

IN THE TOWN PLANNING APPEAL BOARD

TOWN PLANNING APPEAL NO. 5 OF 2021 (5/2021)

BETWEEN

Gig Lok Monastery

Appellant

and

Town Planning Board

Respondent

Appeal Board: Mr. CHUA Guan-hock, SC, JP (Chairman)

Mr. HUI Chun-sing, Thomas (Member)

Ms. LAM King-sze, Cissy (Member)

Ms. NGAI Yuet-ping (Member)

Professor TSE Kam-tim (Member)

In Attendance: Ms. Ivy LI (Secretary)

Representation: Mr. Anthony Ismail,
Counsel for the Appellant,
instructed by Mayer Brown

Ms. Ebony Ling,
Counsel for the Respondent,
instructed by the Department of Justice

Date of parties' written submissions on costs: 20 October 2023

Date of Decision on Costs: 28 November 2023

DECISION ON COSTS

INDEX

		<u>Paragraphs</u>
A.	Introduction	1
B.	Background	2-3
C.	Applicable principles concerning costs on planning appeals	
	C1. TPO	4-5
	C2. Relevant principles on costs	6-9
D.	The parties' contentions on costs	10-11
E.	Applying the principles	12-17
F.	Conclusion and Order	18-23

A. Introduction

1. This is the Appeal Board's Decision on Costs following our Decision dated 29 September 2023 ("**The Decision**"). We directed (at §75) that the parties to exchange written skeleton submissions on costs within 21 days of the Decision.

B. Background

2. The background appears in the Decision which should be read together with this Costs Decision. Unless otherwise stated, we adopt the same abbreviations and nomenclature used in the Decision.
3. In essence, as stated in the Decision (at §73) on the three main issues:-

“(1) The planning intention for the Site under the OZP is primarily to provide “G/IC” facilities “serving the *needs of the local residents and/or a wider district...*”, and providing land “for *uses directly related to or in support of the work of the ...*

organizations providing social services to meet community needs, ...” (emphasis added).

- (2) The existing columbarium complies with the OZP’s planning intention, and of the Explanatory Statement, and there is no credible suggestion to the contrary. The columbarium also complies with *TPB Guidelines 16* (and specifically §2.3) properly interpreted and applied, namely it is compatible in land use terms with “*the surrounding areas*”, and not merely a specific use or area such as Parkland Villas.

None of the four reasons raised by the TPB are good reasons for refusing planning approval.

- (3) The cumulative effect of approval would not cause nuisances to the residential neighbourhood, whether traffic congestion as alleged or otherwise.

We respectfully agree with the views of the minority on the TPB.”

C. Applicable principles concerning costs on planning appeals

C1. TPO

4. Section 17B(8) *Town Planning Ordinance*, Cap. 131 (“**TPO**”) provides:

“(8) At the completion of the hearing of parties appearing at an appeal or at any adjourned hearing, an Appeal Board *may*-
...

(c) award to a party such costs legal or otherwise as it considers *reasonably incidental* to the preparation and presentation of an appeal” (emphasis added).

5. We note:-

- a. The discretion is in general terms, and should be exercised having regard to established principles, and all relevant circumstances of a particular appeal.
- b. The statutory focus includes such costs as are “reasonably incidental” to an appeal’s preparation and presentation.
- c. There is no reference in *s.17B(8)* to costs being taxed, or taxation of costs being necessary.

C2. Relevant principles on costs

(1) *When costs may be ordered against a party to an appeal*

6. The general principles are not in serious dispute. The parties differ in the application of such principles. The general principles on a costs order under *s.17B(8) TPO* are conveniently summarised in the Appeal Board's Decision in *MTR Corporation Limited v Town Planning Board, Decision on Costs*, unreported, Town Planning Appeal No. 3 of 2008, 27 September 2010 ("**TPA No. 3 of 2008**"), which states (at §§15-18):-

"15. The general practice of the TPAB could be presented as follows:

- (i) In the vast majority of cases parties do not appear to have asked for costs.
- (ii) In the six cases where the TPAB dealt with the issue of costs, it did not adopt the "costs follow the event" principle, except in one case. In all the six cases there were circumstances which in fact triggered or could have triggered a request for costs.
- (iii) The TPAB has favoured awarding costs not as a matter of course but *only in exceptional circumstances*.
- (iv) Exceptional circumstances would be where the appellant's case is "frivolous" or "*wholly without merit*"; or where a party has not conducted the case "*with dignity and restraint*" or has conducted the case in *a way "far from being commendable"*; or where a party has acted in *an unfair manner* placing an undue burden on the other party.
- (v) It would be safe to say that the TPAB would be prepared to award costs if *unacceptable behavior of a party has resulted in wasted expenditure* by the other party."

16. We are of the view that the practice of the TPAB not to award costs unless there are exceptional circumstances to justify an award of costs is a sound one. Just as an aggrieved applicant for planning permission must be encouraged to appeal to the TPAB without the risk of being burdened with costs *if they conduct their appeal with restraint and dignity*, so must the TPAB be given every opportunity to defend its decision before the TPAB, with a similar freedom, ***so long as they conduct their case fairly and in a professional manner***. If the TPAB is to exercise its independent planning judgment based *fully and fairly on an examination of all aspects* of the appeal, it is important to continue the current practice that has been followed for the last 20 years.

17. Both the appellants and the respondent assisted us in the conduct of the case with utmost professionalism. Neither party made any attempt to mislead the TPAB or their opponent. We in turn afforded every opportunity to the parties, especially the appellants, to present their arguments fully and without any undue restraint on time.

18. The respondent did not act in any manner which did or would cause prejudice to the presentation of the appellant's case. Nor did they conduct their case in such a manner that resulted in wasted time or expenditure to the appellants. We also hold the TPB's case was not frivolous or wholly without merit." (emphasis added).

7. More recently, in *Isaac Lam v TPB, Decision on Costs*, unreported 10 March 2023, Town Planning Appeal No 5 of 2020 ("TPA No. 5 of 2020"), the Appeal Board's focus included (at §8) whether a party had raised a clearly untenable point:-

"For the reasons that we set out in the Decision, this is *clearly an untenable point*." (emphasis added)

It is noted:-

- a. The situations as set out above where a costs order may be appropriate are not necessarily exhaustive.
 - b. While costs may be ordered in a planning appeal in exceptional circumstances, this may be another way of referring to circumstances that are unusual, or special.
8. In essence, the situations where a costs order may be made against any party to a planning appeal usually involves some degree of fault by a party in:-
- a. Bringing or pursuing a case (or part thereof) which is untenable, wholly without merit, frivolous, or unfair.
 - b. A party's conduct of its case that is without restraint and dignity, or is unacceptable, or far from commendable. Depending on the circumstances, this would arise when it is not reasonable to raise, pursue, or contest a particular allegation or issue.
 - c. Thus, instances where the TPAB may be amenable to awarding costs to a party include where the other party:-
 - i) acts in a manner that results in wasted time, effort, and expenditure.
 - ii) conducts its case in an unfair and unprofessional manner.

(2) *Rationale for ordering costs or otherwise*

9. The rationale for the TPAB's normal approach of no order as to costs includes:-
- a. An appellant is exercising a statutory right of appeal, and should not be deterred from exercising such right. Thus, an appellant is expected to conduct its appeal with restraint and dignity.
 - b. The TPB as a public body, is expected to conduct their case fairly and in a professional manner.

This makes eminent sense as the TPB is a public body exercising public functions, and is expected to be fair and objective. This is contrasted for instance, with being partisan, or adopting an approach of win at all costs.

D. The parties' contentions on costs

10. The Appellant's contentions include:-
- 10.1 The Appellant accepts that the usual position concerning costs of a planning appeal is to make no order as to costs.
 - 10.2 However, there are exceptional circumstances for ordering the TPB to pay part of the Appellant's costs.
 - 10.3 In broad terms, the TPB's case and conduct included unacceptable behaviour that resulted in wasted expenditure by the Appellant and/or it failed to conduct its case fairly and in a professional manner:-
 - a. The TPB's proper approach argument (that the existence of another regulatory regime, and Government's Policy Initiative and Press Release, were "*irrelevant*") was wholly without merit.
 - b. The TPB failed to conduct its case with dignity and restraint, by advancing the proper approach argument.
 - c. The TPB acted in a way that was far from commendable, by ignoring the TPAB's views in other planning appeals that different government departments

should deal with the public straightforwardly and consistently, concerning the same subject matter.

- d. The TPB also conducted its case in a way that was far from commendable because its submissions were not fairly advanced on an objective basis and/or were unduly technical and strict, and without taking a practical view of matters.

10.4 A costs order against the TPB would also provide a salutary warning to it that it needs to properly direct itself on the law, and properly apply the law. The law includes the principle of consistency as a cardinal principle of good administration; rejecting unsupported and exaggerated concerns which is the fundamental duty of a decision maker; basing any concerns on evidence instead of speculation which is another fundamental duty of a decision maker.

11. The TPB's arguments included:-

11.1 First, the fact the TPAB disagreed with the TPB's arguments on the relevance (or irrelevance) of certain considerations relied on by the TPB, does *not* mean such arguments were "frivolous" or "wholly without merit".

11.2 Second, even when the TPB's decision would have the effect of giving effect to the minority view on the TPB, this should not be equated with the TPB not acting "with dignity and restraint" or conducting its case in a way "far from being commendable".

11.3 Third, the TPB in exercising its statutory function to promote health, safety, convenience and general welfare of the community should have "an unfettered right to take into account all relevant considerations". Public views is only one of such considerations.

11.4 Fourth, in the present case where the Appellant's stance coincided with the public's majority view, the TPB has the duty to draw to the TPAB's attention the public's minority view to enable the TPAB to exercise its independent planning judgment based fully and fairly on an examination of *all* aspects of the appeal.

11.5 Fifth, as appreciated by the TPAB in TPA No. 3 of 1992, "*by the nature of things, the TPB cannot be expected to state fully its deliberations and reasons for refusing the application*" (emphasis added).

Further, all the TPB's arguments in the appeal "were raised and explained fully in its witness statement which was filed well before the hearing and cannot be said to have caught the Appellant by any surprise".

11.6 Last, the TPB has not in this appeal acted in an unfair manner placing an undue burden on the other party.

11.7 In conclusion, if a costs order is made against TPB, it would:-

- a. deter the TPB from pursuing its unfettered right to defend its decisions in future;
- b. hinder the TPB's ability to exercise its unfettered statutory function in deciding whether to grant permission for planning approval; and
- c. hinder the TPAB's ability to exercise its independent planning judgment based fully and fairly on an examination of all aspects of the appeal.

E. Applying the principles

12. Applying established principles and having considered and weighed up all relevant matters and the parties' contentions, with great respect, in the exercise of our discretion, we consider there are several exceptional features which warrant a partial costs order against the TPB. We accept the Appellant's contentions on costs which we consider more persuasive, on the balance of probabilities. However, we decline to order the quantum of costs sought by the Appellant, but make an appropriate reduction as set out later. Where we do not refer to a specific point raised, this does not mean that it has not been taken into account.

13. At the outset, we accept:-

- a. A costs order against any party to a planning appeal is not the usual order.
- b. We do not consider that the entirety of the TPB's case or its conduct of the appeal warrants anything other than a partial costs order.
- c. That the TPB's Counsel rightly, did not pursue the undesirable precedent argument.

While the hearing did not proceed to its full length (with several buffer days), the TPAB and the parties set aside a much longer hearing time from 9 am to 6 pm daily (with 1

hour lunch break). In practice, we are not concerned only with time spent at the hearing, but also time for the parties and the TPAB to consider all arguments, evidence, and points raised.

- d. No bad faith or dishonesty is alleged. Such conduct on an appeal by any party would likely be sufficient to warrant an exceptional costs order, but is not strictly necessary.

General principles

14. Several points of general principles are noted, before we consider the specific circumstances of this appeal:-

- (1) On the appropriate approach of parties to planning appeals, and of the TPB as a public body:-

- (a) As stated in the Decision (at §8), as planning appeals often involve issues of public interest, the Appeal Board is more likely to be assisted by submissions advanced on a fair and objective basis, without being partisan. Nor is the Appeal Board likely to be assisted by an approach of win at all costs, or springing a surprise on matters not referred to in the correspondence, witness statements, and a party's written Opening.

- (b) Just as an appellant exercising a statutory right to appeal is expected to conduct its appeal with restraint and dignity, the TPB can safely oppose an appeal on the basis it should not be liable for costs even if an appeal succeeds "so long as they *conduct their case fairly and in a professional manner*" (emphasis added): *TPA No. 3 of 2008 Decision on Costs* (at §16).

- (2) The rationale for this approach on costs is as follows:

- (a) The TPB as a public body exercising a public function, should act for a proper public purpose and in the public interest. Public bodies need to make decisions which are reasonable and sound. If they do, it is unnecessary to fear exposure to costs on a planning appeal. A reasonable approach requires that the TPB must take into account all relevant matters, and must not take into account irrelevant matters. In litigation including planning appeals, all parties need to be encouraged to be selective on the points taken and pursued. Costs recovery in

exceptional circumstances is an incentive for reasonable and responsible conduct concerning an appeal.

- (b) A public body's powers are not absolutely unfettered, but may be exercised for the public purpose(s) for which such powers are conferred and not otherwise. Such powers are conferred as it were upon trust, and not absolutely.
 - (c) Therefore, the TPAB may order costs in the TPB's favour when an appeal fails, if there are exceptional circumstances justifying a departure from the usual no order as to costs. Conversely, the TPAB may award costs against the TPB if it unsuccessfully opposes an appeal and there are exceptional circumstances which warrant a costs order.
 - (d) As the TPAB must consider all relevant circumstances, these include whether a party's case and/or its conduct concerning an appeal has contributed to costs being incurred or increased unreasonably. In particular, by a stance which is not fair and objective, but is partisan.
- (3) The modern approach to litigation and costs recovery is also relevant: increased cost effectiveness of practice and procedure; and to ensure fairness between the parties. Appellants who are individuals or companies would usually have more limited means compared to a public body like the TPB with access to Government funding from taxpayers.

The TPAB is also conscious that litigation in Hong Kong is notoriously expensive, including in planning cases as a specialist area of practice. The TPAB's resources and time are also limited, and should be distributed fairly. Moreover, as a matter of fairness and policy, a successful party to a planning appeal should in exceptional circumstances, be awarded at least some reasonable costs.

The TPAB is also aware that given very high litigation costs in Hong Kong, including in planning matters, some appeals may not be brought or pursued even if meritorious.

In this appeal, the Appellant is fortunate that in keeping with its charitable status, and the well-intentioned nature of its appeal, its solicitors and Counsel discounted

substantially their usual rates and exercised restraint in charging fees and disbursements.

- (4) The TPAB would also in exceptional circumstances, balance the risk of prejudice either way, if a costs order was made or otherwise. As a costs order on a planning appeal is exceptional, an unsuccessful appellant would not normally have to pay costs. Similarly, the TPB would not normally be exposed to an adverse costs order if an appeal succeeds. If faced with such a costs order, the TPB could reasonably be expected to have access to public funds, unlike appellants whether individual or corporate.

Specific application to the circumstances of this appeal

15. Next, we consider the specific circumstances of this appeal. While there is a distinction between the merits of an appeal and opposition thereto, and how a case is conducted by a party, these may overlap. We highlight the following matters as exceptional to warrant a partial costs order against the TPB. With respect, it may be due to over enthusiasm, that certain points were taken, and pursued by the TPB in opposing the appeal. Notwithstanding the TPB's subjective intentions, the matter is viewed objectively:-

15.1 The merits of the TPB's opposition: several aspects of the TPB's case were unfortunately, untenable and devoid of merit:-

- (1) The TPB's arguments that the existing columbaria did not serve "*the needs of the local residents and/or wider district*" (emphasis added), and were not a use "*directly related to or in support of the work*" (emphasis added) of organizations providing social services to meet community needs, were untenable, and devoid of merit. See the Decision at §§38(2), 45 and 46.

Indeed, the TPB arguments included that columbaria could be and are provided by Government, at other locations.

But the same use on alternative sites is normally irrelevant in planning terms, except in exceptional circumstances (the Decision at §50.3). *No* exceptional circumstances were alleged or established by the TPB.

- (2) Concerning the Government’s Press Release “*Policy Initiatives for Pre-Cut-Off Columbaria*” of 22 November 2017 (the Decision at §6.6).

Regrettably, the TPB’s case in this aspect was far from commendable for two reasons. First, it failed to consider and apply the principle of consistency, as a cardinal principle of good administration – even when the appeal was concerned with essentially the same subject matter, i.e. niches in “pre-cut-off” columbaria, where “*a pragmatic and sensitive approach*” was called for. Second, the TPB ignored and disregarded the Appeal Board’s decision in the NSW Decision (at §§48, 49 thereof) concerning consistency or lack thereof, between different Government departments, concerning the same subject matter.

The TPB cannot claim that it did not know of the NSW Decision – it was party to that Decision, and that Decision was cited before the Appeal Board.

This aspect of the case was highly regrettable as the TPB’s mantra in response to these matters was simply that Government’s Policy, and its “*pragmatic and sensitive approach*” in the Press Release were “*irrelevant*”.

- (3) The TPB even argued that the columbaria were *not* “pre-cut-off” columbaria, although this was apparent on the evidence, including the RNTPC’s *own* contemporaneous paper for meeting on 29 November 2019 (the Decision at §6.14). These documents should fairly have been brought to the Appeal Board’s attention, rather than the TPB disavowing the contemporaneous RNTPC paper. That stance was unprofessional and unbecoming. The TPB also changed its stance that the columbaria *is* a pre-cut-off columbaria (Mak’s Statement §7.35).

15.2 The conduct of the TPB’s opposition to the appeal: with respect, several aspects of the TPB’s conduct in opposing the appeal were not commendable, or reasonable:-

- (1) As to the extent of public support or otherwise, the Decision should not be misread. At the very least, the TPAB expects fair presentation of a case by any party, and especially by the TPB as a public body. It should have pointed out the relative positions on public support and opposition to a development, in terms of numbers and/or percentages. In this case, there was 64% support and 34% against.

Instead, the TPB's focus was on the numbers in opposition, without fairly stating the relative positions for and against the proposed development.

- (2) The TPB's lack of empathy towards the planning approval sought flowed from its misconceived position that Government's Policy and approach in the Press Release dated 22 November 2017 were "*irrelevant*".

With respect, the TPB confused the existence of a statutory provision in the *PCO* to remove ashes or niches, with the separate question of whether it was right and appropriate to exercise such power.

- (3) The argument that the Appellant "lacked authority all along", sought to purge its wrong, and was "the only party to blame" was highly technical, and partisan.
- (4) The TPB's reason that the columbaria "*shared the same access road*" was unsupported by any TPB Guidelines or document: that columbaria should *not* share the same access road as a residential development, and/or should have its own access road.

While the position of Government departments concerning traffic congestion was that there was no in principle objection, the TPB's position on traffic was unsupported, and exaggerated. It did not even engage an expert witness to deal with traffic congestion, but sought to rely only on Mr. Mak's factual evidence which was wholly insufficient and unconvincing on this point.

On the evidence, sufficient and adequate measures were *already* taken on traffic and crowd control since at least **2015** – *8 years ago*. Thus, the TPAB pointed out that the position of the relevant Government departments was neither consistent, nor coordinated. Yet again, the TPB did not take the trouble to properly consider and apply the consistency principle, let alone as set out in the NSW Decision.

As there was in substance, *no* good reason to object on supposed traffic congestion, the Appellant could have been spared the significant time and expense of this appeal – traffic being apparently a key concern in the TPB's reasons in its Decision letter.

16. It remains to deal with the TPB's other arguments:-

- 16.1 The argument that even when the TPB’s decision would have the effect of giving effect to the minority’s view on the TPB “this should not be equated with the TPB not acting “with dignity and restraint”, has misread the Decision. We do not rely on the mere fact that the minority disagreed.
- 16.2 The TPB’s reliance on an “*unfettered right to take into account all relevant considerations*” stands matters on their head. As a public body, the TPB must take into account all relevant considerations, rather than having an “unfettered right” to take into account whatever it considers relevant.
- 16.3 The TPB relies on the statement in *TPA No. 3 of 1992* “by the nature of things, the TPB cannot be expected to state fully its deliberations and reasons for refusing the application” (§11.5 above).

That dicta has been read out of context. The Appeal Board in that case was not saying that a public body need not give fair notice, or adequate reasons. Nor was it saying that the TPB is necessarily entitled to rely on reasons without giving fair notice, or reasons not arising from those given, and not appearing in its witness statements.

- 16.4 The TPB’s contends “all the arguments made by the TPB in the appeal were raised and explained fully in its witness statement ... and cannot be said to have caught the Appellant by any surprise”.

With respect, we have compared the Decision (at §13) on matters not raised in the TPB’s Decision letter, and the TPB’s witness statement of Alexander Mak dated 20 July 2022. Of the five matters referred to which the TPB’s Decision letter did not refer to, only factor (1), namely the HKPSG and the columbaria as an alleged “sensitive community facilities” was mentioned in Mr. Mak’s witness statement (at §§7.1-7.13).

The purpose of a witness statement is to give fair notice, avoid surprise, and to focus on the real issues. While a witness statement should deal with matters of fact rather than opinion and argument, it should be full and complete. The fact the Appellant could deal with new points without an adjournment, does *not* mean the TPB is entitled to rely on matters without giving fair notice in its Decision letter, witness statements, and written Opening.

16.5 As to the TPB's conclusion (§11.7 above):-

- a. A costs order would not deter the TPB from pursuing its role in defending decisions in future. It has no "unfettered right" to defend, but should act reasonably, and in the public interest.
- b. A costs order would not hinder the TPB's ability to exercise its statutory function which is not absolutely "unfettered" in deciding whether to grant permission for planning approval. Instead, as a costs order is exceptional, these should *improve* the TPB's statutory function. *No* party to a planning appeal is entitled to mount a case (or part thereof) which is untenable, or not to conduct a case fairly and in a professional manner. No party can proceed with impunity, or supposed immunity to a costs order. Otherwise, the legislative intent in *s.17B(8) TPO* would be rendered otiose.
- c. A costs order would not hinder the TPAB's ability to exercise independent planning judgment. While the TPAB looks at matters *de novo* with new materials and evidence, the same considerations in subparagraphs a. and b. above apply.

Ways to avoid or minimize risk of error

17. With respect, the Appeal Board urges the TPB to take proactive steps to avoid and minimize the risk of error, for any part of its case on an appeal, or presentation thereof in future. These steps merit serious consideration:-

- (1) Much of the TPB's role involves interpreting legal documents which is a question of law, where there is only one correct answer. Further, planning cases often raise several legal points. Prevention of error is much to be preferred than seeking to cure an error, after the event.

Thus, while the PlanD and TPB have many capable persons who may not have legal training, the PlanD and TPB must ensure they have sound legal input *before* they makes decisions with potential legal consequences – to avoid or minimize the risk of error. This should lead to less planning appeals, and a greater chance of successfully opposing an appeal. The result should be less expenditure of time and expense (including public expense) concerning planning appeals. Otherwise, without sound

legal input at an early stage, there is a greater risk of error and confusion, and incurring unnecessary time, effort, and expense concerning such appeals.

In this appeal, we refer for instance, to the Decision (at §64(1)) that *TPB Guidelines 16* (at §2.3) was misconstrued as a key error. Such error could and should have been avoided if the PlanD and TPB had been properly directed, as a matter of law.

Therefore, it is prudent and *necessary*, for the PlanD and TPB to receive sound legal input *before* they make decisions with potential legal consequences – rather than only *after* the Department of Justice is involved after an appeal is lodged. At that stage, the DoJ’s stance may well seek to preserve the position, already taken by the TPB.

(2) We respectfully set out the NSW Decision (at §59):-

“As stated during the hearing, we urge all parties to appeals before the TPAB to seriously consider obtaining advice from Counsel on the merits and evidence well *before* any appeal hearing – to avoid or minimize the risk that a particular point (as here, with the expert’s declarations) may be overlooked, or only spotted at the hearing - whether on the evidence, procedure, the law, or the merits. And especially when as here, an appeal involves expert evidence, and is of some complexity. Parties and Government departments are usually careful with expenditure. If an advice on merits and evidence is obtained in good time, this may assist in the public interest, in some appeals being settled, or the issues narrowed - and to avoid the risks above. Conversely, without an advice on merits and evidence in good time, it may be too late at the hearing, to properly redress certain matters, e.g. gaps in the evidence. This may also impact on the Appeal Board’s evaluation of the merits, and the weight to be attached to a particular witness’ evidence. Independent Counsel instructed should form an overall view, well before the hearing. It may also be that if such an advice is obtained in good time, on mature reflection, certain arguments may not be taken or pursued at the hearing as less persuasive, or not credible.” (the NSW’s Decision’s italics; our underlining).

From the Costs Decision above, it is not apparent that such views were seriously heeded, if at all. Several arguments by the TPB referred to earlier should not have been taken or pursued being less persuasive, or not credible.

F. Conclusion and Order

Order and amount

18. The Appellant contends that its total legal costs exceed HK\$4,000,000 of which approximately HK\$1,000,000 relate only to the costs of the 3-day hearing. It contends that

these costs do not include the Appellant's own costs in for instance, engaging consultants and experts.

19. Adopting a broad-brush approach, the Appellant seeks an order that the TPB pay the Appellant about 35% of its partial costs of HK\$4,000,000 amounting to HK\$1,400,000.
20. In TPA No. 5 of 2020, the TPB claimed costs of HK\$176,225. The unsuccessful appellant claimed that HK\$109,743 was reasonable, i.e. 62% of the TPB's costs. The Appeal Board awarded costs of HK\$70,000, i.e. 63.8% of the amount the Appellant contended was reasonable, or 39.7% of the TPB's claim for costs.
21. On this appeal adopting a broad-brush approach, and in fairness to the TPB as a costs order is exceptional, we are not persuaded to award costs of 35% as sought by the Appellant on this occasion. While there are exceptional circumstances in the TPB's case and conduct thereof, having considered and weighed up all relevant matters, we award 20% of the Appellant's total partial costs of HK\$4,000,000 (already with substantial discount from the Appellant's solicitors and Counsel), i.e. HK\$800,000 as reasonably incidental to the preparation and presentation of its appeal, which is less than one third (33%) of such partial costs.
22. We order that the TPB pay the Appellant such costs of HK\$800,000 within 28 days of this Decision.
23. We thank Counsel and both teams for their assistance.

(Signed)

Mr. CHUA Guan-hock, S.C., JP
(Chairman)

(Signed)

Mr. HUI Chun-sing, Thomas
(Member)

(Signed)

Ms. LAM King-sze, Cissy
(Member)

(Signed)

Ms. NGAI Yuet-ping
(Member)

(Signed)

Professor TSE Kam-tim
(Member)