Neutral Citation Number: [2012] EWHC 231 (TCC)

Case No: HT 2011-165

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2012

Before :

THE HON MR JUSTICE RAMSEY

Between :

Swindon Borough Council	**Claimant**
- and -	
Forefront Estates Limited	**Defendant**

Alan Steynor (instructed by **the Director of Law and Democratic Services, Swindon Borough Council**) for the **Claimants**
The Defendant did not appear and was not represented

Hearing date: 16 January 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE RAMSEY

Mr Justice Ramsey :

Introduction

1. In these proceedings Swindon Borough Council ("the Council") seek to recover sums which have been paid for works which it says were necessary to remove the danger caused by the dangerous state of a building known as the Mechanics' Institute ("the Institute") at Emlyn Square, Swindon. The Claim is brought under Section 78 of the Building Act 1984 ("the 1984 Act").

2. The Defendant, Forefront Estates Limited ("Forefront") is the freehold owner of the Institute having acquired it in 2003. It challenges the Council's entitlement to recover sums under section 78 of the 1984 Act and contests the Council's claim that the works were necessary to render the building safe. It also puts the Council to proof that the costs claimed were reasonably incurred.

Background

3. The Institute is a Grade II Listed building in the historic centre of Swindon. It is a stone and brick building which was constructed by the Great Western Railway and private subscriptions in 1855 so as to provide a place of recreation and education for railway employees. It included a theatre at the Northern end and a library at the Southern end of the building. The Institute is located in a historically important area of Swindon being surrounded by cottages and having a hospital which was erected for railway workers. It is now a conservation area.

4. The Institute has not been used for its original purpose for many years and has not been properly maintained. After Forefront acquired the Institute in 2003 they obtained planning permission to create flats within the property and some work has been carried out at the Southern end of the building to implement this permission.

5. In November 2009 a group of consultants prepared a schedule of urgent works to be carried out at the Institute. On or about 4 December 2009 the Council served on Forefront an Urgent Works Notice under the provisions of Section 54 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the 1990 Act"). That provision permits a local authority to execute any works which appear to them to be urgently necessary for the preservation of a Listed Building in their area. The Council then entered into discussions with Forefront Estates to see whether Forefront would carry out the necessary works.

6. In the end, in July 2010, the Council obtained an order from the Magistrates' Court to allow them access to the Institute and on or about 7 July 2010 Forefront provided the Council with keys to the Institute which enabled the Council to have access for the purpose of carrying out the works under section 54 of the 1990 Act.

7. In carrying out those works at the Institute the Council acted through Swindon Commercial Services Limited ("SCS") which was formerly the Council's direct labour organisation. In July 2010 SCS instructed Structural Design Services

(Swindon) Limited ("SDS Consulting") to inspect the Institute and report upon the structural safety of the building.

8. On 28 July 2010 Mr Lee Bampfield of SDS Consulting visited the site and carried out a first stage site inspection. In his report he said as follows:

> *"The Theatre (FF02) roof structure is the main structural concern to date. It is not considered that the roof is likely to collapse imminently however in certain conditions it may be more prone to this. New temporary support should be provided as soon as possible and at no stage are any finishes to be removed until such support is provided unless under direct instruction from a Structural Engineer. Until this new support is in place it is recommended that in moderate wind and rain access is restricted. The condition of the roof at this stage doesn't prohibit further investigation and the 'clean up' both of which are likely to be required before temporary support is achievable."*

9. He then carried out a further site inspection on 5 August 2010 and noted in relation to the theatre that, following some moderate weather conditions during the previous week, noticeably more material had become loose and was hanging or had fallen from the roof structure. He then reported as follows:

> *"3.1The lateral movement of the eaves without visible distress to the wall suggests that the wall plate has deteriorated allowing it to move independently, whilst the truss bearing deterioration has allowed the trusses to drop. With the first truss over the theatre wedged against the stage it is considered that the risk of collapse of this truss is high. Due to the distress previously reported along the west side to the first four truss supports it is likely that if a collapse occurred at the south end it would pull and result in a failure of all four trusses. The roof is becoming more susceptible to distress and movement as the weatherproofing sheet deteriorates.*
>
> ...
>
> *3.3. Due to the fact that a truss is taking support off the stage arch projection and the deteriorating nature, and overall condition of the theatre roof we are unable to classify this roof as safe."*

10. In early August 2010 SCS installed scaffolding and carried out surveys and asbestos investigations at the Institute. On 16 and 17 August 2010 the Council's site manager at the Institute, Mr Paul Foggoa, contacted Mr Steve Holden of SDS Consulting in Mr Bampfield's absence on holiday. Mr Foggoa was concerned about the condition of the roof structure in the theatre and Mr Holden visited site and confirmed Mr Foggoa's concerns. An instruction was then given by the Council that there should be no access to the building and no further work was then carried out at the Institute.

11. On Bank Holiday Monday, 30 August 2010, a high level inspection of the roof took place using a fire engine, as part of an investigation into the state of the roof. Mr Foggoa noted in the daily site diary that work at the Institute was currently on hold waiting for an evaluation of emergency works. The Council had engaged Mr Christopher Green of Images Project Management Limited to project manage work in relation to the Institute. He summarised the position in an email to English Heritage on 1 September 2010. He said as follows:

> *"As a result of our investigations we are very concerned about the North Roof. Our conundrum is that we have reason to believe that one of the beams is failing resulting in the north roof being in danger of collapse. We would like to prop from the inside, drawing attached, but we can't as this would be putting people at risk whilst undertaking the propping. The other alternative is to take the load from an external structure but again we can't because this would mean putting people on the roof, again putting people at risk."*

12. There were discussions between Council officers, including lawyers and on 6 September 2010 the Council issued a notice to Forefront under section 78(2) of the 1984 Act stating that it appeared that part of the Institute "*specifically the roof over the theatre in the north part of the building is in such a state as to be dangerous and that immediate action should be taken to remove the danger.*"

13. There then followed meetings between the Council and their advisors. On Monday 13 September 2010 the Council started work which involved supporting trusses with cranes whilst removing the sarking boards, battens and secondary roof construction with the intention of removing all eight trusses, being two trusses at each end and six intermediate trusses. The Council stated that, once all the trusses had been removed and the workplace had been rendered safe, a scaffolding structure would be erected to provide wind and weather protection and any necessary protection for stability to the walls.

14. Over the period from 13 September to 31 October 2010 the Council carried out those works to the roof of the theatre at the Institute; including covering the roof with a temporary sheeted roof supported on scaffolding. On further inspection as the works progressed it proved possible to maintain the roof trusses in position supported by scaffolding within the building It is those works which now form the basis of the claim in these proceedings. The Council subsequently carried out work under sections 54 of the 1990 Act which they say was urgently necessary for the preservation of the Listed Building and which they say they will, in due course, claim from Forefront under section 55 of the 1990 Act. That claim which is said to be of the order of £450,000 does not form part of these proceedings.

15. Following completion of the emergency roof removal works the Council sent Forefront an invoice in the sum of £393,271.16 (£334,698.86 plus 17.5% VAT of £58,572.30) on 1 December 2010. That sum was not paid and on 6 May 2011 the Council issued the Claim Form in these proceedings seeking payment of the sum invoiced, together with interest for the works, pursuant to section 78 of the 1984 Act. Forefront acknowledged service and served a Defence on 21 June 2011. Forefront appeared by counsel at the first case management conference on 15 July 2011 when directions were given for disclosure, witness statements and expert evidence leading to a four-day trial commencing on 16 January 2012. In the event Forefront took no further part in the proceedings after July 2011 and its solicitor subsequently came off the record. Forefront was not represented at the hearing.

The Issues.

16. In the Defence Forefront pleaded that the Council was not entitled to recover the sums under section 78 of the 1984 Act because the Council might reasonably have proceeded instead under section 77(1) of that Act. That section provides for the Council to apply to a Magistrates' Court for an order requiring the owner to deal with the dangerous building.

17. Under the provision of section 78(5) it is provided as follows

> *"(5) In proceedings to recover expenses under this section, the court shall inquire whether the local authority might reasonably have proceeded instead under section 77(1) above, and, if the court determines that the local authority might reasonably have proceeded instead under that subsection, the local authority shall not recover the expenses or any part of them."*

18. Accordingly Forefront contends that the Council is not entitled to recover any expenses under Section 78. In addition, Forefront puts the Council to proof that the works were necessary to render the roof of the Institute safe and that the costs were reasonably incurred.

The evidence

19. The Council called evidence from five witnesses. First they called Mr Lee Bampfield of SDS Consulting who, as set out above, was the structural engineer involved in advising the Council in and after July 2010 as to the safety of the theatre roof. He provided expert opinion evidence relating to the matters to be considered under section 78 of the 1984 Act.

20. The next witness was Mr Dean Williams who works for Capita Symonds and was appointed as both the Construction Design and Management Co-ordinator and as Health and Safety Advisor for work at the Institute, in accordance with the relevant statutory requirements. He explained the assessments carried out by the Council and the work carried out. The Council's third witness was Mr Nicholas Newland, the Borough Architect and Head of Design and Construction Property Services and responsible for the works carried out by the Council to the theatre roof at the Institute. The Council then called Mr Christopher Green who was employed by the Council to carry out the project management of the preservation of the Institute.

21. In addition to the above witnesses who each provided a report or witness statement, the Council also called Mr Andrew Thorn who was employed by SCS as a quantity surveyor. He gave a detailed explanation of the figures which formed the sums claimed by the Council.

22. On the basis of that evidence, I now consider each of the issues in turn.

The applicability of Sections 77 and 78 of the 1984 Act

23. Both sections 77 and 78 apply in circumstances where "a building or structure, or part of a building or structure, is in such a [state/condition] or is used to carry such loads, as to be dangerous".

24. The difference between the provisions is that, under Section 78, there is an additional requirement that "immediate action should be taken to remove the danger". Section 78(2) requires the Council, if it is reasonably practicable to do so, to give notice to the owner of the building. It is evident that section 78 is intended to be used in cases where it is necessary for the Council to take immediate action to remove the danger.

25. As Section 78(5) states, if the Council "*might reasonably have proceeded instead under Section 77(1)*" then the Council cannot recover the expenses of taking the Section 78 measures.

26. Section 77(1) applies where there is a dangerous building or structure but it is not necessary to take immediate action to remove the danger. In such circumstances the Council applies to the Magistrates Court for an order and it is only if the owner fails to comply with that order within the time specified, that the Council is then entitled to execute the necessary works and recover the expenses from the owner.

27. In this case there can be no doubt, on the basis of the evidence given orally and in the reports of Mr Bampfield, which I accept, that the roof structure of the theatre roof at the Institute was in such a state or condition as to be dangerous. I also accept his evidence that due to the deteriorating nature and overall condition of the theatre roof he could not classify the roof as safe. It therefore follows that I am satisfied that the roof was in a dangerous state. The second question is whether it was necessary for the Council to take immediate action to remove the danger or whether they might reasonably have proceeded to deal with the matter under Section 77, instead of section 78, by applying for an order in the Magistrates Court requiring Forefront to carry out work.

28. The distinction between sections 77 and 78 shows that merely because a building is in a dangerous state or condition does not, in itself, justify the Council from taking the emergency measures under section 78. I consider that in deciding whether to proceed under section 78, rather than section 77, the Council needs to carry out a form of risk assessment and to consider the risks in terms of the consequences of the dangerous state or condition of the building or structure, the likelihood of those consequences occurring and the seriousness of the situation if those consequences do occur.

29. In this case at a meeting held on Monday 6 September 2010 the Council identified the key risks as being the collapse of the theatre roof and contamination in the event of collapse. It identified that there was asbestos, in the form of white, blue and brown asbestos within the building and that much of the paint work was carried out using heavily contaminated lead paints of the type used in the railway industry at the relevant time. The view was taken that the roof would slide down without bringing down the walls but that, on the evidence of Mr Bampfield, there were risks that masonry would be dislodged, particularly in the form of the tall stone ventilation stacks or chimneys which were located on top of the walls at roof level. Mr

Bampfield was also concerned that the gable wall could be dislodged and, at least in part, collapse.

30. On 6 September 2010 it was noted that in the event of the roof collapsing there would need to be 25 to 50 metre wide exclusion zones and that some 450 people would have to be advised to shut doors and windows and stay inside because of the contamination.

31. In addition, it is evident that the Institute is located in an area which has busy streets, including bus lanes and pedestrian areas around it. Any collapse of the roof which dislodged masonry, in particular the vent shafts or the north gable wall, would be likely to cause that masonry to fall outside the boundary of the Institute, posing an obvious danger to the health and safety of the public.

32. Mr Bampfield, in his report written following his second visit, identified the risk of collapse of the first truss as being high. His view, which I accept, was that due to the distress to the first four truss supports along the West side, it was likely that if a collapse occurred at the south end it would result in a failure of all four trusses.

33. On the basis of the evidence including the written and oral evidence of the witnesses it is evident that the dangerous state of the roof was likely to lead to the roof collapsing, releasing asbestos and lead contamination into the atmosphere and causing masonry to fall outside the boundary of the Institute. The risk of that happening was high and the consequences for the health and safety of people in the vicinity as a result of that contamination or falling masonry would have been serious, giving rise to potentially serious injury or death to those in the vicinity.

34. In such circumstances I consider that it was necessary for the Council to take immediate action to remove the danger caused by the dangerous state of the roof of the theatre at the Institute and that this is not a case where the Council might reasonably have proceeded under section 77(1) of the 1984 Act, instead of section 78, by seeking an order for the Magistrates Court for the owner to carry out the work or, in default, for the Council to be involved.

35. In coming to that conclusion there are three further matters which I have considered. First, sections 77 and 78 of the 1984 Act are worded in the following terms: "if it appears to a local authority that" a building or structure is dangerous and immediate action should be taken to remove the danger. The phrase "if it appears to a local authority" would suggest that the matter depends on the subjective view of the local authority. However, the provisions of sections 78(5) of the 1984 Act show that the court has to enquire whether the local authority might reasonably have proceeded under section 77, instead of section 78 of the 1984 Act. That clearly requires a review of whether it was reasonable for the Council to take immediate action to remove the danger which requires an assessment on an objective basis. Equally I find it difficult to conclude that if there was no reasonable basis for the Council to conclude that a building or structure was in a dangerous state, that decision could not be challenged in these proceedings by consideration of whether objectively it was in such a state.

36. In this case I have not needed to consider this issue further because, even on an objective view, the roof in this case was dangerous and for the reasons set out above

the Council properly concluded that it was necessary for immediate action to be taken to remove the danger.

37. The second aspect concerns the fact that, in this case, in order to carry out the work urgently necessary for the preservation of the Listed Building under section 54 of the 1990 Act, it was necessary for workers to have access to the building to carry out that work. Much of that urgent Listed Building work consisted of making the building water tight and, in particular, in relation to the theatre roof involved covering that roof to make it watertight. In such circumstances, I do not consider that the fact that a danger might have been created for workers carrying out that work would, in itself, justify the Council carrying out emergency measures under section 78 of the 1984 Act rather than proceeding under section 77, on the facts of this case. The Council could have carried out the necessary procedures under section 77 and prevented workers from entering the Institute until those procedures had been completed. There is however evidence that, despite security measures, the derelict building might have been accessed either by addicts or others seeking shelter or by young people encouraged to use the recreational facilities in the area. I consider that this evidence weighs in favour of the Council taking immediate action under section 78 of the 1984 Act.

38. Thirdly the Council referred to the fact that Forefront had failed to carry out the urgent works necessary to preserve the Listed Building under the 1990 Act and its performance both as to the general organisation and as to Health and Safety issues in relation to work which they had carried out at the Institute was unsatisfactory. It was submitted that this formed a further ground for the Council to conclude that it should not reasonably proceed under section 77 instead of section 78. I am not persuaded that this is a factor which would justify the Council from proceeding under section 78, if otherwise, it were appropriate to proceed under section 77. The fundamental question is whether it is necessary to take immediate action to remove the danger. If it is, then it is appropriate for the Council to use section 78 but, if it is not, the fact that the owner may not proceed satisfactorily or at all with the section 77 works is not a reason for pursuing a remedy under section 78 when section 77 would otherwise be the appropriate provision.

39. In conclusion therefore I do not consider that, as pleaded by Forefront, the Council might reasonably have proceeded under section 77, instead of section 78. It follows that section 78(5) does not prevent the Council from recovering the costs claimed in these proceedings.

Necessary work under section 78

40. Under section 78(1) the Council "*may take such steps as may be necessary*" for the purpose of removing the danger. An indication of what work may be included is given in section 78(4) which provides that, insofar as expenses incurred by the Council consist of expenses of fencing off the building or structure or arranging for it to be watched, those expenses are not recoverable in respect of any period after the danger has been removed. That indicates that the cost of removal of the danger may include expenses of fencing off or watching the building but are limited in extent. Although Forefront have made no positive case on this aspect, it is necessary for me to be satisfied that the relevant expenses relate to steps necessary to remove the danger. I turn to consider each of the heads in turn:

41. Preliminaries: These represent the cost of personnel, accommodation, equipment and services over the period of some 7 weeks from 13 September to 31 October 2010. I consider that preliminary costs incurred by SCS and charged to the Council form part of the steps necessary to remove the danger.

42. Highways management: Because the roads in the vicinity of the Institute had to be closed off and temporary diversions put into effect it was necessary to carry out highways management work and the labour, plant and materials incurred by the Council in doing so form part of the steps necessary to remove the danger.

43. Security: During the course of the works it was necessary to have security guards watching the Institute both during the week and at weekends. This security, as indicated by the reference to arrangements for the building to be watched in section 78(4), is included within the steps necessary to remove the danger.

44. Fees: The fees fall under four heads. First, there are the fees of SDS Consulting during the period from 1 September 2010 to 31 October 2010. SDS Consulting provided engineering services in monitoring the building structure during the removal procedure. The costs also included some time prior to 6 September 2010, when the notice was given under Section 78. I consider that the planning carried out prior to the service of the notice formed part of the steps necessary to remove the danger. Section 78(2) states that before exercising their powers under section 78 the Council shall "if it is reasonably practicable to do so" give notice of their intention to Forefront. The evidence shows that by 1 September 2010 the Council were considering what works to carry out to remove the danger. In those circumstances although notice was not given until Monday 6 September 2010, I consider that the costs incurred by SDS Consulting from 1 September 2010 properly formed part of the steps necessary to remove the danger and that it was not reasonably practicable to give the notice before carrying out those initial steps to plan for the work.

45. Secondly, the Council claims the cost of Brunel Surveys Limited who provided continuous monitoring of the roof and the surrounding structure so as to give advance warning of movement and any potential collapse. That monitoring was carried out over a period of three weeks and I consider that it forms part of the steps necessary to remove the danger. Thirdly, the Council claimed the cost of Environmental Scientifics Group who carried out background particulate monitoring on 9 September 2010 prior to the removal of the roof. I consider that monitoring of particulates was properly part of the steps required to remove the danger of contamination.

46. Fourthly, the Council claims the cost of providing drawings which formed part of the design of the scaffolding support and the scaffolding for the temporary roof. As raised during the hearing, there is a question whether the temporary roof which was placed over the Institute formed part of the works carried out under section 78 or whether, in fact, it formed part of the urgent work to preserve the Listed Building under the 1990 Act. I note that in the schedule of urgent Listed Building works prepared in November 2009, at Item 2.3.1.1, there was a provision for a water tight roof to be placed over the theatre. In my judgment, this work was not necessary to remove the dangerous state of the roof to the theatre of the Institute but rather was necessary to protect the building against water ingress in the future. Whilst I accept that water might have caused the floor to deteriorate which was part of the support

put in by the Council, I do not consider that that makes it part of the works necessary to remove the danger of the collapse of the existing roof. It follows that the design fee relating to the temporary roof is not recoverable under section 78.

47. Scaffolding: This consists of a number of items. First, there is internal shoring scaffold and roof sheets. Again, as for the scaffolding design fees, provision of the roof sheets and the supporting scaffolding for the roof is not, in my judgment, work necessary to remove the danger. Secondly, there is independent support and shoring scaffolding for the North gable end. This scaffolding was erected on 6 August 2010 with a minimum hire period of 16 weeks. It was therefore erected at a stage when the Council was carrying out urgent works under Section 54 of the 1990 Act. I do not consider it comes within the works necessary to remove the danger.

48. Thirdly, there was further independent shoring scaffolding provided to the North Gable in accordance with a design drawing, including purchase of that scaffolding. From the documents this scaffolding was erected on 15 September 2010 and subsequently purchased and, in providing additional support to the gable wall it was work necessary to remove the danger of the collapse of the gable wall as part of the removal of the roof. Fourthly, there is the supply of the 55 Heras fencing panels which, as the documents show, were on hire form 15 September 2010 and again form part of the works necessary to remove the danger until the roof was dismantled. Fifthly, there is the cost of independent support scaffolding at ground level to support the roof timbers once dismantled. However, once the roof was dismantled, I do not consider that the support of the dismantled roof timbers was work necessary to remove the danger. Sixthly, there was a temporary shelter for the protection of surveyors during removal of the roof which would form part of the works necessary to remove the danger.

49. Roof removal works: The main item was the work carried out by the Lawson Group including labour, plant and material to remove the roof in September and October 2010. That evidently was work necessary to remove the danger. There are also two smaller items of moving a lighting column so it did not obstruct craneage and providing a column for CCTV cameras, both of which I consider are recoverable as part of the works necessary to remove the danger. The first was work to allow the crane to lift the roof and the second was part of the security needed during the dismantling work.

50. Statutory fees: This relates to a road closure notice. That road closure was necessary to carry out the work and was therefore part of the steps necessary to remove the danger.

51. The fees paid by the Council: This consists of two items. The first is the cost of Mr Newland who, as the Borough Architect, had a heavy involvement in the works. The second is the fees of Mr Green who was the Project Manager engaged by the Council. I consider that these fees are recoverable for the period in September and October as part of the works necessary to remove the danger and would include any subsequent involvement in, for instance, preparing documentation in relation to the steps taken to remove the danger.

The expenses reasonably incurred

52. Under Section 78(3) of the 1984 Act, the Council may recover from Forefront the expenses reasonably incurred by them under Section 78. Having considered the items which fell within section 78, I now turn to consider the quantum claimed for each of those items.

53. Preliminaries: The Council claims a figure of £30,513.50 for this item. As Mr Thorn explained in his evidence, that figure was an estimate which was provided before the work was carried out and was prepared on the basis of the cost of the necessary items for a seven week period. It formed the standard basis of estimation upon which the Council paid SCS for their services and Mr Thorn confirmed that it represented the cost expended. I therefore consider that the sum claimed is recoverable by the Council as being part of the expenses reasonably incurred by them in relation to the work falling within Section 78.

54. Highways management: The Council claims for labour, plant and materials as set out in a schedule in the total sum of £35,671.48. It includes a percentage uplift of 8% being 5% for overheads and 3% for profit. That is the basis upon which the Council pays SCS for the work which SCS carries out. I consider that the sum for highways maintenance, together with the 8% uplift, represents expenses reasonably incurred by the Council under Section 78 of the 1984 Act.

55. Security: Security was arranged by the hire of temporary workers through an agency. SCS added 8% to that cost to form the cost to the Council. I consider that the sum claimed of £11,318.40 covers recoverable security costs in the period of September and October 2010 and formed part of the expenses which were reasonably incurred by the Council under Section 78.

56. Fees: The fees of each of SDS Consulting, Brunel Surveys Limited, Environmental Scientifics Group are recoverable as part of the expenses incurred by the Council in taking the steps necessary to remove the danger. Those fees were incurred by SCS who engaged the consultants and I consider that those fees together with an 8% fee to SCS, form part of the expenses recoverable. The relevant figures are £15,130.80, £14,256.00 and £464.40. In relation to the scaffolding design fees, as I have indicated above, I do not consider that the design of the temporary roof to the theatre is recoverable under section 78. On that basis I propose to deduct from the overall figure of £1,610 a figure of £610 as a reasonable assessment of the costs of carrying out the design of the roofing scaffolding. On that basis the sum recoverable is £1,080.00, being £1,000 plus 8%. This gives an overall total for fees of £30,931.20.

57. Scaffolding: During the course of the hearing Mr Thorne amended the claim downwards to a figure of £87,276.84. There are a number of issues arising from this claim:

    Item 5.01. This item, in the total sum of £38,519.44, represents the cost of purchasing the internal shoring scaffolding and the roof sheets. I consider that from the drawing provided by Optima Scaffold Designs LLP showing the scaffold shoring and temporary roof to theatre an appropriate assessment would be some two-thirds for the support scaffolding to support the roof trusses and about one-third for the

roofing. On that basis I consider that the sum recoverable for Item 5.01 is £25,679.62.

Item 5.02. This is a claim for £20,000.00 for the labour to erect the shoring scaffolding and the roof sheets. Again, I consider that there should be a discount of one-third so that two-thirds or £13,333,33 is recoverable.

Item 5.03. This is related to the cost of dismantling the scaffolding. However, on Mr Thorn's evidence, the Council took the decision that it was better to purchase the scaffolding than to pay continuing hire charges. This means that the Council have not incurred the cost of dismantling this scaffolding. Whilst at some stage the scaffolding will have to be dismantled when work is carried out at the Institute, I do not consider that the cost of dismantling the scaffolding can then form part of the expenses reasonably incurred in removing the danger. I therefore do not allow this item.

Item 5.04. This is a claim for the cost of inspecting the scaffolding. It is claimed at £50.00 per week for a period of 2 years, at a total of £5,200.00. On the evidence, I accept that these inspections are still being carried out on a weekly basis but, in my judgment, as Section 78(4) indicates in relation to fencing and watching, I do not consider that once the danger is removed the subsequent inspections can form part of the expenses reasonably incurred under Section 78 of the 1984 Act. I therefore allow the inspection fees for a total of 7 weeks at a total of £350.00.

Item 5.05. This is the cost of the support/shoring scaffolding for the North Gable which was erected on 6 August 2010. For the reasons set out above I do not consider the sum claimed of £5,041.00 is recoverable under section 78 of the 1984 Act.

Item 5.06. This is the supply of the further shoring scaffolding to the North Gable including its purchase. I consider that this item in the sum of £4,273.90 is recoverable as part of the expenses reasonably by incurred under section 78 of the 1984 Act.

Item 5.07. This is the cost of the design of the further scaffolding and I consider that the sum of £500.00 is recoverable.

Item 5.08. This is the cost for the supply of 55 Heras fencing panels and I allow the cost of £82.50.

Item 5.09. This is the labour for erecting the fencing panels and I allow the sum of £190.00.

Item 5.10. This is the cost of the independent support scaffolding to support the roof timbers once removed from the roof. For the reasons set out above, I do not consider that the sum of £890.00 is recoverable.

Item 5.11. This is the temporary shelter for the surveyors during the removal works and I consider that the sum claimed of £580 formed part of the expenses reasonably incurred under Section 78 of the 1984 Act.

58. Accordingly I consider that the total sum due is £44,879.35, calculated as follows:
Item 5.01: £25,679.62.

Item 5.02:	£13,333.33.
Item 5.03:	Nil.
Item 5.04:	£350.00.
Item 5.05:	Nil.
Item 5.06:	£4,273.90.
Item 5.07:	£500.00.
Item 5.08:	£82.50.
Item 5.09:	£190.00.
Item 5.10:	Nil.
Item 5.11:	£580.00.
	£44,989.35

59. As the scaffolding was supplied through SCS again I consider the expenses were reasonably incurred by the Council should include the 8% uplift referred to above. This leads to a final total of £48,588.50.

60. Roof removal works: There are four items. The first is the labour, plant and materials used by the Lawson Group to carry out the roof removal works in September and October 2010. That is set out in resource records sheets and, for the reasons set out above this is a recoverable item. I consider that the sum of £80,596.16 represents expense reasonably incurred in carrying out this work.

61. The second item, Item 7.02, is for plant hire when SCS hired craneage directly in order to carry out the works and achieve savings. Again there are invoices from King Lifting Limited and I consider that the sum of £15,043.98 has been reasonably incurred in carrying out these roof removal works.

62. The third item, Item 7.03, related to the removal and disconnection of a lighting column so as not to obstruct craneage and I allow the cost, reasonably incurred, of £235.94.

63. The fourth item, Item 7.04, is the installation of a column for CCTV cameras. This work in the sum of £1,481.79 was, I consider, reasonably incurred as part of the work under section 78 of the 1984 Act.

64. Accordingly the total sum of £97,357.87 is recoverable. Again 8% has to be added because the Council obtained this work through SCS and accordingly the overall total of the sum reasonably incurred by the Council is £105,145.42, as claimed by the Council.

65. Statutory Fees: The fee of £167.40 for the road closures in October 2010 is, I consider, an expense reasonably incurred in carrying out the section 78 work.

66. Further fees: These relate to the time spent by Mr Newland and Mr Green and paid by the Council, not SCS. In relation to Mr Newland, an initial summary was produced which was inadequate and incomplete. He produced a further detailed breakdown using timings taken from his diary and I consider that this justifies the

overall total of 236 hours which, I accept, is properly chargeable at £38.30, giving a total of £9,038.77.

67. The fees of £13,598.97 incurred by Mr Green are more complicated, because he was involved in both the urgent works under section 54 of the 1990 Act and the works carried out under section 78 of the 1984 Act. Whilst in his evidence he indicated that certain invoices related to his involvement in relation to the works carried out under section 78 of the 1984 Act and I accept that his time during September and October 2010 was related to that, the documents indicate that after that date he carried out work for both in relation to the urgent works and the section 78 works. The claim which he makes includes fees for November 2010 (£1946.50), December 2010 (£581), January 2011(£970.50), February 2011 (£1816.50), March 2011 (£2640.50) and April 2011 (£1323.00). I allow in full the claim for September and October 2010 in the sums of £6,725.50 and £1,559.00, exclusive of VAT. I am not satisfied that in the other months the total can be claimed to be expenses reasonably incurred in relation to the section 78 work. Some element of documentation in relation to the section 78 work would have been carried out in November and December 2010 and I allow a figure of £2,250.00 for the fees reasonably incurred during those months. As a result, the total of Mr Green's fees I reduce to £10,534.00 (£6,725.00 + £1,559.00 + £2,250.00). The overall figure which I allow for fees is therefore £9,038.77 and £10,534.00, making a total of £19,572.77, exclusive of VAT.

68. VAT: There were two issues relating to VAT and its recoverability as part of the expenses incurred by the Council. The first is the extent to which the Council were entitled to treat the sums recoverable under section 78, including the sum for time spent by Mr Newland, as being sums which attracted VAT,. The second issue arises because various invoices submitted as evidence by the Council indicate that the work is "tax exempt". In written submissions on behalf of the Council submitted after the hearing, it was confirmed that both SCS and the Council are registered for VAT and that SCS renders VAT invoices to the Council. On that basis, I am satisfied that the Council is entitled to charge Forefront VAT on the sums which it has paid for or incurred for the work under section 78 of the 1984 Act. The applicable rate of VAT claimed is 17.5% as the invoice was submitted on 1 December 2010.

69. In those written submissions, the reference to "tax exempt" on certain invoices was also explained. It refers to contractors who can be paid without deduction under the HMRC Construction Industry Scheme as they hold a CIS certificate. On that basis, I am satisfied, that the full value of the relevant invoices represents the correct figure to be allowed as costs reasonably incurred.

Summary of sums recoverable under s.78 of the 1984 Act

70. In summary, I consider that the Council is entitled to recover £332,372.10 from Forefront, calculated as follows:

Preliminaries:	£30,513.50
Highways management:	£35,671.48
Security:	£11,318.40

Fees:	£30,931.20
Scaffolding:	£48,588.50
Roof removal works:	£105,145.42
Statutory Fees:	£167.40
Further fees:	£19,572.77
Total (excluding VAT):	£281,908.67
VAT at 17.5%:	£49,334.02
Total (including VAT):	£331,242.69

Costs

71. Mr Steynor submitted that the Council should be entitled to their costs of these proceedings to be assessed on a standard basis and that, given the way in which matters had proceeded to a one day hearing, he submitted that this was a case where the court should summarily assess those costs.

72. The Council has made a substantial recovery against Forefront and has had to incur costs in proving the claim. I consider that the general principle applies and that the Council should be entitled to recover its costs, to be assessed on a standard basis. Forefront has not participated in these proceedings and doubts have been raised as to whether Forefront has resources to pay any judgment against them. The costs information submitted by the Council contains a statement of costs totalling some £75,036.70, inclusive of VAT, together with a summary of the time spent by the solicitor for the Council. In the circumstances of this case, I consider that I should exercise my discretion to carry out a summary assessment of those costs.

73. In relation to time spent by the solicitor, I note that 16.1 hours were spent in attendance on others and 138.1 hours were spent on work on documents. I have reviewed the details of those two items together with the other hours spent. On a detailed assessment greater scrutiny would be applied and I note that there is considerable time spent before proceedings were issued. I consider that an overall deduction of 12 hours at £161 or £1932.00 would be appropriate to represent time which would not be recoverable.

74. In relation to the costs of Counsel, there was initially a conference with another Counsel prior to the instruction of Mr Steynor. I note that Mr Steynor has advised on a number of occasions between May 2011 and January 2012. No criticism can be made of Mr Steynor's fees but there would be some duplication in changing Counsel, and overall I deduct a figure of £750.

75. In relation to court fees I allow total fees of £2480.00 (£1670 + 220.00 + 45 + 545).

76. At the hearing I raised some issues on the Statement of Costs. First, a question was raised as to the fees claimed in respect of Mr Green and Mr Bampfield. In the written submissions of 27 January 2012, it was explained that the sum of £6775.33 claimed

as costs for Mr Green represented the time he had spent in preparation and presentation of the claim. I have dealt above with the costs of Mr Green recoverable under s.78 of the 1984 Act for the time he spent. Whilst a sum would be allowable for his time in preparing the claim and his evidence for the trial, I note that the invoice which forms the basis of the claim was submitted to Forefront by the Council in December 2010 and that Mr Green's statement is only some 6 pages long. In the circumstances, I consider that a reasonable allowance in terms of recoverable costs on a standard basis would be £1500.00, exclusive of VAT.

77. In relation to Mr Bampfield, he gave expert evidence at the trial and I consider that his time in preparation of his evidence for the trial should be allowed in the sum of £1380.00, exclusive of VAT.

78. Secondly, the question of whether the Council's costs should include VAT was also raised. In the further written submissions, Mr Steynor confirmed that the Council is registered for VAT. As a result, I consider that the sum assessed for costs should not include VAT.

79. On that basis, the figure of costs is reduced as follows to a total of £60,128.30:

Solicitors' costs:	£28,168.30
Counsel's costs:	£26,600.00
Costs of Mr Green:	£1,500.00
Costs of Mr Bampfield:	£1,380.00
Court Fees:	£2,480.00
VAT:	£ nil
Total:	£60,128.30.

Interest

80. Mr Steynor submitted that the Court should award interest for a period of one year at a rate of 4%, which was indicated by Mr Newland to be the rate at which the Council finances its borrowing.

81. As Mr Steynor submitted, the invoice which was issued on 1 December 2010 would have become payable at that stage but he proposed taking January 2011 as the starting point for interest.

82. Under s.107(1) the expenses are recoverable "together with interest from the date of service of a demand for the expenses". Section 107(3) states that the rate of interest chargeable under s.107(1) is "such reasonable rate as the authority may determine".

83. I adopt the approach of taking one year's interest, as Mr Steynor submitted. So far as the rate of interest is concerned, this is a case where the Council has carried out works under statutory power and seeks to recover those charges from Forefront. The Council is entitled to recover at a reasonable rate under the statute. The Council

seeks interest at the rate it has incurred to finance those expenses and, in those circumstances, that seems a reasonable rate to apply. I therefore allow a rate of 4% on the overall sum due of £331,242.69. That amounts to £13,249.71.

A charge under section 107 of the 1984 Act.

84. Section 107 of the 1984 Act provides that, where local authorities have incurred expenses, they may recover those expenses together with interest from the owner and "*as from the date of the completion of the works, the expenses and interest accrued due thereon are, until recovered, a charge on the premises and on all estates and interests in them.*"

85. Under section 107(2) of the 1984 Act it is provided as follows:

> "*(2) A local authority, for the purpose of enforcing a charge under subsection (1) above, have all the same powers and remedies under the Law of Property Act 1925 and otherwise as if they were mortgagees by deed having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver.*"

85. Under section 11A of the Local Land Charges Act 1975 it is provided that a charge is a local land charge if it falls within any of the defined descriptions which include a charge acquired by a local authority under the Building Act 1984.

86. Accordingly, in my judgment, the appropriate way of dealing with the enforcement of this judgment in respect of the expenses and interest by way of a charge is by the registration of a local land charge.

87. So far as the order for costs is concerned, then, as Mr Steynor accepts, s.107 of the 1984 Act does not apply to legal costs. As a result any enforcement of the sum due in respect of costs will have to be by means of the usual procedure for the enforcement of any judgment. If, as the Council anticipates, the sum for costs is not paid within the usual 14 day period, then the Council can apply for an interim charging order, in the usual way.

Summary

88. As a result I consider that the Council is entitled to recover from Forefront the total sum of £331,242.69 (£281,908.67 plus £49,334.02 VAT) plus £13,249.71 interest under the Building Act 1984.

89. The Council is also entitled to the costs of the proceedings assessed on a standard basis, which I have summarily assessed in the sum of £60,128.30. Accordingly £60,128.30 is payable to the Council by Forefront, such sum being payable 14 days after the date of the order.

90. I would ask that, subject to any other matters, the Council prepares a draft order to reflect the terms of this judgment.