attendance throughout the Inquiry.
4. Specifically for costs purposes, this issue of CW’s behaviour, having been correctly and prudently raised, has meant that some Inquiry time has been wasted. The procedural issue is one directly caused by CW’s behaviour alone. NR has incurred both Inquiry time and time to consider the matter outside of the Inquiry in respect of this issue. Around four hours of unnecessary expense was incurred.

***Integrity and functioning of Inquiry process***

1. It is submitted that each of the above reasons plainly engages the fundamental principle of preserving the integrity and very basic functioning of the Inquiry process and ensuring that this is not undermined by the unreasonable behaviour of participants.

**Response on Behalf of NLC**

1. It is important for unreasonable behaviour to have been established and then to establish the time incurred. The exercise should be applied on a broad basis rather than with mathematical precision in relation to the wasted expenditure. It should be dealt with in broad terms such as a day or half a day.
2. Attention is drawn to paragraph 8.1.3 of the Guidance on Procedures for Considering Definitive Map and Public Path Orders in relation to the amount involved and broad extent of any award.
3. It is asserted that four days would have been required to hear the evidence with a fifth day to deal with closing submissions. In contrast, the inquiry has taken six days. The maximum quantum should be one day. 7.30 hours is precise, and no additional time should be awarded for the breach issue.
4. The procedural basis relates to CW answering questions put in cross-examination. It is noteworthy that no point is made in relation to the substance of his evidence or consideration of the evidence being unreasonable behaviour. Nor have NR referred to any guidance or precedent to point to this being unreasonable behaviour.
5. Although it is accepted that it is possible that the way evidence is presented could be found to be unreasonable, this is dependent on the extent of the witnesses’ conduct. It is not considered that the threshold has been met to find CW’s conduct to have been unreasonable.
6. There were times when CW did not answer questions put during cross-examination, but this did not arise all of the time. It is not a case of a persistent failure to answer questions. Instead, there were episodes when this occurred, and these were intermittent. There were passages in cross-examination when he did answer questions.
7. An allowance should be made for witnesses during cross-examination. No criticism is made of the cross-examination which was robust and tenacious. It is no easy position for a witness during cross-examination. It would exceed the suggested allowance if the conduct in this case is considered unreasonable.
8. Ultimately there was not a procedural breach and CW did not discuss the case. The integrity of the process was not harmed. It is unwise for a witness to have a discussion during cross-examination, but it does not cross the unreasonable threshold. It does not go that far.
9. For these reasons the costs application is resisted. In the event that costs are awarded these should be limited to the costs incurred for one day of the inquiry.

**Reasons**

1. Ihave considered this application for an award of costs in light of the Planning Practice Guidance. This advises that costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense.
2. NLC accept that issues arose during the cross-examination of CW. I found that these incidents took up a considerable amount of inquiry time and necessitated the need for me to interject on a number of occasions and offer general guidance to CW on how he should answer questions put in cross-examination.
3. In some instances, NR’s Counsel had to move on to another question or there was a need for me to put the question to CW. Further, my instructions did not lead to any significant improvement in terms of the way CW answered questions put to him in cross-examination. This led to the unsatisfactory situation whereby Counsel for NR took the decision to cease with cross-examination on the fifth day.
4. I agree that the cross-examination was robust. However, I did not feel the need to challenge NR’s Counsel on the basis that it was overbearing. CW had raised concerns about the nature of the cross-examination, and these were addressed at the inquiry. Ultimately, no concerns were raised by NLC’s Counsel in relation to this matter.
5. There was a noticeable contrast with the cross-examination involving other witnesses, most notably the witness called by NR to address the documentary evidence. Her responses were succinct, and she addressed the questions put even if the answer was not supportive of the point being made in her evidence.
6. The conduct of CW was unreasonable given his experience and his subsequent failure to adhere to my guidance to any reasonable extent. Accordingly, the inquiry took longer that it should have done and meant that unnecessary expense was incurred. Given the nature of the unreasonable behaviour it is not possible to determine the exact amount of the time wasted. However, I agree with NLC that one day would be a reasonable estimate.
7. In terms of the second limb of the application, it was inappropriate for CW to speak to other people during a break in cross-examination. However, I do not find that it amounts to unreasonable behaviour. It is apparent to me that this action was misguided rather than an intentional breach to gain some form of assistance when cross-examination resumed.
8. It follows from the above that I conclude that a partial award of costs should be made in favour of NR for the wasted expenses incurred in respect of the first reason, namely the conduct of CW during cross-examination. I consider that these should be limited to the expense incurred by NR in relation to one day of the inquiry.

**Costs Order**

1. In exercise of the powers under Section 250(5) of the Local Government Act 1972, the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and all other enabling powers in that behalf, **IT IS HEREBY ORDERED** that the **North Lincolnshire Council** shall pay Network Rail Infrastructure Limited the costs that result from one day of inquiry time, such costs to be assessed in the Senior Courts Cost Office if not agreed. The proceedings relate to those described in the heading of this decision.
2. Network Rail Infrastructure Limited is now invited to submit to North Lincolnshire Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Mark Yates

**Inspector**