Royal Borough of Kensington and Chelsea v Secretary of State for Communities and Local Government

CO/10514/2009

High Court of Justice Queen's Bench Division the Administrative Court

22 April 2010

[2010] EWHC 1092 (Admin)

2010 WL 1608437

Before: Sir Michael Harrison (Sitting as a Deputy High Court Judge)

Thursday, 22 April 2010

Representation

Mr T Cosgrove appeared on behalf of the Claimant.

Mr T Fisher appeared on behalf of the Defendant.

Judgment

The Deputy Judge:

Introduction

1 This is an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of the Secretary of State for Communities and Local Government dated 6 August 2009 when, through his Inspector, he allowed an appeal by Vannes KFT, the second defendant, against the refusal of planning permission by the Royal Borough of Kensington and Chelsea (“the Council”) for the change of use from hotel to nine self-contained residential units, including subterranean excavation to provide swimming pools for two of the units, at 41 to 43 Beaufort Gardens, London SW3.

2 An unusual aspect of this case is that the Secretary of State has signed a consent order that the decision should be quashed but the second defendant, the applicant for planning permission, opposes the quashing of the decision, maintaining that there is no error of law in the Secretary of State's decision.

Factual Background

3 The Inspector held a public inquiry into the proposed development between 30 June and 3 July 2009. One of the main issues at the inquiry was whether any affordable housing should be provided by the second defendant. The second defendant did not propose any affordable housing, either on site, off site or by financial contribution, on the ground that it was not economically viable to do so.

4 The application included a toolkit viability report seeking to justify the absence of any affordable housing. That was not accepted by the council who produced their own toolkit appraisal. The toolkit was referred to as the Three Dragons toolkit or the GLA toolkit. There was no dispute that it was an appropriate toolkit to use. For the purposes of this judgment, I simply refer to it as “the toolkit”. It is a programme with a number of input values which can be used to determine whether the residential site value exceeds the existing use value. If it does, the scheme will be viable, and vice versa.

5 Before the inquiry, the second defendant wrote to the Planning Inspectorate advising that there would be valuation and costings evidence from experts at the inquiry, and stating that the

Inspectorate should be satisfied that the Inspector allocated to the case was fully numerate and experienced in those matters. At the inquiry, the second defendant's case was that there should not be any affordable housing because it failed the toolkit analysis and it was not, therefore, viable to provide any affordable housing at all, on or off site. The second defendant's planning witness stated in his proof of evidence:

> "It is clear that the issue of economic viability is a vital consideration to affordable housing issues."

6 Eight of the eleven witnesses who gave evidence at the inquiry provided specialist evidence relating to the input values of the toolkit. The Council's toolkit evidence at the inquiry showed a positive value of over £10 million whilst the second defendant's toolkit evidence showed a deficit of over £7 million. Those differences arose from differences in the input values. It is clear that the issue of whether it was economically viable to make any provision for affordable housing at all was a principal important controversial issue at the inquiry.

Policies

7 In order to understand the decision letter relating to that issue, it is necessary, first, to refer to the relevant policies in The London Plan. Policy 3A.11 states:

> "Boroughs should normally require affordable housing provision on a site which has a capacity to provide 10 or more homes, applying the density guidance set out in Policy 3A.3 of this Plan and Table 3A.2".

8 Policy 3A.9 states that, in setting targets for affordable housing, boroughs should take account of the Mayor's strategic target for affordable housing provision that 50 per cent provision should be affordable.

9 Policy 3A.10 states:

> "Boroughs should seek the maximum reasonable amount of affordable housing when negotiating on individual private, residential and mixed use schemes, having regard to their affordable housing targets adopted in line with Policy 3A.9, the need to encourage rather than restrain residential development and the individual circumstances of the site. Targets should be applied flexibly, taking account of individual site costs, the availability of public subsidy and other scheme requirements."

10 Paragraph 3.52, which immediately follows policy 3A.10, states as follows:

> "In estimating provision from private residential or mixed use developments, boroughs should take into account economic viability and the most effective use of private and public investment, including use of financial contributions. The development control toolkit developed by the Three Dragons and Nottingham Trent University is one mechanism that will help. Boroughs should take account of the individual circumstances of the site, the part of the borough in which the site lies, the availability of public subsidy and other scheme requirements. The determination of the affordable housing requirements for a specific site needs to have regard to the borough targets set within the framework of Policy 3A.9 on the basis of maximizing the potential for affordable housing."

11 Paragraph 3.54 states:

> "The Mayor wishes to encourage, not restrain residential development and boroughs should take a reasonable and flexible approach on a site-by-site basis. Further guidance on the role of site appraisals and the toolkit is set out in the Housing SPG."

12 The Housing SPG (Supplementary Planning Guidance) referred to in that paragraph has a

section headed “Assessment of economic viability of development”. Under that heading, paragraph 18.11 states that boroughs should consider the economic viability of the preferred outcome and the potential of the value of the site to contribute to funding the cost of affordable housing provision. Paragraph 18.13 explains that the Greater London Authority (“the GLA”) has developed a toolkit to assist boroughs and applicants in assessing the extent to which site value can support a range of affordable housing options. Paragraph 18.14 states that there is no requirement to use that specific toolkit to undertake the economic viability of a specific scheme, and other financial appraisal methodologies may be appropriate.

Decision letter

13 I turn then to the decision letter. In paragraph 5(ii), the Inspector identified as one of the four main issues:

> “Whether the proposal would conflict with the aim of policy in The London Plan to secure the maximum reasonable contribution to the provision of affordable housing”.

14 In paragraph 13, he described the appeal site as being in a prime central location. In describing the proposal, he stated:

> “The appeal scheme is intended as a high-end residential development that is aimed, either as one lot or as individual flats, at those very wealthy purchasers (often foreign nationals) who wish to locate in a relatively tightly-drawn area of central London where the supply of suitable property is limited … Bearing in mind the nature of the proposed flats and the market at which they are aimed, I consider that the proposal would be in line with the aims of The London Plan to support London's development as ‘the main world city’.”

15 The Inspector dealt with the issue of affordable housing in paragraphs 15 to 34. In paragraph 15, he recorded that it was not disputed that the site had a capacity of more than 10 dwellings so that the threshold of policy 3A.11 was triggered. Paragraph 16 is relied on by the second defendant so I quote it in full. The Inspector stated:

> “Having triggered the threshold at Policy 3A.11, Policy 3A.9 sets out the Mayor's target that 50% of the provision in the scheme should be affordable. Policy 3A.10 explains that Boroughs should seek the maximum reasonable amount of affordable housing when negotiating on individual private residential schemes, having regard to that target. Regard must also be had to the need to encourage rather than restrain residential development and to the individual circumstances of the site. The Policy also explains that targets should be applied flexibly, taking account of individual site costs, the availability of public subsidy and other scheme requirements.”

16 In paragraph 17, the Inspector noted that the need for increased provision of affordable housing generally in the Borough was not in dispute.

17 In paragraph 18, he expressed some sympathy with the view that on-site provision of affordable housing may not sit easily with the type of dwellings proposed, and he thought there might be significant issues relating to maintenance charges and use of communal facilities, but he was not convinced that on-site provision would be impossible, particularly if some internal re-organisation were to take place. In the final sentence of paragraph 18, he stated:

> “However, the evidence at the inquiry centred on whether the appeal scheme would be sufficiently viable to support <u>any</u> provision of affordable housing, whether on or off-site.”

18 In paragraph 19, the Inspector referred to paragraph 3.52 of The London Plan. He referred to the differing results of the toolkit calculations, due largely to the sensitivity of the model to differing input values. At paragraphs 20 and 21, he set out the differing resulting figures if there were no affordable housing; the second defendant's deficit of over £7.6 million, and the Council's positive figure of almost £11.8 million.

19 In paragraph 22, the Inspector stated:

> "These are significantly different results, arising in the main from a number of disputed input values. Evidence for both parties was given by professionally qualified and experienced surveyors and valuers and I do not attempt to determine which figures are "correct". However, I consider that the extent of the professional disagreement detailed below affects the weight that could be given to the toolkit results."

20 The Inspector then turned to the different input values. In paragraph 23, he dealt with the market value of the flats where there was a difference of £4.7 million between the parties. He noted that the witnesses on both sides agreed that the market was uncertain and he gave some weight to the fact that the second defendant's witness, Mr Dalton, was active on a day-to-day basis in this specific high end market, whereas the District Valuer relied on past comparable transactions in the locality. The Inspector, however, did not express any conclusion on the market value issue.

21 In paragraphs 24 to 27, he dealt with building costs, where there was a difference between the parties of £4.5 million. In paragraph 25, he expressed some concerns about the second defendant's evidence on building costs. In paragraph 26, he noted that the cost of swimming pools was a significant factor but he had no reason to believe that their provision would be unjustified. In paragraph 27, he said that he was inclined to the view that the appropriate toolkit figure for building costs would be somewhat less than the second defendant's figures but that he had no basis to determine that figure with any reliability or to confirm whether the District Valuer's figure was more realistic.

22 In paragraphs 28 and 29, the Inspector dealt with existing use value where there was a difference of £5 million between the parties. He noted in paragraph 28 that there was disagreement on the method of valuation to be used and, in paragraph 29, he said that there were other areas of disagreement which would affect the "accuracy" of the input figure, but he did not reach any conclusions on any of the areas of disagreement.

23 In paragraph 30, the Inspector dealt with interest charges where the difference between the parties was £6 million, noting that the main difference between the parties related to the length of the development programme timeline; the Council's evidence being 39 months and the second defendant's evidence being 57 months but once again, the Inspector did not reach any conclusion upon that aspect.

24 The other input value related to VAT which the Inspector dealt with at paragraph 31, but the parties reached agreement on that aspect.

25 It is necessary to quote in full the final three paragraphs of the Inspector's decision letter dealing with affordable housing:

> "(32) The toolkit analysis is not a policy requirement in determining affordable housing provision, paragraph 3.52 of The London Plan indicating that it is just "one mechanism that will help". Given the number of uncertain input values noted above, the inability of the professional witnesses to reach agreement on them at the inquiry, and their significant cumulative value, I consider that, in this case, none of the toolkit results is sufficiently robust to enable any significant weight to be attached to it in determining the provision of affordable housing that could be expected from the appeal proposal. I turn, therefore, to the other considerations in Policy 3A.10 and paragraph 3.52.
>
> (33) I have already identified some practical difficulties in incorporating affordable units into the proposed development. As was accepted by the Council's valuer at the inquiry, affordable units within the same building might also run some risk of making the finished scheme more difficult to sell to the type of purchasers at which it is aimed. It will be a particular problem if, as in the case of Nos 4–5 Beaufort Gardens, a family purchaser were looking to buy the flats as a single lot. Furthermore, I do not doubt that a registered social landlord might be unwilling to take on one or two small units in a development in a prime area and that better value for money would be obtained if more affordable units could be provided elsewhere in the Borough. Despite the advice at paragraph 18.17 of The London Plan Housing SPG, however, the Council does not have any published

policy on contributions for off-site provision.

(34) The appellant's position is that, if affordable housing is a requirement, the appeal scheme is unlikely to go ahead. In that case, no new residential development would result and the building would either remain unused or the hotel use would be reinstated. Policy 3A.10 of The London Plan refers to the need to encourage rather than restrain residential development and to take account of the particular circumstances of the site, applying targets flexibly taking into account individual site costs and other scheme requirements. Having regard to all the circumstances, including the specialised nature of the area in which the building is situated and lack of reliance that could be placed on the toolkit results, it would, in my judgment, be unreasonable to require affordable housing provision in the case of the appeal proposal. There would, therefore, be no conflict with the aim of policy in The London Plan to secure the maximum reasonable contribution to the provision of affordable housing."

26 Finally, in expressing his overall conclusions in paragraph 44, the Inspector stated in respect of affordable housing:

"There are no firm grounds to require affordable housing provision."

Submissions

27 Mr Cosgrove's first submission on behalf of the Council was that the Inspector simply failed to grapple with a key determinative issue, namely the economic viability of making any provision for affordable housing. Being a principal important controversial issue between the parties, the Inspector had to grapple with it and form a view on it, but he had failed to conclude whether or not it was economically viable to provide any affordable housing, despite the fact that he had ample expert evidence to assist him. It was, it was submitted, not unusual for Inspectors to have to grapple with technical issues with the help of expert evidence at public inquiries.

28 I was referred to the case of the London Borough of Barnet v Secretary of State for Environment, Transport and the Regions and McCarthy and Stone (Developments) Limited (2002) EWCA Civ 529 which was a case involving the issue of affordable housing but where the facts and policy considerations were quite different. Mr Cosgrove referred me to the judgment of Latham LJ at paragraph 18 where he stated:

"The question of whether or not it would be necessary in any given case for the Inspector to go beyond a consideration of that question to determine viability, will depend upon the way in which the argument at the inquiry has developed."

Mr Cosgrove submitted that the way in which the argument over affordable housing developed at the inquiry meant that it was a necessary ingredient that the issue of viability had to be determined.

29 Mr Cosgrove's second submission was that, in the absence of a conclusion either way as to the economic viability of providing affordable housing, it was irrational to allow the appeal in circumstances where there was an undisputed acute need for affordable housing and an acceptance that this was a site where, under policy 3A.11, affordable housing would normally be required and where, under policy 3A.10, the maximum reasonable amount of affordable housing should be sought. It was submitted that it was not rational to conclude that permission should be granted without making any contribution to affordable housing in circumstances where the Inspector felt unable to come to a conclusion on the economic viability of providing affordable housing. It was contended that such an approach, if lawful, would have serious implications for the provision of affordable housing as it would mean that an applicant for permission in such circumstances need not seek to demonstrate in evidence that a scheme would be unviable. It was submitted that, in the circumstances of this case, it was for the applicant to justify the grant of planning permission without the provision of affordable housing.

30 Mr Cosgrove's third and fourth submissions related to paragraphs 33 and 34 of the decision letter. So far as paragraph 33 is concerned, which deals with potential practical difficulties of

providing certain types of affordable housing on the site, the point was made that the issue at the inquiry was whether it was financially viable to provide for any affordable housing at all, whether on site, off site or by financial contribution, an issue which did not depend on the type of affordable housing. It was submitted that to rely on such practical difficulties was irrational or inadequately reasoned.

31 The point made in relation to paragraph 34 was that it was irrational for the Inspector to rely on the second defendant's position that the appeal scheme was unlikely to go ahead if affordable housing was required when that position was based on the viability evidence which was the issue upon which the Inspector had chosen not to reach a conclusion.

32 In responding to the Council's first submission, Mr Kolinsky, on behalf of the second defendant, contended that the principal important issue was what was the maximum reasonable amount of affordable housing to be provided, an issue which the Inspector had addressed. Alternatively, insofar as the search for a mathematical answer to the viability issue was a principal important issue, the Inspector reached a conclusion that, given the disparity of the evidence, the extent of the variables and the extreme uncertainty, it was an unrealistic exercise to undertake in the circumstances of this case. It was submitted that that was a legitimate exercise of planning judgment.

33 Mr Kolinsky stressed the degree of uncertainty on the viability issue created by the general degree of economic uncertainty and the highly specialised nature of the development in a small niche market which, he said, created another layer of uncertainty. He placed reliance on paragraphs 13 and 14 of the decision letter and the contribution of the proposed development to London's status as “the main world city”. He referred to the total disparity in valuations between the parties of about £20 million and asked, rhetorically, how the Inspector was going to resolve that kind of dispute in a sensible and practical way. Having concluded that the toolkit did not give reliable guidance or a definitive answer on the viability issue, the Inspector was entitled, said Mr Kolinsky, to look at the range of other factors in policy 3A.10, which he did in paragraph 34 of the decision letter. Policy 3A.10 does not require a mathematical conclusion to the question of affordable housing and, it was said, the Inspector properly considered those other factors, including deliverability, which involved the exercise of planning judgment.

34 So far as the Council's second submission is concerned, Mr Kolinsky submitted that there is no policy support for the proposition that the developer has to show that a proposed development would not be viable with affordable housing. He refuted the suggestion that the Inspector's decision would have serious implications for the provision of affordable housing. He said that a proposal with a £20 million variation in viability projections in the context of small and highly specialised “high-end” schemes for which there is little market data and which contributes to London's status as a world city, are not the norm. It was submitted that a sensible, fact specific approach rooted in a careful analysis of policy 3A.10 would not open any floodgates.

35 Finally, so far as the Council's third and fourth submissions are concerned, Mr Kolinsky submitted that the Inspector was entitled to take the view that the developer might not proceed with a scheme if affordable housing were required and that the potential benefits of the scheme would be lost. He was entitled to take into account that one possibility was that the scheme might not be viable and that a decision in favour of the Council might put the developer off. Reliance was placed on paragraph 19 of Latham LJ's judgment, and paragraph 30 of Buxton LJ's judgment, in the Barnet case as showing that the Inspector was entitled to take such a matter into account.

36 Finally, my attention was drawn to the introduction in the closing speech of the advocate representing the second defendant at the inquiry when emphasis was placed on the deliverability of the scheme and which, it was contended, was echoed in paragraph 34 of the decision letter.

Discussion

37 In my view, this matter is not as clear cut as may be suggested by the fact that the Secretary of State has consented to his Inspector's decision being quashed. Mr Kolinsky has raised some respectable arguments that it was open to the Inspector to attach as much weight as he thought fit to the evidence relating to the toolkit results and to attach more weight to the other factors mentioned in paragraph 3A.10 of The London Plan, rather than having to reach a mathematical

conclusion on the issue of the viability of providing affordable housing. Permeating through his submissions was a recurrent emphasis on the magnitude of the difference in figures between the parties on the issue of economic viability as showing the degree of economic uncertainty involved, together with uncertainty arising from the specialised nature of the development in a niche market contributing to London's status as “the main world city”.

38 Whilst I would accept that those are relevant factors, care is needed to guard against attaching too much weight to them. Although it is right to say that the difference in figures between the parties arising from the toolkit evidence was undoubtedly significant, it was, as Mr Cosgrove pointed out, due in large measure to the high values that exist in the Knightsbridge area of London.

39 What strikes me most about reading the Inspector's decision is the absence of any meaningful conclusion on the issue of the viability of affordable housing. Whilst the Inspector set out the arguments on both sides on the contentious issues of the market value of the flats, building costs, existing use value and interest charges, he failed to reach any overall conclusion on any of those matters. His reasoning for failing to do so seems to be, in large measure, due to the extent of professional disagreement between the parties' expert witnesses (see paragraphs 22 and 32 of the decision letter).

40 Whilst I have some sympathy with the Inspector's predicament faced with differing professional expert evidence, it is not unusual for Inspectors at planning inquiries to have to deal with, and determine, technical issues involving expert evidence. It was not necessary for him to decide what figures were mathematically correct, which seems to be behind his use of inverted commas for the word “correct” in paragraph 22 and the word “accuracy” in paragraph 29 of the decision letter. In some instances, the issue involved a decision on the correct approach, such as the correct method of valuation for the existing use value, or the length of the development programme timeline in determining interest charges.

41 I would accept that the toolkit exercise is not, in itself, a policy requirement. It is described in paragraph 3.52 of the London Plan as one mechanism that will help, and paragraph 18.14 of the Housing SPG says that other financial appraisal methodologies may be applicable. But in this case, both parties adopted the GLA Toolkit as the appropriate mechanism to assess whether it was economically viable to provide any affordable housing. As I mentioned earlier, the second defendant's own planning witness stated that it was clear that the issue of economic viability was a vital consideration to the affordable housing issue and, as the Inspector stated in paragraph 18 of the decision letter, the evidence at the inquiry centred on whether the appeal scheme would be sufficiently viable to support <u>any</u> provision of affordable housing, whether on or off site. In those circumstances, it seems to me that it was incumbent upon the Inspector to reach a conclusion on that issue. It was a principal important controversial issue at the inquiry which the Inspector had to decide.

42 The only way in which it can be argued that the Inspector did decide the issue was by saying, in paragraph 32 of the decision letter, that the toolkit results were not sufficiently robust to enable any significant weight to be attached to them in determining the affordable housing issue. But that seems to me to be an inadequate way of dealing with the matter in circumstances where he has not made any real attempt to try and grapple with the issues. For instance, on the issues of existing use value and interest charges, the Inspector simply set out the evidence of both parties relating to those issues without making any attempt at all to determine which party's evidence should be preferred on those issues and why. On the issue of the market value of the flats, he said why he gave “some weight” to the second defendant's evidence but, again, failed to reach a conclusion on that issue. On building costs, he got closer to expressing an opinion but without deciding the issue.

43 The overall impression is that the Inspector simply failed to grapple properly with the issue of the economic viability of providing any affordable housing on or off-site. The provision of affordable housing was an important issue in policy terms. There was discussion before me as to whether policy 3A.11 raised a presumption in favour of affordable housing and whether there was an onus on the developer to show why affordable housing should not be provided. I do not consider that it is helpful to talk of a presumption, or an onus, in respect of that policy. Policy 3A.11 simply states that boroughs should normally require affordable housing provision on a site with a capacity of 10 or more homes, and policy 3A.10 states that boroughs should seek the maximum reasonable amount of affordable housing. In each case, it will be for the parties to seek

to justify their respective positions relating to the affordable housing issue raised by those policies.

44 In this case, the economic viability of providing any affordable housing on or off-site was undoubtedly a principal important controversial issue at the inquiry which the Inspector had to decide. In my view, he failed to determine it properly or at all. That is an error of law which vitiates the decision. The importance of deciding that issue is emphasised by the undisputed need for affordable housing and by the policy provisions relating to affordable housing to which I have referred. In my view, it was unlawful to grant planning permission without deciding the viability issue in those circumstances.

45 In the light of those conclusions, it is not necessary to deal with Mr Cosgrove's third and fourth submissions. All I would say is that I would accept that it is for the Inspector to decide what weight to attach to the second defendant's stated position that the scheme was unlikely to go ahead if affordable housing were required but, in so far as that position was dependant on the issue of viability, the Inspector's failure to decide that issue would infect his reliance on the second defendant's stated position.

Conclusion

46 It follows from my conclusions relating to the viability issue that the decision in this case must be quashed. I do so with reluctance because it will probably involve revisiting that issue at a further inquiry but, as things stand at the moment, the council are, in my opinion, justified in feeling aggrieved by the Inspector's decision in this case.

47 **MR COSGROVE:** My Lord, I am grateful. My Lord, I have an application for costs. My Lord, can I have passed up to you an updated summary of costs, my learned friend has a copy provided in the normal way.

48 **THE DEPUTY JUDGE:** Yes, thank you.

49 **MR COSGROVE:** My Lord, you will see what we have done. In the normal way page 1 sets out the various solicitors involved and the various hourly rates. My Lord we have divided it into two sections, the first section being on page 2 relates to the period up until 9 March. That is the date upon which the Treasury Solicitor indicated they would consent to judgment. My Lord, so the first part of the costs order I seek would be an order that the first defendant, in other words the Treasury Solicitor pay my costs, summarily assessed, I am going to ask in the sum of £9,500. My Lord, I ask for that because, in email correspondence with my solicitor the Treasury Solicitor has accepted that amount as an agreed amount it would pay should judgment be in my favour today. So, although the total for that stage was £10,358, we have agreed, as it were between us, £9,500, if of course my Lord is in agreement with that.

50 **THE DEPUTY JUDGE:** I see.

51 **MR COSGROVE:** My Lord, that leaves, therefore, on page 3 the costs post that date, in other words from 10 March through to today. My Lord, you will see that the amount I seek, which would be against my learned friend's client, the second defendant, for that period is the sum of £7,487.25, towards the bottom of the page. My Lord, you will see that is made up, as set out on that page, from various attendances. To be fair, one could knock off a small amount in the sense that in the attendance of hearing section, WH, that is the solicitor that sits behind me today, anticipated 4 hours. In fact we have only been less than an hour, so that would be a small reduction of approximately £300 or so. But, my Lord, save for that, my application for costs to be paid by the second defendant would be in the sum, my Lord I am happy to say £7,100 or thereabouts. My Lord I would invite you to summarily assess it today in the normal way.

52 **THE DEPUTY JUDGE:** Yes. Thank you very much Mr Cosgrove. Mr Fisher?

53 **MR FISHER:** My Lord, in respect of the costs, we obviously have no objection to the first part of that costs order against the Secretary of State.

54 **THE DEPUTY JUDGE:** Yes, I understand that.

55 **MR FISHER:** In respect of the second part, against the second defendant, the second

defendant would submit that it would be appropriate to send this to detailed assessment. In the circumstances—

56 **THE DEPUTY JUDGE:** Over that amount of costs, £7,100?

57 **MR FISHER:** Those are my instructions, my Lord. In the circumstances, there is a question about the allocation of the fees incurred, whether they were incurred before or after the withdrawal of the Secretary of State on 10 March. The specific question is in relation to counsel's brief fee.

58 **THE DEPUTY JUDGE:** Well, can that not be decided? I mean to send this off for detailed assessment seems to be unduly cumbersome when whatever the issue is might be capable of decision now.

59 **MR FISHER:** Well—

60 **THE DEPUTY JUDGE:** This is the dates in respect of which counsel's fees were incurred, is that right?

61 **MR FISHER:** That is correct, my Lord.

62 **THE DEPUTY JUDGE:** First of all, what is the item here?

63 **MR FISHER:** The item is counsel's fees.

64 **THE DEPUTY JUDGE:** Can you refer me to—

65 **MR FISHER:** Under disbursements number 2, counsel's fees, fee for hearing on 24 March 2010, £2,200.

66 **THE DEPUTY JUDGE:** Right.

67 **MR FISHER:** My Lord, the Secretary of State withdrew on 10 March 2010.

68 **THE DEPUTY JUDGE:** Yes.

69 **MR FISHER:** And, my Lord, it is my submission that it would be appropriate to allow the second defendant to test when in fact the brief was sent to counsel in those circumstances.

70 **THE DEPUTY JUDGE:** Well, are you able to deal with that? When was the brief sent?

71 **MR COSGROVE:** My Lord, I am able to deal with that because we had this discussion between the solicitors beforehand. The issue is that I was instructed to attend the hearing before 9 March, obviously I was seized with it when I advised on it, but I think the issue, to which there is no particular answer, is whether the fee is technically occurred when one gets a brief to attend or whether it is incurred when one arrives at and, as it were, appears on the court. In practice, and I think this has been argued before, there is no answer, because quite often of course, if a hearing goes off and you have had the brief some months before, in reality the solicitor and the barrister's clerk agree that you do not get anything like the full brief fee or there is a reduction. We considered this, and we made the position clear to Mr Cooper who instructs my learned friend, that we felt that the proper place on a costs schedule to put it was on the day when I appeared and undertook the work, in other words the date of the first hearing, that was when I was earning my fee and so that was where we put it, we have been up front about that and the Treasury Solicitor know that as well. That, as we understand it, is what is normally done on these kind of costs schedules, the date is put by the fee, but I accept there is a discretion, as it were. I do not think there is an answer as such.

72 **THE DEPUTY JUDGE:** Well, the whole purpose of a summary assessment is to try to reach a view which is not on a very precise basis and to save costs, further costs being incurred between the parties. In effect you have both got a point on this particular aspect, I will go right down the middle and I will say that there should be £1,100 reduced. So, from £7,100 we go down to £6,000.

73 **MR FISHER:** I am grateful, my Lord.

74 **THE DEPUTY JUDGE:** Right.

75 **MR FISHER:** My Lord, I also have an application to appeal.

76 **THE DEPUTY JUDGE:** Yes.

77 **MR FISHER:** My Lord, your judgment—

78 **THE DEPUTY JUDGE:** Sorry, before you do that can I just make clear the order that I am making for the benefit of the court. The first defendant, the Secretary of State, will pay the applicant's costs up to 9 March 2010 in the sum of £9,500. The second defendant will pay the applicant's costs from 10 March 2010 to today, in the sum which I have summarily assessed at £6,000.

79 I am sorry, I interrupted you but you are now coming on for permission to appeal?

80 **MR FISHER:** That is correct, my Lord. My Lord, from your judgment it is clear that this was a finely balanced decision and the submissions made on behalf of the second defendant were indeed respectable. In my submission, the Court of Appeal could reasonably come to a different conclusion, especially in so far as it is a question about whether the judgment was about the maximum reasonable amount of affordable housing and whether that judgment did require specific conclusions on viability.

81 **THE DEPUTY JUDGE:** Yes. Well, anything you want to say on that?

82 **MR COSGROVE:** No thank you, my Lord.

83 **THE DEPUTY JUDGE:** No, I am afraid I am not prepared to grant permission to appeal, so if you wish to obtain permission you will have to go to the Court of Appeal.

84 **MR FISHER:** I am grateful.

85 **THE DEPUTY JUDGE:** Thank you very much. Is there anything further?

86 **MR COSGROVE:** No thank you.

87 **THE DEPUTY JUDGE:** Thank you very much. As you know I have got another case so I am going to remain in court, but you leave and everybody else will rearrange themselves.