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King's Bench Walk

"Broadswords and Rapiers": Proportionality in the light of May v Wavell Group Limited

This is an important decision in that it provides perhaps the most authoritative consideration so far as to how the test of proportionality in CPR 44.3(5) is to be applied in post April 2013 cases.

Background

The underlying litigation was a claim in the tort of nuisance brought by the "Queen" guitarist Brian May and his actress wife (the Claimants) against his immediate neighbour (the Defendant) in respect of the allegedly excessive noise generated in the course of the digging of the Defendant's "super basement" in Holland Park, London.

Proceedings were issued in the County Court seeking an injunction to abate the continuing nuisance, and seeking damages for the continuing nuisance caused to the Claimants by the excessive noise and vibration that the basement works entailed. No specific figure was given for the damages being sought but the Claim Form stated that the sums being claimed were in excess of £50 000 and no more than £100 000.

Following service of the proceedings the Defendants made a Part 36 Offer of settlement of £25 000 which was accepted by the Claimants. It followed that the Claimants were entitled to their reasonable costs of the proceedings, to be subject to assessment on the standard basis. The case settled prior to any costs budgeting by the Court.

The first instance decision of Costs Master Rowley

The Claimant claimed costs totalling more than £200 000. As a side note, it is interesting to note that Counsel had been instructed on a direct access basis and the litigation was conducted by Counsel from beginning to end. The detailed assessment of costs took place before Master Rowley[1]. He took a 2-stage approach to the assessment of costs, the first stage being a line by line assessment of "reasonable" costs, and the second stage being to stand back and allow a "proportionate" figure.

The first stage assessment resulted in a figure of £99 655 excluding VAT as being the reasonable costs.

The Master then undertook a second stage, and applied the new test of proportionality as set out in rule 44.3 (5) CPR and having regard to the five factors listed in the rule.

Rule 44.3(5) provides as follows:-

"(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."

Master Rowley also bore in mind rule 44.3(2) which provides that "costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred" i.e. "proportionality trumps reasonableness" (my words not Master Rowley's).

Importantly, when considering "the sums in issue in the proceedings" (as required by rule 44.3(5)(a)), the Master held that "this is a case worth in the region of £25 000". In respect of "the value of any non-monetary relief" (rule 44.3(5)(b)) the Master held that "there was a modest prospect of an injunction at least early in the case". Master Rowley held that the reasonable costs of £99 655 were "undoubtedly disproportionate". He expressly bore in mind the fact the stage that the case had reached when it settled and commented that "the proportionate amount of costs must inevitably be smaller for a case which concludes early than one which reaches a final hearing". The Master determined that the proportionate figure was £35 000 plus vat, so less than half of the "reasonable" figure he had arrived at prior to his application of the proportionality test. In addressing the Defendant's submission that the costs of detailed assessment should be treated separately from the costs of the substantive claim he commented as follows:-

"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"

The Appeal

The case having been issued in the County Court rather than the High Court, the appeal was before His Honour Judge Dight OBE sitting with Costs Master Whalan as his assessor.

There was no appeal against Master Rowley's "stage 1" assessment of reasonable costs, even though that assessment had reduced the claimed costs by over 50%. The appeal was restricted to the "stage 2" application of the proportionality test as required by rule 44.3(5) CPR.

The Court noted that since the coming into force of the new proportionality test there had been very limited authoritative guidance on its interpretation or application and that such guidance as there was "does not all appear to lead in the same direction". Reference was made to the decisions in *Kazakhstan Kagazy v Zhunus* [2015] EWHC 404 and *Hobbs v Guy's and St Thomas's NHS Foundation Trust**[2]*** and the first instance decision in *BNM v MGN*[3]. All the decisions were first instance decisions, the most authoritative being the decision of the Senior Costs Judge, Master Gordon-Saker in *BNM v MGN*. *BNM* was a claim for costs arising from a claim for breach of confidence in publishing data taken from the claimant's phone. In *BNM* the case had settled for £20 000, and the Senior Costs Master had assessed "reasonable" costs at £62 318, before reducing that figure to £33 550 when applying the test of proportionality pursuant to rule 44.3(5).

HHJ Dight held that "whether the relationship between the costs and the relevant factors is reasonable requires an objective assessment and an objective balance to be undertaken in respect of them with a view to achieving the policy objectives or compensating the receiving party for his expenditure but not requiring the paying party to pay more than the litigation warranted".

In respect of whether a 2-stage approach to the assessment was required or not, HHJ Dight held as follows:-

"The rules 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. I suspect that in practice a costs judge will have both tests in mind when undertaking the item by item assessment but he or she will undertake a form of cross-checking when the total is ascertained to see whether it falls within the range of

proportionate totals and then undertake an adjustment if it does not."

In terms of overall approach and the reference to the new proportionality test being a "blunt instrument", he commented as follows:-

"I respectfully disagree with the learned Master insofar if it is right that he used his description of 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. The rules, difficult as they may be to apply in practice, require 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."

Further, HHJ Dight disavowed the notion of a "broad brush" assessment of a proportionate figure:-

"I doubt that the rules committee intended that a costs judge could or should bypass an item by item assessment and simply impose what he or she believed to be a proportionate global figure. In my judgment 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 which I have identified above."

In terms of the Claimant's specific grounds of appeal, HHJ Dight's findings can be summarised as follows:-

- In terms of "the sums in issue in the proceedings", the claim was for damages in nuisance and these were to be assessed by reference to the diminution in rental value of the appellants' property. Judicial notice was taken of the fact that the Claimants' property was likely to be worth in excess of £10 million, with a market rental value of c. £500 000, hence, having regard to reported decisions on assessment of damages in nuisance cases, it was "obvious" that the quantum of the potential loss was "relatively substantial". In terms of looking at "the sums in issue in the proceedings" the task of the Court is to take an objective view as to what the range of figures realistically in dispute between the parties was. Thus, the Master had misdirected himself as to the meaning of "sums in issue in the proceedings". Applying the correct test, and having regard to reported decisions on the tort of nuisance and the statement of value on the Claim Form, he should have concluded that the range was £50 000 to £100 000, rather than £25 000.

- In terms of "the complexity of the litigation", Master Rowley had erred in holding that the case was not of legal or factual complexity. HHJ Dight held that the case was complex when compared with other claims of similar value within the County Court given the need to prove that the noise generated was over and above the reasonable level of noise inherent in performance of the permitted construction works.

- The Master appeared to have reduced the costs "simply because the case settled" rather than because the case concluded at a relatively early stage in the proceedings, and he was wrong to do so.

As regards the overall relationship between "reasonable costs" and "proportionate costs", HHJ Dight held that whilst the objective for the assessing Costs Judge was to arrive at the figure "which bears a reasonable relationship to the five factors in the new rule, having regard to all the circumstances" he doubted that the proper application of the rules entitled an assessing Judge to "impose a very substantial reduction on the overall figure without regard to the component parts". In relation to the exercise undertaken by Master Rowley, HHJ Dight held that "the final figure in this case does not appear to be based on any specific mathematical calculation nor is there a specific explanation of how the weighting of the various factors resulted in the final figure".

Thus, HHJ Dight held that Master Rowley had "misinterpreted and misapplied" the new proportionality test of rule 44.3(5). HHJ Dight and Master Whalan therefore approached the application of the proportionality test afresh and concluded that the proportionate figure was £75 000 plus VAT. i.e. more than double the £35 000 plus VAT that had been allowed at first instance.

Comment

Whilst this is not a High Court decision, it is significant in that it represents perhaps the most detailed consideration yet of how the new proportionality test contained in rule 44.3(5) CPR should be applied in practice. Whilst the decision is "only" that of a Circuit Judge, HHJ Dight was sitting with Costs Master Whalan and the judgment is endorsed by Master Whalan. Thus, whilst each case turns on its facts, it is likely to be persuasive in terms of how the proportionality test in 44.3(5) should be applied, at least until there is higher court guidance.

Whilst this was an appeal against a decision at detailed assessment, it is of wider relevance as the new proportionality test is applicable at all stages of litigation when deciding what costs are to be allowed, for example at a summary assessment of costs and at costs budgeting hearings. The costs in this case had not been budgeted as the case settled pre-CCMC.

The decision emphasises the importance of the Court taking into account all five matters listed in 44.3(5) in determining proportionate costs, whilst highlighting that the Courts may apply proportionality as the second stage of a 2 stage process (assess reasonable costs then assess proportionate costs) (as Master Rowley did) or by rolling up the whole exercise into one assessment of reasonable and proportionate costs and then applying proportionality by way of a cross-check at the end.

Specifically, the appellate Court found that Master Rowley had misdirected himself in law when assessing the sums in issue in the proceedings and the complexity of the litigation. It is interesting to note that the appellate court approached the question of value and what was in issue by looking at what the sums claimed were (by reference to the Statement of Value) and by reference to damages for the tort of nuisance and comparable cases, even though those figures were well in excess of what the claim settled for. The Court could have approached the matter by asking why the case settled for £25 000 if "the sums in issue in the proceedings" were really £50 – 100 000, but it did not do so.

Having found that Master Rowley had mis-directed himself, the Court conducted the proportionality assessment afresh and allowed a figure more than double that allowed by Master Rowley. Neither the first instance decision nor the appellate decision gives a clear rationale as to how the "proportionate" figure was arrived at, albeit that the Judgment implies that if the "proportionate" figure was to be significantly lower than the "reasonable" figure, detailed reasons should be given that referred to the matters listed in 44.3(5).

One of the criticisms of the first instance decision is that the reduction was too impressionistic, and that (to adopt the analogy used by Master Rowley) the application of the test of proportionality required more use of a rapier and less use or a broadsword or blunt instrument. However, arguably both figures are impressionistic, as whilst it was said of Master Rowley's assessment that "the final figure in this case does not appear to be based on any specific mathematical calculation nor is there a specific explanation of how the weighting of the various factors resulted in the final figure", the same criticism might be applied to the appellate decision as well, albeit that the figure arrived at was closer to the "reasonable" figure for costs.

In this particular case, subject to any further appeal, the outcome was a victory for the claimant. Overall, the decision is probably a good result for claimants in that it discourages swingeing and somewhat impressionistic reductions from assessed "reasonable costs" in the absence of detailed reasons to merit such a reduction. However, each case turns on its own facts and the Court has a wide discretion in its assessment of "proportionate" costs, and there is likely to be a wide bracket of outcomes for any given case depending on the view taken by the tribunal performing the assessment as to the reasonableness and proportionality of the costs claimed.

On the facts of certain cases, a dramatic reduction in costs such as that performed by Master Rowley, may still be perfectly justifiable (and un-appealable) as, rightly or wrongly, rule 44.3(5) is clear that proportionality trumps reasonableness.

See here for the judgment.

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[1] [2016] EWHC B16 (Costs) reported

[2] Master O'Hare, 2/11/15 reported Lawtel

[3] Decision of the Senior Costs Judge, Master Gordon-Saker, reported Lawtel