David Bowden Law®

ideas are always in credit

Appeal judge allows £75k legal costs to Anita Dobson and Queen's Brian May for nuisance caused by their neighbour's Kensington super basement construction

Dr Brian May & Anita Dobson v. Wavell Group Limited & Dr Farid Bizzari
Claim Number: A02CL398

Article by David Bowden

Appeal judge allows £75k legal costs to Anita Dobson and Queen's Brian May for nuisance caused by their neighbour's Kensington super basement construction

Dr Brian May & Anita Dobson v. Wavell Group Limited & Dr Farid Bizzari - Claim Number:A02CL398

Executive speed read summary

Anita Dobson and Brian May own a house in Holland Park valued at over £10million. One of their neighbours got planning permission for a large extension and construction of a super basement. The pile driving and construction work went on for over 9 months causing substantial noise and dust nuisance. They instructed a Queen's Counsel privately who acted on a direct access basis. A court claim for nuisance was issued. The claim was settled for payment of £25,000 plus their costs to be assessed. The submitted a bill for over £208k. At a detailed assessment hearing before Master Rowley in the Senior Courts Costs Office, following consideration of points of dispute, these costs were reduced to just under £100k. However Master Rowley said the figure was still 'disproportionate' and reduced the costs yet further to £35k. On appeal Judge Dight sitting with Master Whalan as assessor has ruled that this is wrong. The correct approach is to undertake an item by item assessment of the reasonable costs and then undertake a separate assessment of the proportionality of those sums reducing each of them item by item. The new proportionality test is not a blunt instrument to be used to make a substantial reduction in reasonable costs to bring them down to a rough and ready but proportionate amount. The tests of reasonableness and proportionality are intended to work together, each with their specified role, but with the intention of achieving what is fair having regard to the policy objectives in the CPR. As the rental value of the house was over £500k a year, this claim had a substantial financial value. The litigation was complex as it needed an expert to help formulate the court claim. Early settlement of a claim does not require a greater reduction in overall costs.
A costs judge must search for the figure which bears a reasonable relationship to the 5 factors in CPR part 44.3(5) having regard to all the circumstances which is to be a holistic approach. The proper interpretation of CPR part 44.4 requires a costs judge at the end of an item by item assessment to impose a very substantial reduction on the overall figure without regard to the component parts. A figure of £75,000 for costs was substituted.

Dr Brian May & Anita Dobson v. Wavell Group Limited & Dr Farid Bizzari
Claim Number: A02CL398 *8 January 2017*
High Court of Justice, Queen's Bench Division (HHJ Dight CBE and Master Whalan)

What are the facts of the case?

Dr Brian May and Anita Dobson own 6&7 Addison Crescent, Holland Park in London. Their house is worth over £10million. 13 Addison Crescent is owned by Wavell Group and occupied by Dr Bizzari. Planning permission was granted by the Royal Borough of Kensington and Chelsea for a large extension including a super basement. The building works with pile driving and attendant noise and dust pollution were endured by the other residents of Addison Crescent for 9 months from October 2013. May and Dobson brought a court action claiming damages (but not an injunction) in nuisance. The claim was settled in May and Dobson accepting agreed damages of £25k with costs to be assessed.

How was the case funded?

This was a conventional private client retainer. May and Dobson instructed Mr Simon Farrell QC on a direct access basis. He charged them an hourly rate of between £150 to £300 per hour plus VAT.

What costs were incurred?

May and Dobson submitted a bill of costs for £208,236.54 comprising £131,138.00 profit costs, £42,578.28 disbursements (experts, the costs of issuing the claim and the costs of drawing the bill) and VAT. The profit costs related almost exclusively to the costs of directly instructed counsel authorised to conduct litigation at rates of between £150 and £300 per hour

What objections were taken by the paying party in the Points of Dispute?

The paying party said the costs claimed were disproportionate. They said that May & Dobson in their letter before action had threatened to apply for an injunction but '*they knew that their case for that form of relief was weak*' and they settled for a low sum of £25k. They also said some costs had been incurred prematurely. Further they said the costs had been clocked up on the basis of Anita Dobson's '*campaign to inhibit creation of "super basements" rather than for the grant of an award of damages*'.

Was this case covered by costs budgeting?

Yes – in theory. As proceedings were started after April 2013 (here on 27 August 2014), it was subject to the new costs budgeting rules under Civil Procedure Rules 1998 (CPR) part 3. However as the case settled early there had not been a costs and case management conference hearing (CCMC).

What did the Master Rowley in the SCCO below rule?
Master Rowley assessed the reasonable costs at a detailed assessment hearing on a line-by-line basis at £99,655.74 - **[2016] EWHC B16 (Costs).** However he then said that these reasonable costs were disproportionate under the new rules. He then applied an axe to the whole of the assessed costs and chopped them down even further to the sum of £35k which he ruled was a proportionate figure.

What does the legislation provide?
CPR part 44.3 deals with '*Basis of assessment'.* It provides as follows:

> **'44.3** *(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –*
> *(a) on the standard basis; or*
> *(b) on the indemnity basis,*
> *but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.*
>
> *(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.*
> *….*
> *(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.'*

CPR part 44.4 deals with '*Factors to be taken into account in deciding the amount of costs'* and it provides as follows:

> **'44.4** *(1) The court will have regard to all the circumstances in deciding whether costs were –*
> *(a) if it is assessing costs on the standard basis –*
> *(i) proportionately and reasonably incurred; or*
> *(ii) proportionate and reasonable in amount, or*
> *….*
> *(3) The court will also have regard to –*
> *(a) the conduct of all the parties, including in particular –*
> *(i) conduct before, as well as during, the proceedings; and*
> *(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
> *(b) the amount or value of any money or property involved;*
> *(c) the importance of the matter to all the parties;*
> *(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;*
> *(e) the skill, effort, specialised knowledge and responsibility involved;*
> *(f) the time spent on the case;*
> *(g) the place where and the circumstances in which work or any part of it was done; and*
> *(h) the receiving party's last approved or agreed budget.*'

What were the grounds of appeal?
There was only 1 ground of appeal namely whether the Master below applied the new test of '*proportionality*' in CPR part 44.3(5) correctly or not. This was sub-divided into these 4 strands:

- the sums in issue,
- the complexity of the litigation,
- the relevance of the stage reached at settlement, and
- the global approach

What authorities are referred to in the judgement?
These 7 authorities (listed in chronological order) are referred to in the judgment of HH Judge Dight:

> *Andreae v. Selfridge & Company Limited* **[1938] Ch 1** (Court of Appeal – Sir Wilfrid Greene MR, Romer and Scott LJJ)
> Noise and dust caused by demolition and rebuilding will not be actionable if the operations are reasonably carried on, and all reasonable and proper steps are taken to ensure that no undue convenience is caused to neighbours. The defendant's obligation is to take all reasonable and proper precautions to save

annoyance to the neighbours and reduce nuisance to a minimum. A plaintiff only had to show that an actionable degree of interference had occurred and the burden then shifted to the defendant to prove that its actions were reasonable. In considering what is a usual and normal use of land, account must be taken of modern methods of development. The damages awarded would only be in respect of losses caused by those acts by which it had crossed the permissible line.

Hunter v. Canary Wharf **[1997] AC 655** (House of Lords - Lords Goff, Lloyd, Hoffmann, Cooke and Hope)
Injury to the amenity of the claimant's land consisted in the fact that the persons on it were liable to suffer inconvenience, annoyance or illness reducing the utility of the land entitling the owner or occupier to compensation in the amenity value.

Karl Lownds v. Home Office **[2002] 1 WLR 2450** (Court of Appeal – Lord Woolf MR, Laws and Dyson LJJ)
There should be a 2-stage approach to assessment of costs on the standard basis - a global approach and an item by item approach. A court should consider whether the total sum claimed by way of costs was proportionate before turning to the individual items and determining whether they were reasonably incurred and reasonable in amount. The proportionality of the total sum was to be considered before an item by item assessment, not afterwards. If a judge came to the conclusion that the total sum was disproportionate then he had to determine on an item by item basis whether the cost had been necessary and, if so, reasonable. If costs were necessary (and reasonable) they would be proportionate. After that item by item consideration there could be no second look at the total figure to see whether it was proportionate

Hanifa Dobson v. Thames Water Utilities Ltd and OFWAT **[2009] EWCA Civ 28** (Court of Appeal – Waller, Richards and Hughes LJJ)
Damages in nuisance were for injury to the property and not to the sensibilities of the occupier. A claimant had to show that he had in truth suffered a loss of amenity before substantial damages could be awarded. An award of damages at common law to a property owner would normally constitute just satisfaction to the owner for the purposes of section 8(3) of the Human Rights Act 1998 and no additional award of compensation under the HRA would normally be necessary.

Kazakhstan Kagazy PLC v. Zhunus **[2015] EWHC 404** (High Court, QBD, Commercial Court, Leggatt J)
In a case where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. 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."

Raymond v. Young **[2015] EWCA Civ 456** (Court of Appeal – Patten, Briggs and King LJJ)
Damages for nuisance were for diminution in value of the use of the land affected by the nuisance. t would not be appropriate to give separate damages to individual occupiers for distress because such distress was part of the loss of amenity of the land, which is what had to be valued

Hobbs v. Guy's and St Thomas' NHS Foundation Trust **2015 WL 6655223** (High Court, SCCO, Master O'Hare)
A clinical negligence claim settled before issue following an offer by the defendant. The costs found to be reasonable were nevertheless not proportionate having regard to the factors in CPR 44.3(5). Rather than reducing the global sum, individual items of expenditure were disallowed which appeared to be inconsistent with the true value of the claim.

BNM v. MGN Limited **[2016] EWHC B13 (Costs)** (High Court, SCCO, Master Gordon-Saker)
Phone hacking claim was settled with publisher giving undertakings and agreeing to pay £20k damages. Costs totaling £247,817 were claimed including success fees under CFA and ATE premium. An item by item assessment of the reasonable costs came to £167,389.45. The judge undertook a separate assessment of the proportionality of those sums reducing each of them item by item (but not court fees) by

> around 50%f leading to a total of £84,855.80. The new test of proportionality is intended to bring about a real change in the assessment of costs and a costs judge has to work through the factors in CPR 44.3(5), without slavishly identifying them by paragraph number

What did appeal Judge Dight rule on the general issue of proportionality?
Judge Dight ruled that in his judgment the new CPR part 44 were '*accurately reflecting Sir Rupert's report'* and they '*require a costs judge, when assessing costs on the standard basis, to assess on an item by item basis whether the costs are reasonable having regard to, among other things, the factors listed in CPR 44.4(3), and to consider whether the total figure is proportionate having regard to the definition of that word in CPR 44.3(5)*'. Judge Dight agreed that for receiving parties '*double jeopardy is an inherent part of the new rules'*. The judge also correctly noted that '*there has been very limited authoritative guidance on its interpretation or application*' of the new proportionality test and that authorities do '*not all appear to lead in the same direction'*.

Judge Dight approved the approach taken by the Senior Costs Judge in *BNM* where he had undertaken an item by item assessment of the reasonable costs and '*then undertook a separate assessment of the proportionality of those sums reducing each of them item by item, with the exception of court fees, by about half*'. He noted the Court of Appeal had not disturbed this finding on appeal.

Judge Dight ruled that in his view '*the new rules intended a fresh start'* and that a costs judge '*has to go back to the wording of sub-rule 44.3(5) and reach a judgment as to the amount of costs whose relationship with all the factors identified in that sub-rule is a reasonable one' adding that whether the relationship is reasonable was in his view 'a matter of judgment, rather than discretion'*. Judge Dight said CPR 44 '*requires a costs judge to attribute weight, and sometimes no weight, to each of the factors (a) to (e)*'. Going on Judge Dight ruled that '*the word proportionate is intended to have a consistent interpretation across rule 44.3(2), rule 44.3(5) and 44.4, which means that in considering proportionality the court is to have regard to all the circumstances'* but that a court is '*not limited to, the further factors specified in CPR 44.4(3) even though they are not specifically referred to in CPR 44.3'*. Finally Judge Dight observed that whilst there was a '*considerable degree of overlap*' nevertheless the '*plain intention is that there should be a holistic approach'* with a costs judge being required to '*stand back and look at the overall picture'*.

Judge Dight also presciently noted that the authorities (*BNM* and *Hobbs*) also '*recognise the possibility that the costs may be proportionate even if they exceed the sums in issue if they bear a relationship to the specified factors which is reasonable'*.

As to how an assessment is to be carried out Judge Dight said that the CPR do:

> '*not specifically state that the assessment has to be undertaken in two stages but they do require the costs judge to apply two tests, namely reasonableness and proportionality, and it is open to the costs judge to have an eye to both as he or she undertakes an item by item assessment having in mind a figure or range of figures which would be proportionate but it is equally open to the judge to apply the tests sequentially*'.

Judge Dight was clear that he disagreed with the approach of Master Rowley below who had described the new proportionality test as a '*blunt instrument as a reason to make a substantial reduction in the reasonable costs to bring them down to a rough and ready but proportionate amount'*. Instead Judge Dight rule that whilst the rules may be '*difficult'* to apply in practice, they required the '*specific factors in CPR 44.3(5) to be focused on and a determination to be made as to whether there is a reasonable relationship between them'*. Judge Dight ruled that '*the tests of reasonableness and proportionality are intended to work together, each with their specified role, but with the intention of achieving what is fair having regard to the policy objectives*'.

What did appeal Judge Dight rule on the sums in issue?
Judge Dight noted that May and Dobson's house was worth over £10million and would have an annual rental value of around £500k. Accordingly Judge Dight ruled that the sums in issue in the dispute '*were far greater than the £25k*' that the Master below ascribed to them. Judge Dight was clear that it '*would not have been unreasonable for the learned Master to conclude that the annual letting value of each house was £500,000 and that a reduction due to the alleged nuisance for the period claimed would have been in the range pleaded by the appellants, namely £50,000 to £100,000'*.

Judge Dight ruled that '*the task of the court*' was '*to undertake an objective evaluation of the sums which are in issue having regard to all the material before it, including the highest figure put on his claim by the*

claimant and the lowest figure, if any, admitted by the defendant'. For this reason Judge Dight ruled that Master Rowley got this wrong and '*misinterpreted the meaning of "*sums in issue in the proceedings*" and misapplied the test*'. Judge Dight ruled that a correction direction '*on an objective basis' for the range of figures realistically in dispute between the parties Master Rowley 'should have come to the conclusion that the range was £50,000 to £100,000'*.

What did appeal Judge Dight rule on the complexity of the litigation?
Judge Dight ruled that this case might '*not have been complex within its category it seems to me that it was complex when compared with other claims of similar value within the county court'*. He ruled that he had '*no doubt that a nuisance claim against a developer is one which requires a certain degree of expertise and specialist knowledge of both the law which applies and the evidence necessary to prove the claim'*. Judge Dight said '*an analysis has to be undertaken to identify whether "*the permissible line*" has been crossed and whether the developer has taken reasonable steps to minimise the disturbance to the adjoining owners*' noting that '*expert evidence on the issue of liability is necessary at an early stage'* and that a '*claim in nuisance requires a relatively sophisticated pleading'*.

What did appeal Judge Dight rule on the stage reached at settlement?
Here Judge Dight ruled that 'the real question is as to the impact on the overall assessment'. For this Judge Dight asked a rhetorical question as to whether Master Rowley would:

> '*have formed the view that the stage which the claim had reached was relevant to the assessment of proportionality. If the Master was really saying to himself that the costs looked disproportionately high for a claim which settled soon after issue then the appellants' argument would have no substance but paragraph 46 of his judgment suggests otherwise and, insofar as he is really saying that early settlement requires a greater reduction in the overall costs, I respectfully disagree*.'

What did appeal Judge Dight rule on the global approach?
Judge Dight ruled that the '*search ultimately to be undertaken by the costs judge is for the figure which bears a reasonable relationship to the 5 factors in the new rule, having regard to all the circumstances'*. He ruled that this '*will be a holistic approach and may be done as the item by item assessment proceeds or as a separate and subsequent stage'* but that he doubted that '*the proper interpretation of the rules requires or indeed entitles a costs judge at the end of an item by item assessment to impose a very substantial reduction on the overall figure without regard to the component parts'*.

What figure did Judge Dight allow for costs?
When Judge Dight applied these tests he substituted a figure of £75,000 plus VAT for May and Dobson's costs. This is 2 and a half times what Master Rowley order but is still nearly a third of the £200k claimed costs figure.

8 January 2018

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.