CO/5424/2006

Neutral Citation Number: [2007] EWHC 489 (Admin)
N THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 5 February 2007

B E F O R E:

HIS HONOUR JUDGE MOLE
(Sitting as a Deputy High Court Judge)

- - - - - - -

M & M (LAND) LTD

(CLAIMANT)

-v-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(1ST DEFENDANT)

HAMPSHIRE COUNTY COUNCIL

(2ND DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

- - - - - - -

MR JONATHAN MILNER (instructed by Goodwins) appeared on behalf of the CLAIMANT
MR JONATHAN AUBURN (instructed by Treasury Solicitor) appeared on behalf of the DEFENDANT

- - - - - - -

J U D G M E N T

1. DEPUTY JUDGE: In this application under section 288 of the Town and Country Planning Act 1900, Mr Milner moves to quash the decision of an inspector appointed by the Secretary of State for Communities and Local Government.

2. The decision was on an appeal under section 78 against a refusal by Hampshire County Council, the waste planning authority, of permission to erect a new building and an up-graded hardstanding on a site at the Scrap Yard, Bishops Lane, Shirrel Heath, Hampshire. The inspector dismissed the appeal by his decision letter dated 23rd May 2006.

3. It is useful to start by recording that a challenge under section 288 may be made only on the grounds that the inspector's decision is not within the powers of the Act or that any of the relevant requirements have not been complied with. In other words, the challenge has to be on a point of law, though this may of course include the contention that the inspector reached his decision perversely, that is to say either on the basis that his decision was not open to him on the facts he found, or in the sense that it is not a decision that any reasonable inspector could have come to. I do emphasise that such a challenge is not an opportunity to re-argue the planning merits or the factual issues. The inspector was there. He saw the site. He saw the witnesses. He is chosen because he is an expert. The matter has been put compellingly and succinctly and by a number of judges. (I refer to Sullivan J in the case of Newsmith Stainless Ltd [2001] EWHC (Admin) 74, paragraphs 5 to 8 particularly).

4. In the inspector's decision-letter he identified the main issue in paragraph 2 in terms that are uncontentious. He said:

> "... I consider that the main issue in the appeal is whether the use of the land for buying scrap vehicles and scrap metal, breaking of scrap vehicles and scrap metal and salvaging spare parts of scrapped vehicles and selling salvaged metals and salvaged vehicle spare parts has been abandoned."

5. The reason why that was an issue was because of the relevant planning policies. I will not set out the terms of the policies, they are set out in paragraph 3 of the decision-letter. The point was simply this. That if the use that has been described had been abandoned, then the development for which permission was sought would have conflicted with those policies: if on the other hand the use had not been abandoned and it was an extant implementable use, then equally the development proposed would not be in conflict with the policies.

6. To describe the site briefly: the site is at the end of a lane on the edge of the village of Shirril Heath in Hampshire. It is described as being largely overgrown with brambles and scrub. The inspector recalled that it had an unkempt and dilapidated appearance, with some scrap materials remaining on site, disbursed somewhat randomly around the site. Remaining scrap materials appear to be mostly items of low or nil value. There is a shed adjacent to the entrance with an open-fronted shelter supported on steel posts attached. The inspector said an area of hardstanding is visible, but has become badly degraded through the effects of shrub and weed growth. He went on to record, as I

have said, that the current proposal was to replace the existing building with one of similar dimensions and to upgrade the hardstanding.

7. The evidence about the use of this site was that it had been used as a scrap yard for a number of years on a "low-key" basis (words that come up quite a lot in the course of this decision letter and have been used by a Mr Knight).

8. In 1992, I think, an application was made to Winchester City Council for a certificate of lawful use. The application was granted on 7th July 1993, the Council certifying that:

> "... on 3rd November 1992 the use described in the First Schedule ... was lawful within the meaning of section 191 of the Town and Country Planning Act 1990..."

The first schedule described the use as:

> "The use of the land for buying scrap vehicles and scrap metal, breaking of scrap vehicles and scrap metal and salvaging spare parts of scrapped vehicles and selling salvaged metals and salvaged vehicle spare parts."

Hence the rather long account of the issue that the inspector recited in his paragraph 2.

9. In 2004 Mr Lomax bought the site. He had known it since 1999. He knew of this certificate of lawful use. He had seen something of the site and what went on with it, and he had spoken to Mr Knight about that. He had formed the view that the low-key use was still continuing, and on that understanding he bought the site. His expectation plainly was that he would be able to do something useful on it, given the existence of the use, as he anticipated, and it is pointed out by counsel for the applicant that of course if the issue is determined against the applicant and it is found that the use has been abandoned, then the value of this site would be very much less, indeed it may possibly be negative, because of a possible liability to clear the site up.

10. It would seem that when the planning application was made, Hampshire County Council were initially prepared to grant planning permission on the understanding that the use did continue, but local residents raised the point of abandonment. It was therefore considered at the local hearing when the local planning authority called, as the appearances show, a number of the local residents to give evidence.

11. Mr Milner on behalf of the applicant makes two points. The first is that it is not possible in law, he argues, to abandon the use of land which has received the blessing of a certificate of lawful use. That is, he argues, because of the terms of section 191(6) of the Town and Country Planning Act 1990. His second and, he stresses, main point, is that the inspector's conclusions were perverse and not open to him (in the way that it he expresses it) on the evidence he records. I deal first with the point of law in relation to abandonment.

12. It is common ground that an existing use can be abandoned. The classic exposition is set out in the case of Hartley [1970] 1 QB 413, where Lord Denning put the point at page 420 in this way:

> "I think that when a man ceases to use a site for a particular purpose and lets it remain unused for a considerable time, then the proper inference may be that he has abandoned the former use. Once abandoned, he cannot start to use the site again, unless he gets planning permission: and this is so even though the new use is the same as the previous one."

He then continues:

> "The question in all such cases is simply this: Has the cessation of use (followed by non-use) been merely temporary, or did it amount to an abandonment? If it was merely temporary, the previous use cannot be resumed without planning permission being obtained. If it amounted to abandonment, it cannot be resumed unless planning permission is obtained."

He then sets out the authorities for his propositions, and continues:

> "Abandonment depends on the circumstances. If the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then the tribunal may hold it to have been abandoned."

13. The point about the objective determination of the matter was developed in a number cases and is particularly helpfully set out in the case of the Trustees of the Castell-Y-Mynach v Secretary of State for Wales (and Taff Ely Borough Council [1985] JPL 40. It is unnecessary to do more than note that in this case Nolan J recorded that it was agreed that four factors should be considered in deciding whether or not there had been abandonment. They were:

> "(a) physical condition of the building; (b) the period of non-use; (c) whether there had been any other use; and (d) evidence regarding the owner's intentions."

As Lord Denning said, the test is an objective one and therefore while the wishes and intentions of the owner are relevant, they cannot be decisive. This is shown by the authority of Hughes v Secretary of State [2000] 80 P&CPR at 397. This development of the law has survived what might have seemed to be rather a chill wind blowing from the House of Lords in the case of Pioneer Aggregates [1985] AC 132. In Cynon Valley Borough Council [1986] 2 EGLR 191, the Pioneer Aggregates case was explained by the Court of Appeal. The position is that a valid planning permission still capable of being implemented according to its terms cannot be abandoned. That was the position of the permission that the House of Lords was considering in Pioneer Aggregates. It was a mineral operation and every shovelful dug amounted to another act of development. Therefore, although it had been begun, the planning permission was not spent and remained capable of implementation. However, in other cases -- perhaps most other cases -- the planning permission can only be implemented once, and once the planning permission was implemented its effect had passed and it was spent, as the Court of Appeal made clear in the Cynon Valley case.

14. The Court of Appeal relied upon what had been said by Watkins LJ in the Court of Appeal in Young v Secretary of State for the Environment [1983] 81 LGR 389 at 397. What Watkins LJ said was this:

> "There is ample and powerful authority for the proposition ... that, when land ceases to be used for a lawful purpose for a period of time, it is a question of fact whether the right to use the land for that purpose has been abandoned so that resumption of that use amounts to development requiring planning permission."

I simply remark in passing that what Watkins J referred to there was land ceasing to be used for a lawful purpose for a period of time.

15. The Court of Appeal in Cynon pointed out that on proper analysis it could be seen that this proposition was endorsed by the House of Lords in Young [1983] 2 AC 662.

16. The Cynon Valley case itself was about a fish and chip shop which, permission having been granted, changed to an antique shop. The Court of Appeal decided that the permission was spent when the change of use from fish and chip shop to antique shop took place took place perfectly lawfully, and the original permission could not authorise a change back from the antique shop to the fish and chip shop again. In other words, a planning permission has a single operation unless it is a planning permission of the sort that concerned the House of Lords in Pioneer Aggregates and if it has a single operation it will not be of continuing effect. It follows logically, as the Cynon Valley case showed, that permitted use can therefore be abandoned.

17. This is a point that has been recently analysed and articulated very helpfully by Wilkie J in the recent case of James Hay Pension Trustees [2005] EWHC 2713 (Admin), and without reading it out I will simply say that Wilkie J's analysis at paragraphs 39 to 45 seems to me to be compelling, although I fully recognise that because of the way he dealt with the case it was obiter. His analysis concluded:

> "Accordingly, the defendant argues that the concept of abandonment can, in law, apply to a change of use once the change of use has been made.
>
> 45. In my judgment this is the correct analysis of the statutory framework and the case law."

As I say, I find the analysis in that case a compelling one.

18. Mr Milner draws a distinction between a use that has become lawful through being permitted and the use that has become lawful through being declared to be lawful as a result of a certificate of lawful use or development; and he drew my attention to section 191 of the Act. I will not set out, although I have carefully looked at, subparagraphs (1) and (2). Subsection (6) says:

> "The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

He says in relation to that the strong words that it does not say "the lawfulness of any change of use": it says "the lawfulness of any use ... shall be conclusively presumed".

He says that this means, therefore, that if, as in this case, at a later stage the right to use the land for a scrap yard is challenged, all the person who wishes to use it has to do is to produce the certificate, wave it under the nose of whoever is doing the challenging and point out to him that the lawfulness of the use is conclusively presumed. He acknowledges that this may be slightly anomalous in some ways and something of a contrast with the situation where planning permission is actually granted; but nonetheless those are the terms in which Parliament has expressed itself and I should interpret those words as they are written and apply them in accordance with what he says is their proper meaning.

19. Mr Auburn, for the Secretary of State, says that section 191(6) cannot mean that a certificate of lawful use is in a stronger position than a planning permission. He points out that section 75 of the Act is also in extremely strong terms. Section 75 of the Act is the one that explains the effect of planning permission. It provides:

> "... any grant of planning permission to develop land ... shall enure for the benefit of the land and of all persons for the time being interested in it."

These words were treated as being powerful by the House of Lords in Pioneer Aggregates. He says, "Our point is as powerful as the words in section 191(6) and yet are not powerful enough to prevent a grant of planning permission from being abandoned if that is what the circumstances show has happened". He also points in his skeleton to several anomalies that would occur if the interpretation Mr Milner argues for were actually correct.

20. In my judgment, the Secretary of State's argument is the right one. It seems to me that section 191(6) does no more and no less than declare conclusively that at the point of time that the certificate refers to, that particular use is lawful in that it operates like a planning permission for a change of use which enures for the benefit of the land and makes a particular use lawful and then is spent. However, as I have said, the authorities are quite clear that that does not stand in the way of a permitted change of use being abandoned. It would require the plainest words to compel me to find that the certificate of lawful use achieved a result that is substantially different from that which a planning permission achieves, and I simply do not find that degree of compulsion in the words of section 191(6). In my judgment, the position is the same for a certificate of lawful use as it is for a planning permission. A use permitted can be abandoned: a use that has been dignified with a certificate of lawful use can also be abandoned, notwithstanding the words of section 191(6).

21. With that I turn to the appellant's second point, which is that the decision-letter shows that the inspector reached a perverse decision not open to him on the evidence or, if it were theoretically open to him on the evidence had he expressed himself differently, it is not open to him on the basis that he actually did express himself. It is necessary to return to the decision-letter and set out in a little detail what the inspector did actually record and what his conclusions were.

22. It will be recalled that the inspector dealt entirely properly with the four factors identified by Nolan J (as he then was) in the Trustees of Castell-Y-Mynach case. He dealt with them one by one. He set out the four factors at paragraph 10. He dealt with the physical condition of the site and the buildings in terms that do not attract any challenge, I think it is fair to say. The second factor was of course the length of time for which the building had not been used, which he addressed in paragraph 14. It is particularly to this that the applicant's points go and I set out what was said in full:

> "14. No direct evidence of the period or nature of the use was presented to the Inquiry by the site operator. The previous landowner, with whose consent Mr Knight occupied the site, died some years ago. A letter drafted by the appellant after discussion with the site operator, dated 9th February 2005, asserts that the use was never abandoned."

(This letter is in the bundle of documents before me and I have been taken to it). The paragraph continues:

> "The letter states that he used the scrap yard continuously for the past 25 years, during which time there has always been scrap metal and scrap vehicles stored and sorted on the site. It goes on to say that following a slight stroke 'it would be fair to say that I wasn't dealing as much scrap as I did but I still visited my yard most days. I would sort out the scrap as I have always done, break cars and commercial vehicles and then sell scrap metals and vehicle parts.' The letter refers to pictures of the chassis of a coach, a blue van and a pile of exhaust pipes, which are said to show evidence of continuing use up to the time he was served notice to quit in 2004.
>
> 15. A number of residents presented evidence on behalf the planning authority, claiming that the use was effectively abandoned after a fire in 1995 which took place when the site was being cleared. I found the evidence of Mr Parker, who had a number of dealings with the site operator, compelling. In 1988 Mr Knight acquired a redundant chassis off Mr Parker. He provided vehicle parts to Mr Parker in 1990, and disposed of a further obsolete chassis for him in 1990. Mr Parker describes the yard as 'not a professionally run business but more of a hobby for Mr Knight.' However Mr Parker's evidence gives a picture of a site in active, if low-key use."

I stress the word "active", because of the stress that has been placed on it later.

23. The inspector continued:

> "Prior to 1995 Mr Knight had a one ton truck and lifting gear for handling scrap materials. It was stated that the lifting gear was cut up and removed from the site in 1995, after which Mr Knight visited the site with a smaller vehicle, unsuitable for dealing in scrap.

16. In 1995, when Mr Parker was building a kit car, he was unable to source any of the parts from the yard, and in June 1995 Mr Knight was unable to take the redundant metal body of a Ford Fiesta XR2.

17. A significant removal of material from the site took place at the beginning of August 1995, which resulted in a fire on the site which was attended by a fire engine. Further clearance took place in 2004, after Mr Knight had been given notice to quit by the heirs and successors of the landowner, Mr Emery.

18. While photographs taken in 2004 show the chassis of a coach, a blue van and a pile of exhaust pipes which were subsequently removed in the 2004 clearance, I do not regard this as evidence of continuing use by Mr Knight of the site after the fire in 1995. At that time the lifting gear was removed from the site. I consider Mr Parker's evidence that Mr Night was unable to dispose of a redundant chassis in 1995, and was not dealing in scrap parts to be compelling evidence that the use had ceased at that time. The evidence of residents was that Mr Knight effectively retired at this time, and thereafter only made occasional visits to the site."

(Mr Milner particularly points to the use of the adverb "effectively" and to the visits being described as "occasional", and he makes the point that the use of those words seem to suggest that there is some qualification as to whether or not Mr Knight had actually retired, and that occasional visits are still visits and therefore there is some activity taking place on the site on a proper reading of that sentence). I now move on to paragraph 19:

"Residents stated that they witnessed no activity, such as vehicles being brought onto the site after 1995. I accept that it is possible that such activity was so infrequent as to escape their notice, but this does not support the contention that the site continued in active use after that time. There is no evidence as to when the van, coach and pile of exhaust pipes were brought onto the site, or that they were not left over from the previous site clearance in 1995. Further clearance took place in 2004 in response to the notice to quit served by the then site owners prior to the purchase of the site by the appellant. I do not regard these acts of clearance as evidence of a continuing use of the site as a scrap-yard, but rather as evidence that active [there is that word again] use of the site had ceased.

20. Further convincing evidence for the cessation of the use in 1995 is that after that time no attempt was made to licence the site in accordance with the Waste Licensing Regulations 1994. In order to continue the use legally an exemption certificate would have been required, which in turn would have required the site to be brought up to a certain standard, including the provision of an impermeable hardstanding and appropriate drainage. There is no evidence of any attempt being made either by the site owner or the operator to comply with these regulations."

The inspector then turned to the next two factors, which were evidence of other use that there was no contention that any other use had succeeded the scrap yard use; so that was not relevant; and evidence of the owner's intention, which he set out at paragraphs 22 to 24. He records Mr Emery's various intentions and the wish to obtain planning permission for a dwelling on the site, and Mr Emery acknowledging that the chances of getting such permission would be better if there were an existing use on it. In paragraph 25 the Inspector ended that passage by saying:

> "While I accept that Mr Emery may have recognised the utility of keeping the use alive I consider that this falls short of an intention to reactivate the use."

Mr Milner pointed out that the word "reactivate" might be thought to beg the question, since it appears to assume that the use is not extant. My comment about that is that I am not sure that that is how "reactivate" should be read. "Reactivate", it seems to me as a use of English, can also mean to make something active, that is, at a very low-key stage when it is considered by the person who decided to reactivate, it does not necessarily mean it is completely dead. However, I do not think that advances matters very far. The conclusions which the Inspector reached are as follows:

> "26. Having regard to the four factors I conclude that the site is in a state of dereliction and is unsuitable for the use. The shed is dilapidated and much of it is no more than an open fronted shelter. With regard to the period of use I accept the evidence of local residents that the use was being run down by Mr Knight in the early 1990's and that after the site clearance and fire in 1995 use as a scrap yard effectively ceased, with only subsequent site clearance taking place in 2004, after Mr Knight had been served notice of termination. There is no documentary evidence of any continuing agreement between Mr Emery and Mr Knight relating to the use of the yard for the purpose, and no evidence of any attempt to secure the licences which would have been necessary to carry [on] in accordance with regulatory requirements. I accept that there was no other use intervening.
>
> 27. With regard to the owner's intention I acknowledge that Mr Emery may well have recognised the utility of keeping the use alive as a fall back position to be considered when applying for planning permission for a house, but there is no evidence that he took any active steps to find another operator or to obtain the consents necessary to continue the use lawfully, in particular the certificate of exemption from the requirements of the Waste Licensing Regulations 1993. While it may be that the owner entertained an intention to keep the use alive, I do not regard this as decisive. It is outweighed by the poor physical state of the yard and buildings, and particularly the unsuitable condition of the hardstanding, together with convincing evidence of abandonment for a prolonged period after 1995. It is not contested that the use could not be legally resumed without the physical improvements sought in this planning application. On the evidence I consider that the reasonable onlooker applying an

objective test, would conclude that the use had been abandoned."

Then I come to paragraph 28, which is particularly focused upon by the applicant as being evidently flawed:

> "28. I have taken into account the appellant's argument that the use would never have met regulatory requirements, even when the Certificate of Lawful Use was granted in 1993, as an indication that the use has always been low key, and therefore the way in which it was operated by Mr Knight latterly was no different to how it always operated. The evidence of Mr Sharp was that the use had always been low key, and continued as such throughout the later 1990's and until Mr Knight quit the site in 2004. To some extent this is consistent with Mr Lomax's assertion that there was effectively no difference in the way the site was operated before or after 1995. While I accept that on the evidence the use was always low key, even when the Certificate of Lawful Use was granted in 1993, I consider that the site clearance and fire of 1995 marks a turning point, after which the use ceased. There is no evidence of continuing use of the scrapyard after 1995, and in my judgment the acts of clearance including the coach chassis, the blue van and the pile of exhaust pipes do not amount to sufficient evidence of continuing use as a scrap-yard.
>
> 29. I conclude that the use as a scrapyard has been abandoned for a period of at least 10 years."

The Inspector then went on to refer to the policies and to say that because the policies were against the permission the permission was not granted and the appeal was dismissed.

24. Mr Milner points to the phrase in paragraph 28:

> "There is no evidence of continuing use of the scrapyard after 1995..."

He says there is simply no warrant for such a conclusion. He notes that the Inspector does not say, as he might, that there is some possible evidence of continuing use of the scrap yard after 1995; however, I have weighed it against the other evidence that there is in front of me and I have decided to accept the evidence that is against the continuation of such a use. That is not the Inspector's approach. He dogmatically says that there is no evidence and Mr Milner says there is evidence, and he has taken me to what Mr Lomax has said and Mr Knight's statement. He says that the contradiction in the Inspector's approach is effectively shown by his constant use of qualifying words: his description of the use as being "active, if low-key", or that "active" use of the site had eased is perhaps one example, maybe not his strongest. The use of the word "effectively", qualifying the "ceasing of the use" is another example. He says that if it is said that Mr Knight had "effectively" retired, it means a degree of doubt as to whether or not he had completely retired. It is said that the scrap yard effectively ceased. It acknowledges that to a degree it had not ceased, and he points out that the task the Inspector had properly set himself was whether or not the site had been used at

all. The heading to paragraph 14 is, "The length of time for which the site had not been used".

25. Perhaps I should observe that every decision-letter must be read as a whole. It must be read in context, and the court must bear in mind that it is directed to people who can be expected to know what the appeal was about, people who will probably have been at the appeal (as in this case the major players including Mr Lomax clearly were) and are probably familiar with the evidence. In other words, the letter is addressing a reasonably educated, in a non-technical sense, audience.

26. The conclusions speak of a use that was "low level" on any reckoning; and of course it is difficult to mark the point when a very low-key use becomes so low-key that it is a non-use, but of course such a point must come if the use continues to decline.

27. It seems to me that in his conclusions the Inspector is rightly focusing upon the use as a scrap yard. What he is looking for is evidence that the scrap yard was used as a scrap yard after 1995. He is not suggesting -- indeed he could not in the light of the evidence -- that Mr Knight did not still come and go. Mr Knight obviously did; he clearly visited the site, although much less frequently. Nor is it suggested that Mr Knight never did anything on the site. He obviously did do some things on the site, including cleaning about, tidying up what was on it to a degree and perhaps moving stuff about. But what the Inspector, it seems to me, is doing is contrasting Mr Knight up to 1995 making a very low level use of the site as a scrap yard, and after 1995 making what might fairly be described as some sort of use of the site but insufficient to amount to use as a scrap yard.

28. When the Inspector says in paragraph 28 (the paragraph in which he sets out what is the high point of the appellant's case and what Mr Sharp said and what Mr Lomax said, and when he says what he does about acknowledging the point) that the use was always low-key, and then going on to say there is no evidence of continuing use of the scrap yard after 1995, it seems to me that a reasonable and informed reader of that paragraph will understand that what the inspector is talking about is no evidence of continuing use of the scrap yard as a scrap yard after 1995. Mr Knight, in other words, was not doing enough of the sort of work that could be properly described as using that site as a scrap yard.

29. I acknowledge of course that the Inspector might have expressed himself slightly differently in a way which put the matter completely beyond doubt, but all the authorities make it plain that the courts are not to be too pernickety when they study inspectors' decisions and are to give them a reasonably generous reading, and it seems to me that, giving this decision-letter a reasonably generous reading, having looked at not only the evidence that is recorded in the decision-letter but the evidence which has been put in front of me, no criticism can be made of the Inspector's decision that justifies saying that his decision was perverse or that he reached a conclusion that was not open to him on the evidence.

30. For those reasons this application fails.

31. MR AUBURN: Thank you, my Lord. My Lord, I have an application for costs.

32. DEPUTY JUDGE: I have not seen any summary assessment or anything like that from anybody.

33. MR AUBURN: We did not serve one on the claimant, and I have a copy here.

34. DEPUTY JUDGE: Thank you very much. (Handed).

35. MR AUBURN: If I can make some very short observations on there. The overall figure of around £7,000 is a reasonable one for a full day's case in the High Court, and particularly the legal point raised did take some work to analyse the correct result, or the effective point is (inaudible). One other point, the work done on documents at the top of page 2: the explanation of what that work is is in the box on the bottom of the page.

36. DEPUTY JUDGE: Yes. That is by far the largest single item, is it not?

37. MR AUBURN: Yes, and you can see that a significant part of that is my instructing solicitor determining the merits of the case for obvious reasons. If that was not done by the instructing solicitor then it would have fallen to me. Obviously when a challenge is made someone needs to determine whether or not it should be the defendant, and that is a proper part of the costs to be claimed.

38. DEPUTY JUDGE: So that is effectively minute of advice, £1,984, as opposed to the witness statement of exhibits for £400. Is that what you are saying?

39. MR AUBURN: Yes, limited advice is the (inaudible), detailed analysis of the case and the merits and the advice to the client.

40. DEPUTY JUDGE: I see.

41. MR AUBURN: My Lord, unless I can assist you further it is for my learned friend to comment.

42. DEPUTY JUDGE: Let me hear what Mr Milner has to say. Mr Milner, what do you say?

43. MR MILNER: My Lord, I cannot resist the application of costs in principle, and I do not take issue with the time spent or the overall sum that has been occasioned by my learned friend and the Secretary of State. There is an issue -- a residual issue -- about the witness statement, because it has always been our case that that was unnecessary as I indicated to you this morning, the Secretary of State had written to us saying they did not intend to rely on that statement, but they thought for some reason they had to be included. And it seems unreasonable and unfair to expect us to pay for the costs of preparation of the bundle upon which no reliance has been put in your Lordship's judgment. It is not a great sum. I see in the box to which we have been directed in his witness statement exhibits, £400, there would be a small element of preparation and discussion with my instructing solicitor which is at the first page, attendances on

apponents. That is the sum of £224, which I think was exclusively in relation to discussions about the bundle. I do not know whether there is any other component of this that relates to the witness statement in terms of Miller and friends which may cover documents. But this is a rough-and-ready calculation. It seems to me some deduction ought to be made simply for that.

44. As I indicated this morning, in accordance with the rules any witness statement in opposition should have been considered by last July. Really there is no excuse that the Crown has (inaudible) document. That was subsequently remedied in November, and yet this witness statement did not appear until two weeks ago.

45. DEPUTY JUDGE: Very well.

46. MR AUBURN: Can I just come back on that one point, if I may?

47. DEPUTY JUDGE: Yes.

48. MR AUBURN: It is not a large sum, but we do feel that it is vital to claim it because it was such a simple matter. We quite frankly thought that the claimant was acting rather unreasonably in relation do it. We simply wanted the witness statements to refer to -- that were referred to in the decision-letter -- to be before you because these were referred to in the decision-letter; and it seemed frankly bizarre that one should deny the court access to those. And we had always thought for the very simple reason that they would just go in the bundle. They were referred to by the inspector, clearly before him, no dispute about that, for obvious reasons. There was no prejudice to the claimant. All they had to do was say, "Yes, quite right, they go in the bundle". The reason for the (inaudible) because they took what be we consider to be a quite unreasonable position in relation to that evidence.

49. DEPUTY JUDGE: Thank you very much.

50. There will be an order for costs, and I summarily assess the costs at £7,176. In relation to Mr Milner's point about the witness statement, I simply say two things. First of all, when the argument that is run involves querying the ability of the inspector to reach the decision he did on the basis of the evidence, the court will expect to see -- or at least have available -- all the evidence that is capable of being relevant to that decision. I simply remark that from my own experience the usual practice, and the convenient and cheap way of doing things was, as Mr Auburn has submitted to me, for the parties sensibly to get together and add documents to the bundle as requested so that everything was put in front of the court. That seems to me to be a very pragmatic and sensible, if somewhat informal, method of going about things. I do not think that a complaint against the Treasury Solicitor for seeking to do things in that way justifies me from making any deduction from what otherwise seems to me to be a perfectly reasonable figure for costs.

51. For those reasons I summarily assess costs in the sum of £7,176. Thank you both for your assistance in an interesting argument.

52. MR MILNER: My Lord, thank you. I just want to know whether I have to formally ask for leave to appeal. I think I know what the answer might be, but I think I am obliged to ask at this stage.

53. DEPUTY JUDGE: I think, Mr Milner, I would not be inclined to give you leave to appeal, certainly on your second and main point. That seems to me to be looking again at the facts.

54. On your first point, you have more of a point but still, I fear, not enough of one for me to believe that it would have any real prospect of success in the Court of Appeal. So if you want to appeal on that point you had better go and ask the Court of Appeal and see if you can interest them.