IN THE COUNTY COURT AT CENTRAL LONDON **CLAIM No.A02CL398**

ON APPEAL FROM THE SENIOR COSTS OFFICE

BEFORE HIS HON JUDGE DIGHT CBE and MASTER WHALAN

BETWEEN:

(1) DR BRIAN MAY
(2) ANITA MAY **Appellants**

-and-

(1) WAVELL GROUP LIMITED

(2) DR FARID BIZZARI **Respondents**

JUDGMENT

The appeal

1. This is an appeal from the decision of Master Rowley, a Costs Judge of the Senior Courts Costs Office, sitting as a judge of the county court at Central London, on the hearing of detailed assessment of the appellants' costs following their acceptance of an offer made by the respondents under CPR Part 36 (after commencement of proceedings) which gave rise to a deemed costs order under rules 36.13(1) and 44.9(1)(b) requiring the respondents to pay the appellants' costs on the standard basis. Following a reserved judgment, which he handed down in writing, the learned Master ordered the respondents to pay to the appellants the sum of £35,000 (plus VAT) against a bill of costs by which the appellants had sought more than £200,000. The learned Master had first reduced the sums claimed by the appellants to identify the costs which were reasonable and then further reduced them to identify the costs which were proportionate thereby arriving at the figure of £35,000. He made no order as to the costs of the detailed assessment proceedings. He refused permission to appeal.

2. I heard the appeal with Master Whalan, sitting as an assessor, who has very considerable skill and experience in the matters which this appeal concerned. I am very grateful for his advice, which I have taken account of and reflected in this judgment, which he has read in draft and agrees with.

3. The central issue on this appeal is whether the learned Master correctly interpreted and properly applied what has been referred to as the new test of proportionality which came into force on 1 April 2013.

The factual background

4. The appellants and the respondents are residential neighbours. The appellants are the registered proprietors of 6 and 7 Addison Crescent, Holland Park, London W14, which they occupy as their home. The first appellant is a well-known musician and the second appellant is a well-known actor. The first respondent, which is a company incorporated in the British Virgin Islands, is the registered proprietor of 13 Addison Crescent. The second respondent is said to occupy 13 Addison Crescent. At the hearing of the appeal we were shown a plan and an aerial photograph of Addison Crescent showing the positions and close proximity of the parties' houses and their respective gardens which, in effect, back onto each other forming part of a relatively large triangle of adjacent gardens giving rise to a green space of a size not often seen in Central London. The houses in Addison Crescent are extremely valuable. There was no specific evidence about the value of the houses but we were told that each of them was worth more than £10 million, which given the experience of dealing with property cases at this court, we readily accept.

5. The original dispute between the parties arises out of a substantial programme of redevelopment works commenced by the respondents in 2013 pursuant to planning consent which they had been granted by the local authority. At the hearing we were taken to a drawing contained in the report of Mr Tim Chapman, a civil engineer from Ove Arup & Partners, dated 5 March 2015 which graphically showed, in cross-section (at internal page 10), the extent of the construction works which the respondents planned to undertake. I should mention that this report was only obtained by the appellants after settlement of the claim and was not therefore in play in the proceedings, although we

were told that it was among the papers that were put before the Master on the detailed assessment proceedings. The respondents therefore reserved the right to object to it and argued that it did not satisfy the *Ladd v Marshall* test and was inadmissible. Nevertheless it seems to me that the plan and photograph are illustrative of the contextual background and the report contains some useful reference material which does not appear to be contentious and is useful for reference purposes. The appellants have described the resultant building constructed by the respondents as a "super basement". Significant works of excavation and piling to a considerable depth were involved and continued for some time. The appellants viewed the piling as the noisiest and most intrusive of the building operations carried on by the respondents. They felt very strongly about the respondents' interference with their enjoyment of their property and the use to which the respondents were putting their land. The appellants said that the excessive noise and vibration created by these works caused an unreasonable and therefore unlawful interference with the enjoyment of their property which the respondents failed to take reasonable steps to avoid and accordingly gave rise to an actionable nuisance at common law. The respondents told us that the piling operation had continued for 80 days between February and July 2014, whereas the appellants said that it was for a period of nine months from October 2013: whichever is correct there is no doubt that this was a lengthy period of time. Full particulars of the nuisance relied on are pleaded in paragraph 11 of the particulars of claim referred to below. Attached to the appellants' statement of case was the report of a Mr Cobbing, an acoustics expert, dated 7 July 2014 which, among other things, set out his opinion as to the excessive level of noise generated by the works, the impact on the appellants' enjoyment of their property and the appropriate remedial steps which in his view ought to be taken to reduce it to an acceptable level. This was answered by a report from Mr Jarman of Cole Jarman, instructed by the respondents, dated 27 August 2014. In his report referred to above Mr Chapman advised that the works could have been conducted in a less disruptive way had the respondent used what Mr Chapman advised were more reasonable methods of construction.

6. The appellants had originally taken advice from solicitors in the summer of 2013 but they instructed leading counsel, who appeared before us, to advise them on a direct access basis, in May 2014. Counsel settled and sent to the respondents on behalf of the appellants a detailed letter before action, dated 14 July 2014, in accordance with the

Practice Direction on Pre-Action Conduct. In it the appellants invited the respondents to adopt the measures which Mr Cobbing had advised on, to cease working on Saturdays and to make proposals for the payment of damages. A response was sought within 10 days. Mr Shannon, of Shannon & Leach Surveying Ltd, who was involved in the construction works, replied on behalf of the first respondent, his company and the contractors (but not the second respondent) in a lengthy letter dated 25 July 2014 in which he denied liability, denied that the respondents had acted unreasonably but agreed that they would be prepared to participate in some type of alternative dispute resolution. The letter was not framed as a formal pre-action protocol response and a more detailed response was asked for in the appellants' letter of 6 August (also drafted by leading counsel). The first respondent's formal protocol response was provided in a letter dated 27 August, fleshing out the initial response and replying paragraph by paragraph to the appellants' letter before action.

7. On 19 September 2014 there was a without prejudice meeting at which the parties' representatives did not manage to settle the dispute.

8. On 27 August 2014 the claim was issued in this court, although it appears not to have been served until December 2014 after District Judge Price had granted permission to serve the claim on the first respondent out of the jurisdiction in the British Virgin Islands where that company is registered. The face of the claim form confined the relief sought to damages and valued the claim at £50,000 to £100,000. The piling operation had by then come to an end. The respondents instructed separate solicitors, Boodle Hatfield LLP for the first respondent and MMS Law for the second respondent. Five other neighbours were prepared to support the claim and at one stage a draft consent order to join them to the proceedings was in circulation between the parties but in the event was not finalised because the claim was settled before the neighbours could be joined as co-claimants.

9. By paragraph 11 of the particulars of claim the appellants pleaded that the works undertaken by the respondents had caused a nuisance to the appellants' property, which was continuing (and which they expected to continue until May 2015). In the same paragraph they pleaded, in the alternative, that the works were being carried out negligently by the respondents and their agents. That paragraph then set out various

particulars on which the appellants relied in support of the allegations of nuisance and negligence including (1) unreasonable noise and unreasonable interference, (2) the non-normal and unusual nature of the respondents' building project, and (3) the failure to take any reasonable steps to prevent the appellants from suffering undue inconvenience.

10. In the prayer to the particulars of claim (and paragraph 13 of the body of the pleading), and notwithstanding the terms of the claim form, the appellants sought a mandatory injunction requiring the respondents to undertake certain steps identified in the report of Mr Cobbing to abate the nuisance and a prohibitory injunction to restrain continuation of the works pending the implementation of those steps. In the alternative the appellants sought damages for interference with their quiet enjoyment of their property which they said should be calculated by reference to the diminution in the letting value of their property by virtue of the nuisance (see paragraphs 14 and 15 of the particulars of claim). The claim form valued the damages at more than £50,000 but less than £100,000. The claim form and particulars of claim were verified on behalf of the appellants.

11. No application was made for an interim injunction to restrain continuation of the works pending trial of the claim. By the time that proceedings were served the works were well advanced and it was submitted that a change in the methods of construction could not have been used to reduce the interference being suffered by the appellants at that stage. Mr Farrell QC submitted, there was no point in then seeking an interlocutory injunction because "the horse had bolted" and the case had really become one which was about damages in respect of the disturbance which the appellants had suffered and would continue to suffer for a period of time.

12. By a request dated 27 February 2015 the first respondent formally sought further information in respect of the particulars of claim pursuant to CPR 18 probing the detail of the appellants' case, particularly in relation to the particulars in paragraph 11 of the particulars of claim. No defence was filed and, because the claim was settled shortly afterwards, no response was made on behalf of the appellants to the Part 18 request.

13. By a letter dated the same day as the request for further information Boodle Hatfield LLP made an offer to settle the claim for £25,000 pursuant to CPR Part 36. The offer was made on behalf of both respondents, notwithstanding the fact that Boodle Hatfield

LLP were on the record for only the first of them in the litigation. It was not suggested that it was not an effective offer on the part of the second respondent for the purposes of CPR Part 36. The offer carried with it the automatic consequences of Part 36, including a liability on the part of the respondents if the offer were accepted within the relevant period to pay the appellants' costs on the standard basis up to the date on which notice of acceptance was served (CPR 36.13(1)). The offer was accepted by a letter dated 9 March 2015 from Mr Farrell QC on behalf of the appellants and the claim progressed to detailed assessment of the appellants' costs on the standard basis.

14. The appellants submitted a bill of costs which totalled £208,236.54 comprising £131,138.00 profit costs, £42,578.28 disbursements (ie 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. As to the experts, only 25% of the costs attributable to the report of Mr Chapman, the civil engineer referred to above, were sought from the respondents because it was accepted that his report also benefitted the other occupants of Addison Crescent who were contemplating issuing their own proceedings but who had not ultimately joined the appellants as co-claimants in the current claim.

15. Recognising that the battle ground on detailed assessment would be proportionality the appellants argued in their bill that

> *"…the claim was in no way extravagantly framed. Notwithstanding the value of the properties concerned – and the consequences for quantum should this be determined on the basis of hypothetical rental value – the claim was put on the claim form at between £50,000 and £100,000. However, financial considerations were a very minor feature from the Claimants' perspectives, rather they were predominantly concerned with fighting back against the erosion of their quality of life and to seek a precedent to inhibit the damaging consequences of further such "super basements".*

16. The appellants then made the following specific written submissions in relation to the matters which CPR 44.3(5) required to be taken into account by the costs judge in assessing proportionality when considering costs which have been ordered to be paid on the standard basis:

> *"a.* ***"the sums in issue in the proceedings"*** *– only of tangential relevance*
>
> *b.* ***"the value of any non-monetary relief in issue in the proceedings"*** *– highly relevant; the Claimants wanted to be able to enjoy their home and garden in peace without gross interruption*
>
> *c.* ***"the complexity of the litigation"*** *- relevant; there were numerous possible methods of redress (including criminal nuisance and injunctive relief) and the First Defendant complicated matters by failing to provide a UK address for service of the proceedings, by allowing an incorrect address to be entered on the Land Registry, and (it can be inferred) by instructing Wedlake Bell to refuse to accept service of a letter of claim on their behalf*
>
> *d.* ***"the additional work generated by the conduct of the paying party"*** *– relevant; see above, and the Defendants complicated matters on liability by refusing to accept that the works could have been conducted in any other way*
>
> *e.* ***"any wider factors involved in the proceedings, such as reputation or public importance"*** *– highly relevant; the works disrupted all residents in the vicinity, damage the environment and wildlife, generated substantial amounts [of] noise and dust pollution and the Claimants were keen to establish a precedent to discourage the building of further "super basements" and to encourage future such works to be undertaken in a much more considerate and quieter way, with wider consultation of those affected."*

17. The respondent contended that the costs which had been incurred by the appellants and claimed by them in the detailed assessment proceedings were disproportionate. The parties' respective positions are fully articulated in the "First and Second Defendants' Points of Dispute and Claimants' Replies to Claimants' Bill of Costs", which we have considered carefully in reaching my conclusions in respect of this appeal.

18. In paragraph 1.1 of the First and Second Defendants' Points of Dispute and Claimants' Replies to Claimants' Bill of Costs the respondents argued, in relation to the issue of

proportionality, that the appellants had claimed an injunction when they knew that their case for that form of relief was weak, the sum ultimately accepted in settlement was low, the appellants had incurred costs prematurely given the incipient stage(s) at which the work giving rise to the costs had been carried out, the proceedings were brought *"on the premise of a campaign"* to inhibit creation of "super basements" rather than for the grant of an award of damages and the work in respect of which costs were claimed was done *"on the wrong or unreasonable footing"*. In response the appellants argued that the damages claim gave rise to complicated issues requiring, in part, expert acoustic evidence to resolve, and the damages could have been assessed on several different bases. However, they accepted that money was not the driving motivation behind the litigation *"instead it was the moral imperative to right a clear wrong, recover the right to quiet and peaceful enjoyment of one's home and garden and to discourage other such vulgar excavations being undertaken in the locality."*

19. Both parties were represented by lawyers at the hearing.

20. The learned Master applied a two stage test, first assessing the reasonableness of the individual items of costs which had been incurred, which he determined at £99,655.74, having heard argument and given a short ruling on each item in dispute, and secondly assessing the proportionality of the total sum so determined, which led to his reduction of the "reasonable" sum to £35,000 and VAT, which he considered to be the "proportionate" sum. We have read the Master's reserved judgment on the issue of proportionality with care. It is detailed. He referred to the relevant provisions of the Civil Procedure Rules, which I set out below, before considering the five factors set out in CPR 44.3(5) which the appellants had specifically addressed in the narrative to the bill of costs and which I have set out in paragraph 15 above. He summarised his views as to those factors in paragraph 43 of his judgment:

> *"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 a factual nature. There were no additional costs caused by the defendant's conduct nor were there any wider factors to be considered. In those*

circumstances the reasonable costs allowed of £99,655.74 are undoubtedly disproportionate".

21. Immediately before this summary the learned Master had turned his attention to what he described as "the new approach" which came in from 1 April 2013 with the reforms to the costs rules brought about by Sir Rupert Jackson's review and the role played by proportionality. He reviewed the post-2013 decisions of the courts, some of which I refer to below, and then set out in his conclusions as follows:

> *"44. ...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 [counsel for the first respondent'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 (sic), 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 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."

The appeal

22. The appellants do not challenge the learned Master's item by item rulings as to the costs which he assessed as reasonable. They appeal his decision on the basis that the learned Master misdirected himself and misapplied what they describe as the "new test of proportionality" which came into force on 1 April 2013. They confine their appeal to four specific aspects of his approach to the question of proportionality, which they say allows us to reassess the sum which it would be proportionate for the respondents to pay to the appellants. I subsequently granted permission to appeal on paper and gave directions for the hearing.

23. We received extremely helpful written and oral submissions from counsel on both sides, although Mr Carpenter was formally instructed only on behalf of the first respondent. It

is accepted that both respondents are paying parties and that the outcome of this appeal will bind both of them.

24. The respondents remind us that the role of the court on appeal is limited and that there is a heavy burden on an appellant from a decision of a costs judge to show that he was wrong. The respondents cite well-known authority about the *"generous ambit"* afforded to a judge when exercising a discretion. However, in my view the construction of the rules relating to the definition of proportionality and their application do not involve a discretion properly so called but require the court to make a judgment on what the rules mean and how they should be applied. That is a matter of law. The application of the rules, once interpreted, require a balance to be undertaken, in that weight (which includes the possibility of no weight) has to be accorded to each of the factors specified by the rules, but that again is the making of a judgment, albeit of a rather broader nature than construction of the rules, rather than the exercise of a discretion. At paragraph 9 of their written submissions the respondents submit that *"…[t]here is no challenge to the Costs Judge's decision on the basis that he made it. In other words, Cs accept that, if the Costs Judge applied the correct approach, then his assessment of the level of proportionate costs cannot be faulted."* I agree that it is only if we come to the conclusion that the learned Master has misdirected himself as a matter of law in construing the rules or in applying them that it is open to this court on appeal to overturn his decision and consider whether to reassess the final figure as to the amount of costs which are proportionate.

<u>The rules governing assessment of costs on the standard basis.</u>

25. Rule 44.3 of the CPR sets out the approach to be taken by the court in assessing costs in relation to cases started after 1 April 2013 and in relation to costs incurred after that date. That rule applies to this case. The starting point in accordance with sub-rule (1) is that:

> *"(1) Where the court is to assess the amount of costs…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 unreasonable in amount."

In relation specifically to assessment of costs on the standard basis sub-rule (2) provides as follows:

"(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.

(Factors which the court may take into account are set out in rule 44.4)"

By virtue of the deemed costs order the respondents were the paying party in whose favour doubts as to reasonableness or proportionality were to be resolved. Where costs are to be assessed on the indemnity basis (not this case) proportionality has no role to play and doubts are to be resolved in favour of the receiving party.

26. The meaning of proportionality is now specifically provided by sub-rule (5) in the following terms:

"(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."

The factors referred to in sub-rule 44.3(2) which are to be taken into account in deciding the amount of costs are set out in rule 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…*
>
> *…*
>
> *(2) In particular, the court will give effect to any orders which have already been made.*
>
> *(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 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.*
>
> *…"*

The Grounds of appeal

27. The appellants rely on four grounds of appeal arising out of the learned Master's application of the proportionality test. They say in the first two grounds that he has misconstrued and therefore misapplied two of the factors in CPR 44.3(5), in the third

ground that he has taken into account a factor which he was not entitled to take into account and in the fourth ground that he has erred in applying the proportionality test to the global figure which he assessed the reasonable costs at and reduced the overall figure to an excessive extent. In my view, and notwithstanding the respondents' submissions to the contrary, the appellants' grounds raise points of law and are not merely an attempt to ask the court on appeal to substitute a different view for the figure arrived at by the Master.

Ground 1 – the sums in issue

28. By the first ground the appellants argue that the learned Master erred in considering factor (a) in CPR 44.4(5), namely *"the sums in issue in the proceedings"*. He dealt with this between paragraphs 6 and 12 of his judgment concluding that *"the sum of £25,000 reflects the sums in issue in the proceedings".* The respondents had argued that the claim was worth the sum for which it had settled. The first reason given by the Master for this conclusion was that *"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".* He said that he found nothing in the narrative to the bill or the documents filed from time to time to suggest that the claim was *"ever worth more than £25,000"* [para 6]. The second reason which he gave was that not only was there no evidence before him as to the rental value of the property but that the figure of £25,000 was one which the appellants considered to be acceptable. He said [para 11]:

> *"…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 to trial."*

He added [12]:

> *"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 or more importance to the first claimant at least."

29. The appellants submit first, that the learned Master was wrong to seek to ascertain what the claim was worth, as opposed to identifying the sums in issue, secondly that he erred in seeking to include within that determination a subjective element (ie what the appellants thought the claim was worth), thirdly that contrary to his finding there was material on which he could properly find that the sum in issue was more than £25,000 and had he directed himself correctly he would have concluded that the sum in issue was substantially greater. The appellants point to the fact that the claim form on its face valued the claim at between £50,000 and £100,000 (repeated on page 6 of the Claimants' replies on the points of dispute), that the appellants' houses were worth more than £10 million each, that a notional letting value would perhaps be £500,000 per annum, and that the sums in issue were far greater than the £25,000 found by the Master.

30. The respondents submit that the Master had expressly found that he had not come across anything in the papers to show that the claim was in fact worth more than £25,000 (there was no evidence as to the value of the properties or their letting value) and that he made a finding of fact that it was worth no more than £25,000 and that the appellants believed that it was worth no more than £25,000 and it is not open to the appellants to argue that they thought that the case was worth more.

31. They also argue that CPR 44.3(5)(a) necessarily incorporates a subjective element because it requires consideration of the sums in issue rather than the value of claim but that in this particular case there is no difference between the two because the whole of the claim was challenged and therefore it was the total value of the claim which was in issue. They say that the best evidence of value would be the amount awarded at trial or for which a claim settled, noting that in this case the appellants did not seek to negotiate an increase in the sum which had been offered under Part 36, which indicates that they (subjectively) did not put a greater sum in issue. In any event they argue that where a party is competently advised there is unlikely to be any difference between what he reasonably expected to recover and what it was in fact reasonable for him to recover.

Ground 2 – the complexity of the litigation

32. The second ground focuses on the factor identified in CPR 44.4(5) (c), namely the complexity of the litigation. The appellants had argued before the learned Master that while legally straightforward the claim was factually complex, given the nature of the arguments about the extent of the noise created by the respondents and the steps which they should have taken to reduce it. The respondents had argued that the claim was neither legally nor factually complex. The Master held [paragraph 19] 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 that 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."*

In paragraph 45 of his judgment the Master accepted that providing the evidence necessary to prove the various levels of noise to which he had referred in the earlier paragraph (above) carried with it the cost of engaging both experts and lawyers.

33. The appellants submit that the learned Master erred in his consideration of this factor because he compared the case against civil claims in general rather than against claims which were at the lower scale of values, which he had already found this case to be. The appellants say that had the Master taken this approach he would have concluded that this case was more complex than other cases of similar value and he would therefore have attributed more weight to this factor. The appellants also rely on the specialist nature of the expert evidence which they had to commission (as the learned Master recognised in paragraph 45 of his judgment).

34. The respondents argue that before the Master the appellants did not take the point that this claim should be compared against civil claims of a similar value and therefore it is not open to them to take the point on appeal and the Master would have been in a position to undertake such a comparison had he been asked to do so. Secondly they submit that

complexity of the case is separate from value claim – there is no inherent link. They point out that a low value clinical negligence case may nevertheless be complex and a high value claim on an invoice may be straightforward. Thirdly they say that the appellants' submission on this point is based on pure assertion. Fourthly that, in any event, this claim was "obviously straightforward". Fifthly, even if the learned Master was wrong on this point it does not undermine his conclusion on proportionality and that he took account of the need for expert evidence, reflecting the complexity of the case, when reaching his conclusion on proportionality giving the appellants costs which exceeded what he found to be the value of the claim.

Ground 3 - the relevance of the stage reached at settlement

35. The appellants submit in reliance on their third ground of appeal that the Master erroneously took into account the stage reached which the claim had at settlement (see paragraph 46 of his judgment) holding that *"[t]he proportionate amount of costs must inevitably be smaller for a case which concludes early than one which reaches a final hearing".* They argue that on a proper construction of CPR 44.3(2)(a), as extended by the definition of proportionality in CPR 44.3(5), there is no room for a costs judge to take into account the stage which a claim has reached at the point when considering whether the costs are proportionate: it is not one of the factors identified in the rules. They say that such a consideration is already built in to the assessment when the court undertakes the first stage in the process in determining what is reasonable. Secondly they argue that an approach which reduces the recoverability of costs simply by reference to the stage which it has reached would discourage attempts to settle early.

36. The respondents submit that the learned Master was correct to take into account the stage at which the claim had settled, just as the Senior Costs Judge had done in *BNM v MGN Limited [2016] EWHC B13* (Costs). They say that this is because:

    a. it is specifically required by the rules, namely the so-called "seven pillars of wisdom" in CPR 44.4(3) and, in particular, sub-paragraph (f) *"the time spent on the case"*, and that it is to be borne in mind that on a proper construction of the rules the costs judge is entitled to take account of *"all the circumstances"* (CPR 44.4(1));

b. it is inherent in the concept of proportionality, being the *"justifiable price for succeeding in the litigation"* adding that no litigant would expect to pay the same if the claim settled after one letter as if the claim had gone to trial. The question which the costs judge should ask him or herself is what would be the proportionate price to be paid to get as far as the case did rather than what would be proportionate to get to trial; and

c. it reflects the pre-April 2013 position since which time although the factors relevant to proportionality have changed the concept of it has not, and that it has been the universal practice in the Senior Courts Costs Office.

Ground 4 – the global approach

37. The way in which the Master approached and reduced the "reasonable" total item by item sum is the subject matter of the appellants' fourth ground of appeal. The learned Master's reasons as to how he reached the proportionate figure are to be found in paragraphs 44 to 48 of his judgment which I have set out above. At paragraph 44 he held that the rules did not require him to revisit the bill item by item when considering proportionality but that there should be a global approach in which *"the resulting figure becomes entirely a matter of judgment"*. It was at this point that he took account of the stage at which the claim had settled [paragraph 46] and held that the proportionate figure was £35,000 (and VAT). At paragraph 48 he referred to his use of a broadsword and a blunt instrument.

38. The appellants argue that the preferred approach should be that adopted by the Senior Costs Judge in *BNM* where Senior Master Gordon-Saker had revisited his item by item assessment of what was reasonable, making a further reduction to take account of what was proportionate. Master Gordon-Saker had also specifically omitted from consideration of proportionality the sums which had been paid by way of court fees, and in particular the fee paid on issue of the claim. The appellants say that this last factor alone, the relevant court fees being £910, would have increased the final figure at which the learned Master had assessed the costs. Their principal submission in respect of this ground is that even if a blunt instrument is to be used there has to be a degree of focus but that that the proper way to approach proportionality is to stand back, for a view about

whether the total is disproportionate and then consider the bill item by item. They say that any other approach is too crude and impressionistic.

39. The respondents say that in considering proportionality an impressionistic view has to be taken and that unless there is an obvious flaw in the Master's approach the court should hesitate to interfere with his decision.

40. As to the issue fee they submit that it should not be singled out because all costs have to be subject to the proportionality test, which must necessarily include court fees. One cannot tell from his reasoning whether the Master reduced the court fee or not. They say that it is the totality of the costs which the court has to consider when assessing proportionality at which point the difference between various categories of costs *"have merged into a single, indivisible figure"*. They distinguish *BNM* on the grounds that there were conditional fee agreements at play in that case which meant that the Senior Costs Judge necessarily had to look at the various elements separately.

Discussion

41. It is undoubtedly the case that the new test of proportionality was a key part of the reforms proposed by Sir Rupert Jackson in his Review of Civil Litigation Costs, Final Report. Proportionality now plays a much more central role in the Civil Procedure Rules, appearing in the new definition of the overriding objection and elsewhere. Sir Rupert's recommendations in respect of why the principle of proportionality of costs should be reformulated and how are set out in Chapter 3 of his report, headed "Proportionate Costs".

42. The current CPR 44.3(2) and (5) replaced the previous rules relating to assessment of costs on the standard basis which were formerly to be found in CPR 44.4(2) and which had provided as follows:

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

(Factors which the court may take into account are set out in rule 44.5.)

The rule 44.5 factors are the same as the current factors to be found in CPR 44.4, except that the new rule also requires the court to have regard to *"(h) the receiving party's last approved or agreed budget"*. It is to be noted, however, that the new rule 44.3(2) contains the specific provision that *"…Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred"* and that new rule 44.3(5) specifies the criteria by which proportionality is to be judged. The old rule was also supplemented by the provisions to be found in section 11 of the former Costs Practice Direction, which have yet to be replaced.

43. Under the previous rules the leading case on the approach to proportionality was the decision of the Court of Appeal in *Lownds v Home Office* [2002] 1 WLR 2450, the judgment of the court having been given by Lord Woolf MR. The Court of Appeal there held that there should be a two stage approach to assessment of costs on the standard basis (para 31), a global approach and an item by item approach. Lord Woolf held that first the 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 after. If the 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. This gave rise, by a side wind, to a test of necessity; 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. The Court of Appeal were of the view that a second look at the issue of proportionality would create a "double jeopardy". The main effect of *Lownds* has now been explicitly reversed by the inclusion of the new final words in CPR 44.3(2)(a).

44. At the hearing our attention was also drawn to paragraph 39 of *Lownds* where the Court of Appeal considered the situation when a claimant recovered significantly less than he had claimed. The Court held that the costs judge should take the following approach:

"39. Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus:

i. The proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim…

"40. The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim…"

45. Sir Rupert Jackson's view was that while a winning party should be compensated for his costs the burden of the paying party should not be greater than the subject matter of the litigation warranted, but that the guidance given by the Court of Appeal in *Lownds* as to the application of the proportionality test, which was intended to limit the burden on the paying party, was no longer satisfactory and needed reformulating. Costs which were disproportionate should not be payable even if they were reasonable and necessary. He said, at paragraph 5.13:

"5.13 In other words, I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction…"

The footnote (62) at that point reads:

"62. The test of proportionality does not, however, replace the requirement for the court to consider the bill on an item by item basis. The application of any reduction for proportionality should only take place when each item on the bill has been assessed individually."

46. In paragraph 5.15 of his report Sir Rupert proposed a definition of proportionality which has been adopted in the current CPR 44.3(5), as set out above. He anticipated that the application of the reasonableness test would

> *"…usually result in a total sum which is 'proportionate'…However, if the process of assessment on the standard basis…results in a figure which is not 'proportionate', then the receiving party's entitlement to costs will be limited to such sum as is proportionate."*

His recommendations as to a new definition of proportionality have made their way as formulated by Sir Rupert into CPR 44.3(5). It seems to me that in construing the test one should focus on the wording of the rules rather than having regard to former jurisprudence which it was plainly the intention of the rule-makers to move away from. The rules were intended to give rise to a new start.

47. In my judgment the new rules, accurately reflecting Sir Rupert's report in that respect, 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). The respondents in argument submitted that *"double jeopardy"* is an inherent part of the new rules and, subject to what I say below, I agree.

48. Since the coming into force of the new test there has been very limited authoritative guidance on its interpretation or application. Such that there is does not all appear to lead in the same direction.

49. In *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 Leggatt J commented on the new proportionality test in a case of hard fought litigation in which neither side showed any sense of moderation. The sums at stake were many millions. The learned judge in that case was involved in assessing a sum to be paid on account of the costs of various applications which the claimant was to pay. His Lordship said in relation to proportionality as follows:

> *"13. In a case such as this 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."

50. In *Hobbs v Guy's and St Thomas' NHS Foundation Trust* 2015 WL 6655223 Master O'Hare took a slightly different line. He reduced a claimant's bill substantially where a clinical negligence claim had settled before issue following an offer by the defendant to pay the sum of £3,500 and the claimant's costs. He considered and then applied the new proportionality test. In his view the test explained by Leggatt J in the *Kazakhstan* case had no application *"in cases such as this where the amount of reasonable costs will inevitably exceed the value of the claim."* He held that the costs which he had found to be reasonable were nevertheless not proportionate having regard to the factors in CPR 44.3(5) and rather than reducing the global sum he disallowed individual items of expenditure which appeared to be *"inconsistent with the true value of the claim"*. He explained his reasons as follows:

> *"35. The adjustment I made on grounds of proportionality reduced the total costs provisionally allowed to a figure below £10,000 (including VAT but excluding the cos of the provisional assessment). Whilst such an expenditure is high in respect of a claim of that value which settles pre-issue, I did not think it disproportionate in all the circumstances. I did not think it right to disallow the expenditure on medical records or expert reports. Even in modest value clinical*

negligence claims it is necessary to incur costs on these items. I did not allow these items of costs on grounds of necessity since that is trumped by proportionality. I allowed them having regard to the fact that clinical negligence claims have more complexity and involve more work than do other claims of similar value."

51. Last we were referred to a decision of the Senior Costs Judge, Master Gordon-Saker, in *BNM v MGN* in which he considered and applied the new proportionality test. The claim was for breach of confidence in publishing data taken from the claimant's phone, which she had lost. She sought a prohibitory injunction to restrain future publication, an order for delivery up of confidential information and damages. The claimant funded the litigation and protected herself by entering into conditional fee agreements with her lawyers and buying after the event insurance cover providing her with a limited indemnity against the defendant's costs. The claim was settled with the defendant giving undertakings and paying the sum of £20,000 in damages. The defendant also agreed to pay the claimant's costs of the claim, which were in the sum of £247,817 which included success fees under the conditional fee agreements and the premium for the after the event cover. The Senior Costs Judge undertook an item by item assessment of the reasonable costs and held them to be £167,389.45. He 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 leading to a total of £84,855.80, just under a third of the original figure. The Senior Costs Judge, having commented that the new test of proportionality was intended to bring about a real change in the assessment of costs, worked through the factors in CPR 44.3(5), without slavishly identifying them by paragraph number. He concluded that while the sum in issue was modest and the value of the non-monetary relief not substantial the proceedings would not have been issued had there not been a claim for damages, and that although it was not a particularly complex case of its type the costs could bear a reasonable relationship to the value of the claim, despite exceeding it and despite the fact that it settled at an early stage, because the case was of importance to the claimant, it was specialist "Londoncentric" work, the allegations against the defendant were serious and the claimant, not knowing the use to which her information might be put, was justified in the circumstances in issuing the claim. On the figures before him, and applying the reasoning which I have paraphrased, the Senior Costs Judge held as follows:

"49. In those circumstances base profit costs of £46,000 and base counsel's fees of £14,000 must be disproportionate under the new test, being over 3 times the amount of agreed damages, and covering work which fell far short of trial. In my judgment costs of about one half of those figures would be proportionate."

52. Before one takes account of the success fees payable to counsel and solicitors under the conditional fee agreements which the claimant had entered into in that case and the amount of the ATE premium the "proportionate" costs as determined by the learned Master were approximately £33,550, against "the reasonable" base costs which he had assessed at £62,318, the damages having been agreed at £20,000.

53. We were aware that *BNM* was subject to an appeal to the Court of Appeal and might have an impact on the instant appeal, in which case we would have invited further submissions. Judgment was given by the court of appeal on 7 November ([2017] EWCA Civ 1767) and as we read the judgment it has no impact on the issues before us. Their Lordships did not comment on the new test or the Senior Costs Judge's application of it in the circumstances. The assessment has been remitted to him in light of the judgment of the Master of the Rolls as to the applicable test.

54. The comments of the learned Senior Costs Judge in *BNM* are therefore obiter but his approach to the application of the new test of proportionality (which was not the subject matter of consideration by the Court of Appeal) is one which we have had regard to.

55. In my view the new rules intended a fresh start. It seems to me that one 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. Whether the relationship is reasonable is, in my view, a matter of judgment, rather than discretion, and, as I have said above, requires a costs judge to attribute weight, and sometimes no weight, to each of the factors (a) to (e). Further, it seems to me 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 (see CPR 44.4) which includes, but 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. There is a considerable degree of overlap but the plain intention is that there should be a holistic approach; the costs judge is intended to stand back and look at the overall picture.

56. 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 of compensating the receiving party for his expenditure but not requiring the paying party to pay more than the litigation warranted. Paragraphs 5.1 to 5.3 of Jackson and the comments of Leggatt J in the *Kazakhstan* case are support for those propositions. Leggatt J was dealing with a high value cases, but that was simply the factual context. His comments are of wider application and form part of the ratio of his decision.

57. The authorities 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 (see *BNM* and *Hobbs*). The Master in the present case recognised such a possibility.

58. 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. 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. 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.

59. I turn then to the grounds of appeal.

Ground 1

60. Both parties submitted that ground 1 required consideration of the decision of the Court of Appeal in *Andreae v Selfridge & Company Limited* [1938] Ch 1 which concerned an appeal by the defendant who had been ordered to pay damages to its neighbour, the plaintiff, for nuisance which had been caused by the works of demolition and construction which the defendant had undertaken in the course of building on its own land. The Court of Appeal (Sir Wilfrid Greene MR, with whom the other two Lords Justices agreed), in allowing the appeal and reducing the amount of damages, held that 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. In other parts of the judgement the Master of the Rolls phrased the defendant's obligation as one to take *"all reasonable and proper precautions..to save annoyance to the neighbours"*. Further on in his judgment he said that the defendant's *"duty is to take proper precautions, and see that the nuisance is reduced to a minimum"*. Determining whether these principles had been broken was a matter of fact and degree in all the circumstances. The 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".

61. In respect of the basis and measure of damages where the loss in question was loss of amenity of the land affected by the nuisance our attention was drawn to the decision of the Court of Appeal in *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28 which concerned claims brought for nuisance caused by odours and mosquitoes resulting from the negligent operation of sewage works. Reference was made to the

speeches of the Law Lords in *Hunter v Canary Wharf* [1997] AC 655 where they held that 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 (per Lord Hoffmann). That left open the question of assessment. Lord Justice Waller, with whom the other two members of the Court of Appeal agreed, gave the following guidance:

> *"33. If the house in question was available to let during the period of the nuisance, it may be that there would be direct market evidence of loss of rental value. Otherwise, it is perhaps inevitable that the assessment of damages for loss of amenity will involve a considerable degree of imprecision. But if estate agents are to assist in placing a value on the relevant intangibles, whether by calculating the reduction in letting value of the property for the period of the nuisance or in some other way, we would expect them in practice to take into account, for the purposes of their assessment, the actual experience of the persons in occupation of the property during the relevant period. It is difficult if not impossible to see any other way of proceeding. As Lord Hoffman observed, the measure of damages for loss of amenity will be affected by the size and commodiousness of the property. If the nature of the property is that of a family home and the property is occupied in practice by a family of the size for which it is suited, the experience of the members of that family is likely to be the best evidence available of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend.*
>
> *34. On ordinary principles, it must also be clear that a claimant must show that he has in truth suffered a loss of amenity before substantial damages can be awarded. If the house is unoccupied throughout the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad, or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be*

any actual loss of amenity. So in this way also, as a matter of practicalities, the assessment of common law damages for loss of amenity to the land is likely to be affected by the actual impact of the nuisance upon the occupier, or the lack of it.

35. It follows that the actual impact upon the occupiers of the land, although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of such damages in many cases, including such as the present where a family home is in question and no physical injury to the property, loss of capital value, loss of rent or other pecuniary damage, arises."

62. In *Raymond v Young* [2015] EWCA Civ 456, a more recent decision of a differently constituted court, the principles explained by Waller LJ were cited with approval, the Court of Appeal emphasising the point that damages for nuisance were for diminution in value of the use of the land affected by the nuisance. It 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.

63. It is apparent from the above authorities that damages for nuisance in the instant case were to be assessed by reference to the diminution in rental value of the appellants' property, even though in one sense it was the occupiers (ie the appellants) who suffered a loss rather than the land itself. On the assumption that the degree of interference crossed the permissible line identified by application of the above principles it is, in my respectful view, obvious in this case that the quantum of the potential loss was relatively substantial.

64. On a detailed assessment I would not have expected to see valuation evidence or indeed specific evidence as to the rental value of the property in question but some material on which a costs judge could properly reach a view as to the sums in issue. The court at that stage is not being asked to consider what sum would have been awarded but at a range which fairly represented the sums in issue between the parties. As the respondents rightly submit, there were no admissions in this case and therefore whatever the

appellants claimed was in issue between the parties. A conservative view (by way of judicial notice or otherwise) of the rental value of the appellants' property would have shown that the potential damages were far greater than the £25,000 which the learned Master concluded to be the sum in issue between the parties. The county court deals with many different types of property disputes and it would readily be appreciated by a judge of the court that the letting value of the appellants' property and the diminution in it arising from a nuisance could be substantially more than the sum for which the claim settled. 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.

65. Nor do I agree that there was no material before the court on which the learned judge could have come to a conclusion that a figure greater than £25,000 was in issue. The claim form, pleadings (both verified and therefore having the status of evidence) and narrative in the bill together set out the figures and the basis for them. In undertaking the proportionality assessment the learned Master could have had regard to them. Had he done so he would have concluded that the sums in issue were £50,000 to £100,000. In terms of county court litigation that puts the claim into a different context.

66. The Master was, of course, entitled to have regard to the figure at which the case settled but only as part of the overall weight to be attached to the first factor. A settlement figure might provide some indication of the former battle ground but it is the battle ground which is to be identified when looking at the "sums in issue" and not the final figure which brought the battle to an end.

67. The Master in looking at the final figure and considering the sums in issue appears to have been looking for the appellants' view as to the value of the claim. In one sense there will always be a subjective element to the question of what sums are in issue because account has to be taken of the sum which a claimant chooses, perhaps on advice, to value his claim at and one has to take account of the sum or sums which a defendant chooses, again perhaps on advice, to admit or challenge. However the task of the court is, in my judgment, 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. The task of the court is, it seems to me, to determine what realistically is in dispute because it is unlikely that a reasonable relationship exists between costs and a figure (whether claimed or admitted) which is simply plucked from the air or is in some other respect fantastic. A paying party ought only to be expected to pay the price of an objectively realistic case advanced against it.

68. In my judgment the learned Master therefore misinterpreted the meaning of "sums in issue in the proceedings" and misapplied the test. Had he directed himself to ascertain on an objective basis the range of figures realistically in dispute between the parties having regard to the reported decisions on nuisance caused by development works and taking account of the material before him he should have come to the conclusion that the range was £50,000 to £100,000.

69. Ground 2 looks at the complexity of the litigation. The Master found that the case was neither legally nor factually complicated. Certainly the law in the area is clear, and I have set out the relevant principles above, but the absence of a dispute between the parties as to the applicable legal principles does not mean that those which do apply area not complex. Nevertheless the appellants conceded that the case was not legally complicated. In a sense the facts here were not complicated, in that there could have been no real dispute as to the nature and extent of the works which were carried out by the respondents. On the other hand I have 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. In order to prove the claim on what is really the first *Andreae* principle alone 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. There is a judgment call to be made. Expert evidence on the issue of liability is necessary at an early stage before such a judgment can be made by the claimant's advisors. A claim in nuisance requires a relatively sophisticated pleading. If one compares such a claim to the range of claims which are made in the county court it can readily be seen that this is towards the more complex end of the range. It is almost impossible to generalise but there will be many road traffic accident claims and those arising out of sale of goods or contracts, all of similar value (ie £50,000 to £100,00)

which may be much less complex than this claim. On the other hand there will be lower value chancery and clinical negligence claims, for example, which may be more complex. Although this case may 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.

70. By ground 3 the appellants argue that the learned Master was wrong to take account of the fact that the case settled at an early stage because that is not a factor to which the rules specifically draw attention, whereas the respondents say that they do. In my judgment the rules require a costs judge to have regard to all the circumstances which must include the fact that it settled rather than proceeded to trial. However, the real question is as to the impact on the overall assessment of having regard to that fact. I accept, as the respondents submit, and it is, to my mind, obvious that if £100,000 is the proportionate price to be paid after trial it is not likely to be the proportionate price at an earlier settlement. However, that does not address the real point raised by the appellants in the third ground, which is that the Master appears to have reduced the costs further than he would otherwise have done simply because the case settled. In oral argument the respondents suggested that the Master had not squeezed the costs greater at settlement, than he would have done at trial but simply took into account how far the claim had proceeded. I am not sure that is correct, otherwise, I ask rhetorically, why would he 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.

71. I have dealt with the question, raised by ground 4, of how the court should take account of the factors once weight has been given to them earlier in this section of the judgment. The search ultimately to be undertaken by the costs judge is for the figure which bears a reasonable relationship to the five factors in the new rule, having regard to all the circumstances. This will be a holistic approach and may be done as the item by item assessment proceeds or as a separate and subsequent stage. However, I doubt, for the reasons given above, 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. I reiterate that what the rules require the judgment to achieve is a balance, a reasonable relation, a correlation which may necessitate a certain amount of fine tuning. There may be a limited range of acceptable difference in the total figure once the rules have been applied, in that different judges could legitimately come to slightly different conclusions as to the proportionate sum, and so long as they have applied the rules correctly they should not be open to challenge on appeal. However, 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.

Conclusion

72. I have come to the conclusion that the learned Master misinterpreted and misapplied the new proportionality test. In particular, he undervalued the sums in dispute, by a considerable margin in county court litigation, and he gave too little weight to the complexity of the litigation. Further, he reduced the costs disproportionately because of early settlement. In those circumstances we have undertaken our own assessment of the costs having regard to the factors mentioned in this judgment. We have given greater weight to the sums in issue and to the factor of complexity, both of which tip the balance significantly in the appellants' favour. We have discounted the notional reduction for early settlement. We bear in mind, as the respondents recognised in argument, that the reduction made on the item by item assessment was unusually large, albeit unchallenged on appeal and that the learned Master concluded that it had been reasonable for the claimants to have spent nearly £100,000 on costs prior to settlement. When the reasonable costs are compared against a value of between £50,000 and £100,000 in a reasonably complex claim requiring specialist expert evidence, in what is to judge from the pre-action correspondence likely to be hard fought litigation, they appear less disproportionate than previously. We have revisited the elements of the bill and take the following approach, having regard to our view of the factors, including the factors which were not challenged before us. First, we would not reduce the court fees or costs of drawing the bill and secondly we would apply a smaller reduction to the expert's fees than we would to the profit costs reflecting our view of the essential part played by the expert evidence. In those circumstances I concluded that in all the circumstances the proportionate figure is £75,000 (plus VAT), which I believe to be a fair figure bearing a

reasonable relationship to the factors as I see them after taking careful account of the advice of Master Whalan to whom I am particularly indebted at this stage of the process.

73. I would ask counsel to agree a minute of order reflecting the decision in this judgment and dealing with any ancillary issues, including costs, and submit it to the court via email. In the event that an order cannot be agreed the parties should notify the court as soon as possible that they require a hearing which will be listed before us on the first open date with a time estimate of 1 hour.