

CO/4865/2014

**Neutral Citation Number: [2015] EWHC 1978 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Friday, 1 May 2015

**B e f o r e:**

**MR JUSTICE HOLGATE**

**Between:**

**TRUSTEES OF THE CECIL FAMILY ESTATE\_**

**Claimant**

v

**SOUTH KESTEVEN DISTRICT COUNCIL\_**

**Defendant**

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**Mr J Clay and Mr R Hanstock** (instructed by Bond Dickinson LLP) appeared on behalf of the  
**Claimant**

**Mr R Langham** (instructed by South Kesteven Borough Council Legal Services) appeared on  
behalf of the **Defendant**

J U D G M E N T  
(As approved by the Court)

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1. MR JUSTICE HOLGATE: In this application for judicial review brought with the leave of Lewis J, the claimant challenges two planning permissions granted by South Kesteven District Council ("the Council") on 10 September 2014 for development at Blackfriars Street, Stamford, Lincolnshire. One permission authorises simply the demolition of the former Newage and Cummins Social Club, whilst the other authorises that demolition, together with the redevelopment of the site by the construction of a four-storey office building including a basement. It is agreed that the basement would involve excavation across the site to a depth of some 5 Metres and would accommodate a 150-seat auditorium.
2. The claim was served upon two interested parties, interested in the land and in the development. They have not filed acknowledgements of service and did not appear at the hearing.
3. The site lies within the Stamford Conservation Area. There are a number of listed buildings in the vicinity; some grade I and others grade II\*. They include two adjoining properties which belong to the claimant: 14 and 14A Blackfriars Street. They are both dwelling houses and listed grade II\*. They lie to the west of the development site.
4. The definition of a listed building is given by section 1(5) of the Planning (Listing Buildings and Conservation Areas) Act 1990. This provision extends the definition of a listed building beyond the building included in the statutory list and reads as follows:
  - i. "In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act —
    - (b) any object or structure fixed to the building;
    - (c) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948,

- i. shall be treated as part of the building."
5. Section 66(1) of the 1990 Act provides:-
  - i. "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority... shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."
6. Number 14A has a large garden at the rear in which stands a medieval stone barn with a pantile roof and an adjoining lean-to structure. These structures lie on the boundary with the development site. The remainder of that boundary is marked by a stone wall. It is common ground that the barn, the lean-to and the wall are all "listed structures" protected by Part I of the Listed Building Act 1990 by virtue of section 1(5). They all form part of the land. The barn lies within the curtilage of 14A and the lean-to lies within the curtilage of number 14. The boundary wall lies partly within the curtilage of number 14 and partly within the curtilage of number 14A.
7. The two applications were the subject of two officers' reports to the meeting of the Defendant's Development Control Committee on 9 September 2014. In accordance with normal practice, the officer recommended that the application purely for demolition of the existing club building should not be approved in the absence of a planning permission for an acceptable redevelopment scheme, and so the two matters were considered together.
8. The report stated that the application site is "in a sensitive location within Stamford Conservation Area". The more substantial of the two reports dealt largely with the merits of the redevelopment proposal.
9. In the concluding section of that report, paragraph 10.8.1 read as follows:
  - i. "The application is finely balanced with the potential impacts on residential amenity, visual amenity and the historic environment

being acknowledged. However, it is considered that the amended scheme has successfully mitigated against these negative impacts and will, on balance, have a positive impact on the character and appearance of the conservation area and bring significant economic benefits to Stamford."

10. The officer in paragraph 10.8.2 went on to recommend that planning permission be granted on the two applications for the reasons he had set out.
11. The Claimants objected to the two applications. First, a letter of objection was sent to the Council on behalf of the Trustees by Mr Thomas Bagge, a partner in Strutt & Parker, and in charge of the firm's Stamford office. The letter concentrated on the effects of the proposed new building on the setting of the nearby listed buildings. Second, and as the minutes record, Mr Bagge also spoke on behalf of the Trustees at the Committee Meeting. It is common ground that the listed structures directly abut the club building and would directly abut the new building proposed to be constructed, including its basement.
12. In paragraph 5 of his first witness statement, Mr Bagge says that the trustees objected to the demolition of the existing building, the excavation of the site, and the erection of the new building, on the grounds of the consequential damage that would be caused to the listed structures. In paragraph 5 of his witness statement, Mr Paul Thomas, the Defendant's Executive Manager, Development and Growth, accepted that Mr Bagge had raised this objection at the Committee Meeting and that he had pointed out that it would be necessary for the listed structures to be rebuilt as the result of the proposed works on the adjoining site.
13. In paragraph 12 of his witness statement, Mr Thomas said this:
  - i. "The Council does not know whether the physical integrity of the barn and wall are 'directly affected' by the development. I supposed that it is inevitable that it is 'potentially affected'."

14. Mr Richard Langham, who appears in this court on behalf of the Council, accepted that:

(i) The officer's report contained no assessment of whether the proposed scheme would have an impact upon the listed structures, and in particular their structural integrity

i. (ii) This matter was not taken into account by the Council in deciding to grant the two planning permissions

ii. (iii) In accordance with paragraph 15 of the Council's detailed grounds of defence, the Council only applied section 66 of the Listed Building Act in terms of how the proposed development "would affect the setting of listed buildings" and not whether the development would affect the listed buildings themselves, in particular, the structures within the curtilages

iii. (iv) Consequently the Council did not apply section 66(1) so as to have special regard to the desirability of preserving the listed structures in so far as their structural integrity would be put at risk by the proposed development and to give "considerable importance and weight" to that matter in the planning balance (see Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors [2014] EWCA Civ 137, paragraphs 26 to 29 and R (Field Forge Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin) paragraphs 48 to 55.

15. Accordingly, the lawfulness of the Council's decision to grant the two planning permissions turns upon whether its construction of section 66(1) of the 1990 Act is correct. It is accepted that if section 66(1) was engaged as regards the effect of the proposed development upon the listed structures, in particular their structural integrity, the Council's reading of that provision was too narrow and the decisions to grant planning permission cannot stand.

16. Mr Langham did not pursue a further argument raised in the Council's summary and detailed grounds of defence, namely that the Council was entitled to leave the effect upon the listed structures to be dealt with under the Party Wall etc. Act 1996. In my judgment he was entirely correct not to do so. If section 66(1) was engaged here to deal with the effect of the development upon the listed structures, the Council was obliged to comply

with that provision and could not avoid its obligation by reference to another statutory code. In any event, the object of the 1996 Act is to regulate the carrying out of "boundary development" as between neighbours. It is not concerned with the protection in the public interest of listed buildings and their special architectural or historic features.

17. Mr Langham submits that the words "development which affects a listed building" have the effect of restricting the application of section 66(1) to applications for planning permission for development of a listed building. So, where the development comprises the carrying out of works, section 66(1) only applies to a proposal to undertake works to the listed building itself. Similarly, if a proposal is for a change of use, section 66(1) only applies where the change of use would take place in the listed building or its curtilage.

18. However, Mr Langham accepts that the language used in section 66(1) is open to a wider interpretation which would cover any development, whether or not it be development of the listed building itself, which has an effect or impact upon a listed building.

19. Mr Langham said that he was unaware of any authority to support his contention but he argued that it was supported by the following interrelated points:

- (i) The narrower meaning is the natural meaning of the language used in section 66(1). It is submitted that "development which affects a listed building" means "development of a listed building"
  - i. (ii) The narrower meaning accords with the statutory scheme which provides a separate dedicated control, the listed building consent procedure, for dealing with demolition of or alterations to a listed building
  - ii. (iii) If, for example, proposed development in the vicinity of a listed building would put at risk the structural integrity of the listed building and result in damage to that building, the developer may need to obtain listed building consent in order to avoid breaching section 7 of the 1990 Act and becoming subject to criminal sanctions under section 9. The listed

building consent procedure would enable the effect of neighbouring development upon the fabric or structure of a listed building to be assessed and controlled at a subsequent stage if and when it becomes necessary for that issue to be considered

- iii. (iv) It would be advantageous for developers to be able to obtain a decision on the principle of whether their scheme is acceptable through the grant of planning permission without needing to consider at that stage also the effect on the structure of a listed building (a) in case the permission is not implemented, and (b) even if it is, in case the scheme does not result in damage to the listed building.

20. I am unable to accept the Council's contention for a number of reasons. First, it does not represent the natural meaning of section 66(1) read as a whole. The relevant phrase in fact reads:

- i. "... development which affects a listed building or its setting..."

21. It is impossible to accept the Council's construction of the phrase "development which affects a listed building" without the same construction also applying to "development which affects the setting of a listed building". As regards the second limb, the setting of a listing building, the Council's argument would confine the application of section 66(1) to development of the setting itself. In other words, the presumption in section 66(1) in favour of the preservation of the setting of a listed building (see Barnwell at paragraph 28 and Field Forge Society) would not apply to a proposed development on a neighbouring site which would harm the setting of a listed building albeit that the expressly stated objective of the provision is the preservation of that setting.

22. The Council's construction is inconsistent with the well-established understanding of the scope of section 66(1) upon which many decisions of the courts (not least Barnwell) and of planning inspectors have been based. For example, the decision on ground 1 in Barnwell would have been unnecessary if the Council's interpretation is correct. Indeed,

it is inconsistent with the approach taken by the Council itself in the present case when applying section 66(1) to the effect of the proposed development upon the setting of the listed buildings (see paragraph 15 of the Council's detailed grounds of defence).

23. Second, the Council's argument involves rewriting, not interpreting, section 66(1).

Parliament did not enact the alternative phrase "development of a listed building or its setting". It chose to use instead the phrase "development which affects" in order to make it clear that the scope of section 66(1) is not limited to development of the listed building or its setting, but also embraces development which would have an impact upon a listing building or its setting, whether direct or indirect, and whether harmful or beneficial, or a mixture of the two.

24. Third, the Council's argument is inconsistent with the statutory objective to promote preservation of listed buildings. The Council's argument assumes that the harm, or risk of harm, to a listed building or its setting arising from a proposed development could be controlled by the combined effect of sections 7 to 9. Section 9 makes it an offence to carry out works falling within section 7 without complying with section 8. In general, the requirement is to obtain, and then comply with, a listed building consent. The problem is that, putting to one side the control of demolition of the whole, or virtually the whole, of a listed building (see Schimizu UK Ltd v Westminster City Council [1997] 1 WLR 168), section 7 only applies to works for the alteration or extension of a listed building in any manner affecting its character as a listed building, and even then only prohibits a person from executing or causing the execution of such works.

25. There are therefore a number of difficulties with the Council's analysis. It is possible that the person carrying out the development of a site adjacent to a listed building might say that he is not causing any "works to be carried out to the listed building". He is



simply carrying out works on an adjacent site. Even if that difficulty does not arise, any damage caused to the listed building, such as a crack, and even if immediate, might not be described as an "alteration" of that building. There may also be arguments as to exactly what works could and/or should be consented under section 8.

26. Ultimately, the Council's argument relies upon its ability to prosecute under section 9 once an offence has taken place. Its analysis does not accord with the statutory objective of preserving a listed building, which would include avoiding damage to such a building before it occurs. Furthermore, the code contained in sections 7 to 9 does not deal with the simple requirement to preserve the setting of a listed building where that is the problem rather than consequential damage to the building itself.

27. Fourth, even where sections 7 to 9 are applicable, the protection of the listed building depends upon the application of a second set of controls (listed building consent) subsequent to the grant of planning permission. The whole thrust of the Council's case is that a decision on whether or not to grant a permission should not have to consider risk of damage to a listed building or its structural integrity. On that reading of the legislation, if the risk is not properly assessed at the planning permission stage then any consequential damage, including latent damage, may not be discovered until some time after the development project on the neighbouring site has been started or even completed. By then, in many cases, serious damage may have been done. The Council's argument denies prospective protection for listed buildings and their settings. That is contrary to the statutory objective of "preservation" which must embrace the preservation of a listed building in its existing state and not be restricted to the rebuilding or repair of such a building in order to remedy damage already caused, especially where that could have been avoided.

28. A local planning authority does have power to serve a listed building enforcement notice (see section 38) or a repairs notice (see section 48) or to apply for an injunction (see section 44A) but these provisions essentially involve reacting to damage already caused rather than to the preservation of a listed building in the first place. Moreover, they involve taking action against the owner of the listed building rather than the party who caused the damage by carrying out a development nearby. In my judgment, it cannot have been Parliament's intention to give section 66(1) the narrow construction for which the Council contends by relying upon provisions of this nature which would have the inappropriate effect of transferring a party's responsibility for the damage he has caused to an innocent party.

29. For these reasons, the planning permissions granted by the District Council must be quashed. I conclude by noting that, in addition, the claimants sought to challenge the planning permissions on the ground that the Council had failed to consider the effect of the proposed development on the settings of adjacent listed buildings and also failed to consider the issue of overlooking to the garden. In my judgment, the Council's decision cannot be criticised on this basis. The matters were adequately addressed in the officer's report to Committee, and of course this type of decision is not one which would have required each aspect to be dealt with in the officer's report. I am satisfied from the written statements which have been filed and served on behalf of the Council that these additional matters were, from a legal perspective, adequately addressed by the Council.

30. Any orders, apart from quashing the permissions? Costs?

31. MR CLAY: Costs, my Lord.

32. MR JUSTICE HOLGATE: Yes. I have seen a costs schedule.

33. MR CLAY: There is a costs schedule. You may have one which is very slightly out of

date. Yours is £74,000 but it is out of date.

34. MR JUSTICE HOLGATE: It has come down a lot, has it?

35. MR CLAY: It hasn't come down.

36. MR JUSTICE HOLGATE: What are you asking for?

37. MR CLAY: What we are asking for is that costs should be as per the cap, £35,000.

38. MR JUSTICE HOLGATE: £35,000. What do you say about that, please Mr Langham?

39. MR LANGHAM: I say detailed assessment subject to a limit of £35,000.

40. MR JUSTICE HOLGATE: And the reason for that?

41. MR LANGHAM: Is this: your Lordship can't be certain that a properly assessed assessment of the costs would be less than £35,000. If your Lordship was satisfied with £38,000 or £39,000 --

42. MR JUSTICE HOLGATE: I have thought about this because I am astonished by this costs bill. The number of hours spent by the firm of solicitors for a case of this kind taking one day is frankly astonishing, at first sight. I see that nearly 180 hours were spent by the solicitors. I take into account the fact that a lot of the material in the bundle was to do with the setting point, and there was the production of photographs.

43. MR LANGHAM: They were by us.

44. MR JUSTICE HOLGATE: Well, the photographs may have been; I am not sure about the drawings, but the comments and the evidence that was being put forward were getting to perilously close to re-arguing planning merits again. The point upon which the claimant has succeeded is in fact a narrow point of construction.

45. MR LANGHAM: Yes.

46. MR JUSTICE HOLGATE: It was embedded in their setting arguments.

47. MR LANGHAM: It certainly was, yes.

48. MR JUSTICE HOLGATE: It was not particularly clearly articulated but it was there, and I do not see how one could possibly justify costs of this order simply to argue a point of that nature. That is a pretty clear impression I have formed on the papers, so the question then is: how shall we deal with this? By way of a summary assessment. A detailed assessment would involve more costs for a case listed for only one day. In fact argument took place in barely an hour or so.

49. MR CLAY: My Lord, would you like me to reply?

50. MR JUSTICE HOLGATE: Yes, of course. I just thought you ought to know which way my mind was thinking provisionally.

51. MR CLAY: That is very helpful, my Lord. I think there are a number of points.

52. MR CLAY: I will try and make them quickly.

53. MR JUSTICE HOLGATE: Yes.

54. MR CLAY: This is the first time -- the defendants have had the costs schedule --

55. MR JUSTICE HOLGATE: It is the first time they have made these points.

56. MR CLAY: It is the first time that any of these points have been made by them.

57. MR JUSTICE HOLGATE: So be it.

58. MR CLAY: The whole purpose of the summary assessment point is that the thing is dealt with quickly and in court and does not involve it going there. There has been no question. The second is that the scale of difference between what is claimed and the cap is that it means that the cap would be at less than 50 per cent of what is claimed, so even if there was to be very significant taxation down of the fees, it would still not be likely to be less than the £35,000 cap the order --

59. MR JUSTICE HOLGATE: What are the costs now then, the revised figure, please?

60. MR CLAY: My figure is £75,878 --

61. MR JUSTICE HOLGATE: In the same area.

62. MR CLAY: It is still in the same area, yes. So we are talking about effectively a claim with the cap.

63. MR JUSTICE HOLGATE: So really your point there is what are the prospects of a taxation getting substantially below £35,000?

64. MR CLAY: My Lord, that is right. And then taking the point in relation to the extent to which the claimants were concerned with setting, my Lord, it is probably right to say as originally lodged there were very clearly two clear points: one was the setting; one was the direct effect. But you will see the way that the case evolved and by the time the second witness statement was provided by Mr Bagge it was directed specifically at, and the photographs that are exhibited with it, were concerned with the direct effect on the building. And indeed the skeleton argument that was produced dealt with the question of physical effect as the first point, and the setting as a second point.

65. MR JUSTICE HOLGATE: Well, part of his second witness statement was to do with the simple point that the listed structures abut the building next door. One would have thought that could be agreed by an exchange of letters.

66. MR CLAY: Well, it's not simply --

67. MR JUSTICE HOLGATE: And here we end up with fees from Strutt & Parker of £12,000. Plus VAT.

68. MR CLAY: Well, the question of the effect and in order to carry out a belt and braces job which is necessary to get the court to --

69. MR JUSTICE HOLGATE: Well, you said it. Belt and braces is not proportionality, is it?

70. MR CLAY: Belt and braces is proportionality where there is a need to actually

demonstrate a fact.

71. MR JUSTICE HOLGATE: Well.

72. MR CLAY: And what we needed to do was to show that the question of abutting was such that one could inevitably draw the conclusion, as my Lord, you were, that the effect of the works would be such that they would be likely to cause some kind of damage to the listed building. So that was perfectly legitimate.

73. MR JUSTICE HOLGATE: Would you like the costs to be the subject of a detailed assessment?

74. MR LANGHAM: Well, I think it would be unnecessary additional expenditure which you would never be able to recover.

75. MR JUSTICE HOLGATE: It would. So what is the alternative, then?

76. MR CLAY: A summary assessment, given that we are asking for £75,000, and that should be for £35,000. I would add that, and it is not a criticism in any way, my Lord, but we did not argue the question of setting, and it seemed that the issue was so clear on the question of the interpretation of the setting, that would have been a waste of the court's time. I note your Lordship's finding on that, on the papers, as it were, and that was a matter on which your Lordship was entitled to do so. But that was not argued; no court time was taken up with arguing the point on setting.

77. MR JUSTICE HOLGATE: It wasn't the real point in the case. The real point in the case was about damage to the listed building.

78. MR CLAY: It was the second string, yes, I accept that.

79. MR JUSTICE HOLGATE: Yes.

80. MR CLAY: We focused on the real point in the evidence and in the skeleton argument in preparation for the court case was directed to that end as well.

81. MR JUSTICE HOLGATE: Well, if I am going to embark upon a summary assessment, I need to hear from the Council as to which elements they attack.
82. MR LANGHAM: It goes like this, my Lord. There were essentially three elements in this schedule computed at £75,000. There is the total costs from the solicitors.
83. MR JUSTICE HOLGATE: About 180 hours or thereabouts.
84. MR LANGHAM: Yes. Then there is this strange item: less restriction in amount formed by claimant. It appears to involve knocking off about 10 per cent.
85. MR JUSTICE HOLGATE: Well, that is in your favour.
86. MR LANGHAM: Certainly, yes.
87. MR JUSTICE HOLGATE: £33,000.
88. MR LANGHAM: £33,000. Then there is my learned friend's fees of £15,000 and then there is the Strutt & Parker contribution, and, of course, these are all subject to VAT.
89. MR JUSTICE HOLGATE: Yes. I can't do anything about that.
90. MR LANGHAM: Oh no, certainly, my Lord. The way I put it to your Lordship is this. I do not criticise the fee for my learned friend. But that accounts for all the pleadings and the replies and the skeleton argument.
91. MR JUSTICE HOLGATE: And in court.
92. MR LANGHAM: And in court. And the question really for your Lordship is: what else was it legitimate to spend money on for the purposes of advancing this case. And, in terms of the bundle, there are three witness statements, two of which are from Mr Bagge. The witness statement from the solicitor is about a side of text producing a report.
93. MR JUSTICE HOLGATE: And it is formal witness statement in the usual format which produces the relevant documents.

94. MR LANGHAM: Yes.

95. MR JUSTICE HOLGATE: This is a review of documents primarily. And really not many at that.

96. MR LANGHAM: Yes, yes. It is commendably short.

97. MR JUSTICE HOLGATE: Yes.

98. MR LANGHAM: The reason one commends short witness statements in part is not because there is loads to read but because they involve limited costs. And to put the point shortly, in my submission, it would be difficult to justify more than £10,000 including VAT for the other element of the case. And so anything in the solicitors' costs and the Strutt & Parker costs beyond that, given what one can see in terms of the product of their labours.

99. MR JUSTICE HOLGATE: So that would produce a total of £25,000.

100. MR LANGHAM: Yes. I am including all the VAT in that.

101. MR JUSTICE HOLGATE: Oh.

102. MR LANGHAM: So I suppose there would be a slight reduction in relation to my learned friend.

103. MR JUSTICE HOLGATE: This, by definition of a summary assessment, is a broad brush exercise.

104. MR LANGHAM: Yes, my Lord.

105. MR JUSTICE HOLGATE: Well, if it were to be for the sake of argument, taking round figures, £25,000 to which you add VAT, that would arrive at £30,000.

106. MR LANGHAM: £30,000, well.

107. MR JUSTICE HOLGATE: But the number you were contending for was £25,000 inclusive.



108. MR LANGHAM: Your Lordship can proceed on the basis that I am not seriously arguing for a figure materially lower than £25,000.
109. MR JUSTICE HOLGATE: No? Thank you. Well, what would you like to say, Mr Clay?
110. MR CLAY: Well, there is a sort of sense of horse trading.
111. MR JUSTICE HOLGATE: Well, it is a summary assessment. Which means what it says.
112. MR CLAY: But the figure of £10,000 is actually plucked completely from the air.
113. MR JUSTICE HOLGATE: That may sometimes happen in summary assessment.
114. MR CLAY: Yes. But that is one of the reasons why if there is going to be some complaint about some particular part of it being unreasonable that it would be fair for us to be put on notice of that.
115. MR JUSTICE HOLGATE: Well, are you saying that you feel unable to deal with the short points which have been made? Basically, what is being said if I take the bundle and I start at the claim form, page 1, and I go through to the witness statement of Mr -- that takes us to 87 pages, a lot of which is photocopying. The paralegal was charged out at 18 hours. Anyway, there is the photocopying. There is a short formal witness statement. There is also the short statement initially from Mr Bagge. Much of the rest of the bundle I think has come from the local authority.
116. MR CLAY: Well, my Lord, no. In fact quite significant parts of the bundle --
117. MR JUSTICE HOLGATE: Beyond page 87, sorry.
118. MR CLAY: Can I just start with where the solicitors' job actually becomes

engaged in something like this. Because there is a process which is, of course, concerned with, in the first place, deciding whether there is a viable claim. That involved instructing counsel, there is a conference with counsel, there was in this case, and in my submission entirely justified, there was a visit to the site.

119. MR JUSTICE HOLGATE: A visit to the site to argue a point of law? Is that in the fees?

120. MR CLAY: Well, my Lord.

121. MR JUSTICE HOLGATE: Is it in the fees?

122. MR CLAY: Yes.

123. MR JUSTICE HOLGATE: Fine. Including your fees: did you visit the site as well?

124. MR CLAY: I visited the site.

125. MR JUSTICE HOLGATE: And that is in the charge, as well?

126. MR CLAY: My Lord, yes.

127. MR JUSTICE HOLGATE: Right.

128. MR CLAY: The visit to the site was justified, in my submission, in order to understand the relationship between the buildings, on a very complex site.

129. MR JUSTICE HOLGATE: I was able to understand it by looking at the bundle.

130. MR CLAY: My Lord, you were, only because we were able to go to the site and we were able to put together the documents that would explain to the court how the buildings related to each other, to take the photographs, to produce the --

131. MR JUSTICE HOLGATE: How many people went on the site visit?

132. MR CLAY: Three people went on the site visit. What we are saying is, I don't think my fees are challenged.

133. MR JUSTICE HOLGATE: Well, that is in a broad brush way, isn't it?
134. MR CLAY: My Lord, yes. But if one takes off the £15,000 that relates to counsel's fees from the £35,000, you are left with £20,000 to cover the costs of Mr Bagge. Mr Bagge attended court in case there was any question of the need for any matter to be clarified in evidence. We didn't know quite where the case was going to come from from the Council's position. You saw the nature of the skeleton argument. It is not a criticism but it was one of those cases that can go any way. The case had to be prepared in the first place. The relevant documents had to be sifted from those that were not relevant. Those parts of the application documentation which would have been extensive. There is actually an exercise which, my Lord, is an important exercise, which is slimming down the bundle to make sure that you are not producing all sorts of irrelevant material, and then providing a document in the bundle in form, duplicating it, serving it and lodging it with the court, the court fees that are involved. All of those issues, as well as attendance at court on the day.
135. MR JUSTICE HOLGATE: The court fees are set out in a separate line at £890.
136. MR CLAY: My Lord, yes. But all of that, including the court fee, has to be recovered from the remaining £20,000 which is to cover everything else other than counsel's fees. And that, of course, does not take account of VAT. So all that I am submitting is that even if, and I don't have anyone from my instructing solicitors here to explain to me precisely how the fees were incurred, but even if it was taken that the fees were likely to be taxed down, it is my submission that they are not likely to be taxed down in relation to everything other than counsel's fees to a figure of less than £20,000 including VAT. My Lord, if you are not persuaded by me, my Lord, can I put it in this way. If you were to decide on a figure that was less than £30,000, we ask for the matter

to go to taxation.

137. MR JUSTICE HOLGATE: You cannot hedge your bets that way. You cannot embark upon summary, that is simply improper, isn't it?

138. MR CLAY: Well it is simply that we are taking a pragmatic approach, which is to avoid having to go to the time and expense of everybody being involved in a costs assessment.

139. MR JUSTICE HOLGATE: I think both parties have agreed to embark upon summary assessment.

140. MR CLAY: My Lord, yes.

141. MR JUSTICE HOLGATE: That is why I asked the question.

142. MR CLAY: It is summary assessment.

143. MR JUSTICE HOLGATE: It can't be summary assessment so long as I win.

144. MR CLAY: I take your Lordship's point.

145. MR JUSTICE HOLGATE: Just let me reflect for a moment, please. Is there anything more?

146. MR CLAY: No my Lord. I hope I have covered all the bases.

147. MR JUSTICE HOLGATE: I think you both have.

148. I am asked to assess the costs summarily in this matter. The claimant's statement of costs has been presented in the figure of approximately about £75,000. It is fair to note that although the schedule was served in advance of the hearing, the Council did not respond to it to identify any particular items of cost to which they might take exception.

149. At the conclusion of an oral judgment today in which I accepted the claim, the Council asked initially for a detailed assessment of costs but having regard to the costs cap which applies in this case pursuant to the CPR as well as the costs of a detailed

assessment, and also a realistic appraisal of the likelihood of any significant costs savings been achieved below the costs cap pursuant to a detailed assessment, they suggested instead there should be a summary assessment. That was a procedure to which the claimant agreed.

150. In summary, Mr Langham on behalf of the Council criticises two elements of the costs bill: first of all the number of hours, amounting to almost 180 hours involving the participation of six persons at the claimant's solicitor's firm which produced a total cost net of VAT of £33,000 or thereabouts. Also, secondly, the fees incurred by the claimant's agent, Strutt & Parker, net of VAT, in the sum of about £12,500.

151. Obviously this has got to be looked at in the context of the nature of this case. This was a relatively straight forward judicial review involving a hearing listed for only one day, but which took little more than one hour. There were only two grounds of challenge. Ultimately, on a proper analysis of the papers, there really was only one point in the case, namely whether the Council had erred in law in construing the Listed Building Act. I am astonished to hear that it was thought necessary in this case to have a site visit and to treat that as part of the charges for the case.

152. This betrays a tendency in this and in other judicial review cases, involving planning decisions, a tendency to present too much information on the planning merits of the case and intertwine legal argument with analysis of planning merit. This court is not concerned with revisiting the planning merits of the decision. That is the preserve of the decision maker: in this case the local authority. If planning merits are going to be considered in this fashion then inevitably the costs will become inflated. The same point arises to some extent in relation to the second witness statement of Mr Bagge, which was concerned with establishing that the listed structures abutted the development site and

also, no doubt, helpfully in a different context, to give an appreciation of the relationship between the development proposal and his client's land. But it was far more extensive than was necessary in order to resolve a point of law in this type of procedure. It might have been appropriate in a planning appeal, but I do not see why it was commissioned in this case.

153. Given that it was necessary to establish that the listed structures abutted the development site, all that was needed was an exchange of correspondence between solicitors. It took only a few seconds for that simple matter to be agreed when I raised the question during the hearing. So I am left in no doubt that the costs which had been incurred were excessive and disproportionate in relation to the issue at stake.

154. I should bear in mind that counsel's fees do include a site visit to which I have referred. Inevitably when the court is asked to make a summary assessment, a relatively broad brush needs to be used. The material produced by the claimant which was relevant to the case was fairly limited in nature. It primarily consisted of a formal witness statement from the solicitor and a statement describing the relationship between the different properties. There were a number of documents exhibited in order to give the context. In my judgment, the costs which should be assessed in this case, having regard to all these matters, is the sum of £30,000 including VAT. That is the order I make.

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