Case No: JR 1504587

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 16/06/2016

Before:

MASTER ROWLEY

- -

Between:

(1) Dr Brian May	**Claimants**
(2) Mrs Anita May	
- and -	
(1) Wavell Group Plc	
(2) Dr Bizarri	**Defendants**

- -
- -

Oliver Jones (instructed by **Simon Farrell QC**) for the **Claimants**
Jamie Carpenter (instructed by **Boodle Hatfield LLP**) for the **First Defendant**

Hearing dates: 12 & 13 May 2016

- -

Judgment Approved

Master Rowley:

1. The claimants brought proceedings against the defendants in the County Court for private nuisance. The claimants accepted the defendants' Part 36 Offer of £25,000 prior to the defendants entering their defences. A deemed costs order in accordance with CPR 44.9 resulted from that acceptance and the claimant commenced detailed assessment proceedings as a result. The claimants' bill came to £208,236.54. All of the work post dates 1 April 2013 and the defendants say that the claimants' costs should be reduced to a proportionate level in accordance with the new test of proportionality. Given the novelty of that test, I reserved judgment in case either of the parties wished to take matters further.

2. The claimants' costs are to be assessed on the standard basis. CPR 44.3(2) provides:

> *(2) Where the amount of costs is to be assessed on the standard basis, the court will –*
>
> *(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

3. CPR 44.3(2)(a) gives rise essentially to a two-stage test. First, an assessment of the costs which are reasonable has to be carried out on an item by item basis and a calculation of the aggregate of those reasonable sums made. In this case that figure is £99,655.74.

4. The extent of the reduction in the bill as originally claimed was undoubtedly due in part to the method of representation adopted by the claimants. They instructed Simon Farrell QC on their behalf. Mr Farrell is authorised by the Bar Standards Board to conduct litigation. Consequently no firm of solicitors were instructed and Mr Farrell utilised the services of other barristers and a solicitor as required. The Bar Standards Board had only begun to authorise barristers to conduct litigation shortly before Mr Farrell was instructed by the claimants. Inevitably therefore, there was some novelty in conducting litigation for Mr Farrell and his team. Nevertheless, I am satisfied that the sum that I have ultimately allowed as being a reasonable sum is so whether or not it had been incurred by a firm of solicitors or by direct access counsel. As Mr Carpenter, counsel for the defendants said, and I accept, the reasonableness and proportionality of the recoverable costs cannot depend upon the method of representation. I have raised the point merely to provide some reasoning for the significant level of reduction on assessment from the original sum claimed.

5. The second stage of the test required by CPR 44.3(2)(a) is to consider whether the reasonable sum allowed is also a proportionate sum. In doing so, the court must have regard to CPR 44.3(5) which provides:

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

<u>The sums in issue in the proceedings</u>

6. The defendant's case is that the claim is worth the sum for which it settled i.e. £25,000. This was the defendants' first offer and there was no attempt by the claimants to negotiate any higher figure before it was accepted. There is nothing before the court to suggest that any other figure ought to be preferred as to the sum that was in issue in these proceedings. Mr Carpenter was prepared to accept that there may be cases where the claimant reasonably expected a certain level of damages to be

achieved but for one reason or another had to settle for rather less, but this was not one of those cases. There was nothing in the narrative to the bill, the replies to the points of dispute or the skeleton served by Mr Jones, the cost lawyer representing the claimants, which suggested the claim was ever worth more than £25,000.

7. According to Mr Carpenter's analysis of the merits of the claim, it could never have been of any significant value in any event. A meeting prior to the involvement of Mr Farrell had taken place between the first claimant, his acoustic expert, and contractors for the defendants. A regime of noise reducing methods had been implemented which inevitably restricted the potential value of the claim. In Mr Carpenter's submission, the value of the claim could only be for the noise generated over and above that which was reasonably generated in undertaking the works for which planning permission had been given.

8. Mr Sareen, who was one of the barristers to form part of Mr Farrell's team in this case, made submissions on the issue of proportionality in addition to those of Mr Jones. He did so in line with points of response that he had drafted during the course of the detailed assessment. He did not accept Mr Carpenter's argument that the extent of damages recovered could only be for the noise in excess of the reasonable noise generated by the works. That was only the second limb referred to in the case of Andreae v Selfridge & Co Ltd [1938] Ch 1.

9. The claimants had also pleaded their case under the first limb relating to the works carried out being a non-natural user of the land. As such, the nuisance would involve all of the noise et cetera created by the defendants and their contractors. Mr Sareen accepted that this was an uncertain claim given that there was little or no case law since Andreae which would determine whether or not a two-storey basement covering essentially the entire area of the garden in a residential property would be considered a natural use of that property in the 21st century. But if it was successful, then the damages would have been significantly higher than the settlement sum.

10. In his skeleton argument, Mr Sareen set out figures relating to the value of the properties involved and, based on a percentage yield, the rental figures that could be produced for the period during which the nuisance had occurred. I have not set out the specific figures for two reasons. Firstly, and with no criticism intended, they were rough and ready figures which, when added to by additional assumptions, proved to be fairly elastic. When Mr Carpenter responded to those submissions, the figures he extrapolated, again on the hoof, did not vary significantly from the £25,000 figure which was ultimately accepted.

11. The second reason is that the loss of rental value, whilst theoretically a possible measure of damages, does not seem to have weighed heavily in the minds of the claimants and their advisers when considering the value of this case. Having read the papers lodged for the detailed assessment, it seems to me that the figure of £25,000 is one that was well within the contemplation of the claimants as being an acceptable figure and it is striking that there is nothing in writing at the time of settlement regarding advice as to whether or not the claimants could have expected to receive more if they had pressed on to a trial.

12. There is also nothing that I have seen relating to the substantially higher damages potentially recoverable under the first limb of Andreae. The first claimant in particular

clearly feels very strongly about the matters underlying proceedings and if there was any significant prospect of the entire works being halted, it seems to me that claim would have been pursued vigorously. In fact, the existence of some damages being received rather than the quantum of them seems to have been of more importance to the first claimant at least. For the purposes of considering the factors in 44.3(5), I take the view that the sum of £25,000 reflects the sums in issue in the proceedings.

The value of any non-monetary relief in issue in the proceedings

13. It is common in private nuisance proceedings for consideration to be given to injunctive relief in addition to damages. Here, the claimants clearly considered the possibility of obtaining an interim injunction but concluded by the time that proceedings were commenced that this was not likely to succeed. Nevertheless, the possibility of an injunction remained in the prayer in case further issues arose prior to the final hearing of the claim.

14. Mr Carpenter argued that the injunctive relief ought to be entirely discounted on the basis that it could only ever have been contemplated whilst the piling work was undertaken. That had finished before court proceedings were brought and the claimants' own expert evidence showed that thereafter there was no regular or lengthy intrusive noise created by the works undertaken. Consequently neither an interim nor a permanent injunction could realistically have been sought.

15. However, if I was against the first defendant on that argument, Mr Carpenter submitted that I should conclude that such value as an injunction had was included within the Part 36 Offer in any event. Therefore, on either basis I should not allow anything for the non-monetary relief over and above the damages obtained. Mr Carpenter referred to a letter from Mr Farrell in the proceedings which referred to damages being sought as the principal remedy and the replies to the points of dispute which referred to the viability of an injunction diminishing as the works progressed.

16. Mr Sareen asked, somewhat rhetorically, "what price tranquility?" There is some suggestion in his skeleton argument that the ability to assert that damages had been received was in some way a further form of relief which was valuable to the claimant. I do not think there is anything in that argument but I do accept Mr Sareen's other point which was that the claimants were entitled to consider an injunction at the outset and they ought not to be penalised for deciding subsequently that it should not be pursued. It seems to me that the evidence obtained regarding the noise levels served both the claim for damages and the claim for any injunctive relief and as such there was little extra cost in contemplating an injunction in any event. Nevertheless, some time must have been spent (properly in my view) considering the possibility of an injunction, even if it was modest, and it seems to me that it weighs in the balance of the factors to be considered under CPR 44.3(5).

The complexity of the litigation

17. Mr Carpenter's position was straightforward on this aspect. The claim was neither factually nor legally complex. Whilst the claimants' legal team had canvassed various potential claims in civil and criminal proceedings, they were irrelevant other than the private nuisance claim that was actually brought. Whilst much was made of the need

to serve the first defendant out of the jurisdiction that was no significant hurdle to a competent litigator.

18. Mr Sareen contrasted noise nuisance litigation from claims which are formulaic and common. Nevertheless, he accepted that the case had been legally straightforward since the test in Andreae clearly applied. He disputed whether the case was factually straightforward since the defendants could have accepted that they had made "a din", as he put it, and the argument should have been simply about the extent of that noise and whether the works could have been dealt with more quietly.

19. It seems to me that this case was neither legally nor factually complicated. Service outside the jurisdiction is not a matter which ought to have caused much additional work. Given the second limb of the Andreae test, seems to me that it was always going to be for the parties to prove not only how much noise had been generated but how much noise would inevitably have been generated so that a court could consider whether there was a gap between the two and, if so, its value. I think the first defendant's position was more akin to saying that all of the noise was within the inevitably-generated band and that was far from a surprising position to take.

Any additional work generated by the conduct of the paying party

20. Mr Sareen referred to the entry in the Land Registry for the property at which the works have been carried out. Apparently it does not cite the first defendant's correct address in the British Virgin Islands. Whilst it provides an alternative address of a solicitors firm in Guernsey, those solicitors do not have instructions to accept service. The incorrect address in the BVI and the lack of instructions to the solicitors led to further costs being incurred.

21. Mr Sareen also referred in his skeleton to a gap of four months between August and December 2014 where there was no move by the defendants to settle this case. During the detailed assessment Mr Farrell, in particular, had been adamant that the case had to be progressed towards trial because the defendants had shown no inclination to resolve these proceedings. The extensive Part 18 requests served by both defendants showed that the case was going to be contested.

22. Mr Carpenter pointed out that the address in the Land Registry entry was for the purpose of Land Registry matters rather than anything to do with being an address for service of court proceedings. There was no lack of instruction therefore to the solicitors in Guernsey simply because they were not authorised to accept service of proceedings. Mr Carpenter also pointed out that, even if they had been so instructed, Guernsey was also outside the jurisdiction and no saving would have been made as a result of such service.

23. It was also misleading, in Mr Carpenter's submission, to suggest that the defendants had not sought to resolve these proceedings. He referred me to correspondence prior to the commencement of proceedings where alternative dispute resolution had been proposed by the defendants rather than the instigation of proceedings. The site meeting in March 2014, prior to any lawyers being involved, was another example of the defendants' willingness to resolve matters amicably.

24. It does not seem to me that the jurisdictional point ought to have incurred a great deal in the way of costs as I stated under the previous heading. I accept that some overtures regarding settlement were made prior to the proceedings being commenced and I do not accept the claimants' argument that the defendants were clearly resolute in defending these proceedings. It is a time-honoured approach of defendants to coincide an offer of settlement with an onerous request for information so that acceptance of the former appears more attractive than completion of the latter. In short, I do not think that there is anything in the defendant's conduct which has caused additional work to be generated in this case.

Any wider factors involved in the proceedings, such as reputation or public importance

25. Mr Carpenter submitted that there were no wider factors involved in these proceedings. Whilst the other residents had intimated proceedings against the defendants, they were private nuisance claims in the same way that this was a private nuisance claim between the respective claimants and defendants. The fact that the claimants enjoyed a celebrity status and therefore were able to generate publicity for their concerns did not create any wider public importance to these proceedings.

26. Mr Sareen accepted that the fact that the claimants are public figures did not equate to any form of public interest. Nevertheless the existence of these proceedings had, according to Mr Sareen, caused the council to change its policy regarding basements and a settlement, even if short of a judgment, had a value in seeking to discourage basements being contemplated by other residents. That had a value to the claimants in its own right.

27. Whilst it is undoubtedly the case that the first claimant in particular is clearly exercised by the new phenomenon of "mega basements", his campaign to disrupt their creation is well outside the ambit of these County Court proceedings. I do not think there is anything within the costs claimed for these proceedings which can be considered proportionate as a result of any wider factors.

The new approach

28. The recasting of the costs rules in the CPR as from 1 April 2013 was part of the implementation of the review of civil litigation costs by Sir Rupert Jackson. The terms of that review were to consider the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

29. Chapter 3 of the final report is devoted entirely to the subject of proportionate costs. The test set out at CPR 44.3(5) comes from this chapter and so too does the method of considering proportionality at the end of the detailed assessment rather than at its beginning (thereby reversing the decision in Lownds v Home Office [2002] EWCA Civ 365).

30. Under the heading "proportionality of costs", Sir Rupert Jackson said:

> *"5.5…Proportionality of costs is not simply a matter of comparing the sum in issue with the amount of costs incurred, important though that comparison is.*

> *It is also necessary to evaluate any non-monetary remedies sought and any rights which are in issue, in order to compare the overall value of what is at stake in the action with the costs of resolution.*
>
> *5.6 The comparison exercise set out in the previous paragraph produces a strong indication of whether the costs of a party are proportionate. Before coming to a final conclusion, however, it is also necessary to look at the complexity of the litigation. There can be complex low value claims where the costs of litigation (if conducted properly) are bound to exceed the sum at stake. Equally, there can be high value, but straightforward, commercial claims where the costs are excessive, despite representing only a small proportion of the damages. It is also relevant to consider conduct and any wider factors, such as reputational issues or public importance."*

31. At paragraph 5.10, Sir Rupert states that disproportionate costs do not become proportionate because they were necessary to bring or defend the claim. He refers to the cost benefit analysis undertaken by the Legal Aid Agency and states that any self-funding litigant would do the same. No doubt such a litigant would consider the costs involved, but if an act were seen to be necessary to be successful in the litigation, it does not seem to me to be obvious that a litigant would discount that necessary step simply on the ground that it might subsequently be found to be disproportionate.

32. In my view this is the crux of the challenging concept of proportionality. Achieving justice at proportionate cost would, to many people, mean allowing for the recovery of at least the minimum costs involved in bringing the case to a successful hearing. In Kazakhstan Kagazy PLC v Zhunus [2015] EWHC 404 (Comm) Leggatt J said:

> *"The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."*

33. This description of the minimum necessary costs being recoverable from the losing party, and the excess being a matter between the solicitor and his client, tallies with the general notion of costs recoverable on the standard basis.

34. But as Master O'Hare said in the case of Hobbs v Guy's and St Thomas's NHS Foundation Trust (2 November 2015) about the Kazakhstan case:

> *"However, I do not think that test applies in cases such as this where the amount of reasonable costs will inevitably exceed the value of the claim.* Kazakhstan Kagazy PLC *was a case where the sums in issue bore no relation*

to the costs however high they were. However the amount of the sums in issue is one of the factors I have to take into account here and, indeed, it is the first factor listed in CPR 44.3."

35. It seems to me to be clear that where the sums in issue are modest, the Kazakhstan method is still too generous to the receiving party under the new approach. The amount that can be recovered from the paying party is not the minimum sum necessary to bring or defend the case successfully. It is a sum which it is appropriate for the paying party to pay by reference to the five factors in CPR 44.3(5). It is not the amount required to achieve justice in the eyes of the receiving party but only a contribution to that receiving party's costs in many modest cases.

36. This is a change of approach from the one set out by Lord Woolf in both Lownds and Jefferson v National Freight Carriers Plc [2001] EWCA Civ 2082 when he approved the dicta of HHJ Alton in the case of Stevens v Watts. In that case the judge explained that the receiving party needed to plan what work was required and at what level it should be done in order to bring the case "home" for a proportionate sum. That philosophy carried on into paragraph 11 of the Costs Practice Direction where the court was cautioned to understand that the relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide and so a fixed percentage could not be applied in all cases to the value of the claim in order to decide whether or not the costs were proportionate (11.1).

37. The Costs Practice Direction went on to say that there would be costs inevitably incurred and which were necessary for the successful conduct of the case. Solicitors were not required to conduct litigation at rates which were uneconomic and so *"in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute."* (11.2)

38. In fact, in modest claims, any case which ran all, or most of the way to trial, often involved costs that exceeded the amount in dispute. Mr Carpenter submitted forcefully that these provisions in the Costs Practice Direction had been deliberately removed when the rules were recast in April 2013. This was done, in his submission, because they no longer informed the test that the court should apply. It seems to me clear, however, from the Final Jackson Report that Sir Rupert did not necessarily expect the guidance to be entirely removed. Under the heading "proposed practice direction amendments" he drew a distinction between those provisions of paragraph 11 which would need to be repealed because they dealt with additional liabilities and those which simply needed amending in order to make clear that, on an assessment of costs on the standard basis, proportionality prevailed over reasonableness and that the proportionality test needed to be applied on a global basis: see paragraph 5.22. Paragraphs 11.1 and 11.2 are specified to fall into the latter category.

39. The dicta of Leggatt J in the Kazakhstan case demonstrates an understanding that there are cases where the sums at stake will be so large that the costs involved in bringing proceedings will always be "proportionate" if the costs are simply compared to the sums at stake. It was for that reason that Leggatt J cautioned against parties taking the approach of "no expense being spared" in such cases. At the other end of the scale, the case of Hobbs involved the settlement of a clinical negligence claim for £3,500 plus costs. At this lower end of the scale, it is not the case that a minimum

necessary spend approach is proportionate in the way that it would be in a Kazakhstan type case.

40. It is for this reason that I did not find the cases referred to by Mr Carpenter such as CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481 (TCC) to be of much assistance. Those cases all involved significant damages claimed in the Technology and Construction Court and where limiting the recoverable budgeted costs to the sums at stake still gave the claimants' legal teams considerable scope in planning the minimum necessary spend.

41. I made the point at the hearing that, in a case run by a direct access barrister, the client care letters were specifically intended to define the costs by reference to discrete pieces of work rather than the case overall. It has only been since barristers have been entitled to conduct litigation, that there has been any prospect of the client being given an indication of the overall spend. In the present case therefore there was no estimate given to the client in the manner expected (but by no means always achieved) by the SRA Code of Conduct. But, even if such an estimate had been given, it seems to me to be inevitable that the figures involved would have exceeded the damages claimed by some margin. I note that in his interim report, Sir Rupert considered the question of whether private nuisance claims should be ones which benefited from Qualified One way Costs Shifting given the level of damages compared with the costs involved.

42. In cases such as this, it seems to me that the new test of proportionality as described in paragraphs 5.5 and 5.6 of the final report (see [30] above), will require legal representatives to inform their clients that, even if successful, they will receive no more than a contribution to the costs that will be incurred. It may be that such advice proves to be a driver for the costs to be reduced or for alternative dispute resolution mechanisms to be explored. It is to be hoped that cases such as this one, which are in a transitional phase of understanding the new proportionality test, will be relatively rare.

43. I set out my views on the five factors in CPR 44.3(5) when setting out the parties' submissions. In summary, this is a case worth in the region of £25,000 and for which there was a modest prospect of an injunction at least early in the case. There was no noteworthy complexity in the litigation of either a legal or factual nature. There were no additional costs caused by the defendant's conduct nor were there any wider factors to be considered. In these circumstances the reasonable costs allowed of £99,655.74 are undoubtedly disproportionate.

44. In the case of Hobbs, Master O'Hare reduced the reasonable, albeit disproportionate, costs that he had originally assessed by revisiting certain items which he then disallowed as being disproportionate. Mr Carpenter urged me not to take the same course and it seems to me that it will be an unusual case where that will be appropriate given the requirement to consider proportionality on a global basis. It is tempting to do so here because it seems to me that the reasonable figure is larger than it might otherwise have been by virtue of the disbursements allowed in respect of the acoustics expert. Those fees were challenged in principle but I was against the first defendant on that point. Challenges were then raised as to the quantum of those fees but I disallowed those challenges too. They had not been specifically set out in the points of dispute and were not clarified when specifically requested in the replies. I have no doubt that if I were to have assessed the quantum of the reasonable costs of

obtaining evidence from an acoustics expert, it would have been rather less than is contained in the reasonable figure that I have assessed here. But, I accept that the revisiting of individual items does not appear to be what was intended when the judge "steps back" to consider whether the reasonable sum is also proportionate and so I decline to take that course in this case.

45. The effect of the global approach however is that the resulting figure becomes entirely a matter of judgment. I reject Mr Carpenter's argument that the costs should never exceed the damages as seeking to elevate the first aspect of the 44.3(5) test to a different level from the remainder. In paragraph 5.6 referred to above, Sir Rupert Jackson refers to the possibility of low value but complex litigation incurring costs above the value of the damages. Whilst I have determined that this was not legally or factually complex case, it undoubtedly relied upon the use of expert evidence. No claim could have been brought without some such evidence to calibrate the noise involved and to compare it with the level of noise otherwise involved in everyday living. Such evidence has a cost in itself and also involves legal work in support.

46. However, it also seems to me that I should bear in mind the stage at which this case had reached when the claimants accepted the Part 36 Offer. The proportionate amount of costs must inevitably be smaller for a case which concludes early than one which reaches a final hearing. The figure that I consider to be a proportionate one for the first defendant to pay bearing in mind all of the factors in 44.3(5) is £35,000 plus VAT.

47. Finally, Mr Carpenter sought to persuade me that I should remove the costs of drawing the bill (as well as the VAT) when considering whether the sum is proportionate. Having decided upon a proportionate figure I should then allow a reasonable and proportionate figure for drawing the bill in addition. It is not said that this is to penalise the receiving party's drawing of the bill as such, but instead is to avoid the paying party having to pay the full price for a bill to be drawn when only a proportion of the bill has been allowed.

48. I appreciate that the approach proposed by Mr Carpenter is standard practice when considering proportionality at the beginning of an assessment under the Lownds test. There is also some superficial attractiveness in the separation of the costs involved in the proceedings from the costs effectively relating solely to the detailed assessment proceedings. It may be that in some cases such a separation is useful to the court when considering whether the costs claimed are both reasonable and proportionate. But if this case is anything to go by, in my view, it is an unnecessary refinement. There is only so much finesse that can be employed when using a broadsword rather than a rapier. A concluding global assessment of proportionality as envisaged by the new approach involves the court wielding a blunt instrument rather than a precision tool.

Next steps

49. There is no need for either party to attend the handing down of this judgment. If there are consequential matters to be determined, the parties are to contact my clerk for a hearing date which will be fixed depending upon the time estimate given. The time for seeking permission to appeal this decision will be extended to any such hearing.