Neutral Citation Number: [2018] EWHC 2613 (Ch)

Case No: CH-2017-000286

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 8/10/2018

Before:

MR JUSTICE MORGAN

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Between:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HOUNSLOW	**Claimant/ Respondent**
- and –	
(1) DAVID FRANK DEVERE **(2) VERNON CARROLL ROBERTS** **(3) ROGER MCGONAGLE** **(4) PAUL MENDOZA** **(5) STEPHEN ALEXANDER JAVOR** **(6) PETER MCCRUDDEN**	**Defendants/ Appellants**

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Mr Christopher Jacobs (instructed under the Bar Public Access Scheme) for the **Appellants (apart from Mr DeVere)**
Mr DeVere in person
Mr Gary Blaker QC (instructed by **K & L Gates LLP**) for the **Respondent**

Written submissions following judgment

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Judgment Approved by the court for handing down

MR JUSTICE MORGAN:

1. On 14 June 2018, I handed down judgment in this case. The neutral citation of that judgment is [2018] EWHC 1447 (Ch). That judgment was in relation to an appeal against the order dated 17 November 2017 made by His Honour Judge Wulwik sitting in the County Court at Central London.

2. On 30 July 2018, I heard submissions from the parties as to the form of the order which should be made to give effect to the conclusions reached in my judgment. On 31 July 2018, I made an order in the terms which I held to be appropriate. That order did not deal with issues as to the costs of the proceedings in the county court nor as to the costs of the appeal save that the order provided that those issues would be determined by the court following receipt by it of written submissions from the parties relating to costs.

3. I have now received written submissions from all parties and I have considered them. The Defendants (apart from DeVere) initially submitted that the right order was that there be no order for costs either as to the proceedings in the county court or as to the appeal. In their written submissions, the Defendants (apart from Mr DeVere) made further and alternative submissions as to the orders for costs which ought to be made. Mr DeVere also submitted that there should be no order for costs throughout. Hounslow submitted that it should recover 80% of its costs of the proceedings in the county court and of the appeal. In this judgment, I deal with the outstanding issues as to costs.

4. The nature of the dispute and the relevant facts are set out in my earlier judgment and I need not repeat those matters here. However, I do need to summarise some aspects of the dispute and the facts to the extent that they may be of importance for the purpose of determining the issues as to costs.

5. The Particulars of Claim referred to "the Claimant's Land" and "the River Works". The first of these defined terms referred to land which was owned freehold by Hounslow although there was a dispute as to the boundaries of that land and, in particular, whether the river wall was included in the freehold title. The second of these defined terms referred to the rights of Hounslow under a licence dated 20 August 1996 granted by the Port of London Authority ("the PLA"). There was a dispute as to the nature of the rights granted to Hounslow in relation to the River Works and there was a possible distinction between the walkway and various piles and posts fixed in the bed of the river.

6. One of the complaints in the Particulars of Claim was that the Defendants had trespassed on the Claimant's Land in various respects. The alleged respects included the running of wires over the freehold land and attaching mooring lines to the Claimant's Land. Another complaint was that the Defendant had interfered with Hounslow's rights in relation to the River Works, principally by attaching mooring lines to the River Works.

7. In the Particulars of Claim, Hounslow sought orders to restrain the alleged wrongful acts in relation to the Claimant's Land and the River Works. If that relief had been granted, then the Defendants would have to stop mooring up against the Claimant's Land and would have to cast off all mooring lines from the Claimant's Land and the River Works. Hounslow wished to obtain orders which would mean that the Defendants would have to move their boats away from the area in which they had been previously moored. Hounslow wished to clear away the boats so that it could, in conjunction with the PLA, make an alternative use of the bank and the river bed in that area. The PLA was relevant to Hounslow's wishes because it owned the river bed in that area. However, the PLA was not a party to the claim. If it had been, some of the points which were later argued would probably not have mattered because it would seem likely that it would be held that the Defendants were interfering with the combined rights of Hounslow and the PLA. Accordingly, those two entities, acting together, could have obtained orders requiring the Defendants to move away from the area which Hounslow and the PLA wished to use for their own purposes. Nonetheless, the PLA was not a party to these proceedings and the court had to consider the rights of Hounslow alone.

8. The Defendants sought to resist Hounslow's claim by relying on a wide range of arguments. The width of those arguments can be seen by referring to the number of issues which Judge Wulwik dealt with in his judgment which he gave after a trial lasting 7 ½ days. The matters he dealt with in his judgment were:

   i) the facts;

   ii) the effect of several sets of previous proceedings;

   iii) a submission by Mr De Vere that the proceedings were an abuse of process;

   iv) whether the river wall was part of Hounslow's freehold title;

   v) a dispute as to the eastern boundary of the Claimant's Land;

   vi) the effect of the licence in relation to the River Works and whether Hounslow was in possession of the River Works;

   vii) the detailed evidence as to the mooring of the Defendants' boats;

   viii) the detailed evidence as to wires crossing the Claimant's Land;

   ix) whether the Defendants' actions involved acts of trespass or otherwise interfered with Hounslow's rights;

   x) the use of the Claimant's Land to gain access to the Defendants' boats; this led to a consideration of the Byelaws, the Thames Path and the law as to highways and rights of access;

   xi) a defence of acquiescence;

   xii) a defence of adverse possession;

   xiii) the Defendants' reliance on Article 8 and Article 1 of the First Protocol of the Convention on Human Rights;

   xiv) the need for injunctive relief;

   xv) Hounslow's claim to damages or an account of profits.

9. I do not need to set out the detail of the judge's conclusions on all of the matters he dealt with in his judgment. Suffice to say that Hounslow essentially succeeded on the points which had been argued and the Defendants failed. This was reflected in the orders made by the judge including his order as to costs. In summary, he ordered the Defendants to remove their boats from their present moorings and to remove items such as wires which trespassed on the Claimant's Land. He also granted a number of other injunctions. He awarded substantial damages to Hounslow. He also ordered the Defendants to pay Hounslow's costs of the claim on the standard basis and to make a payment on account of £150,000.

10. For the purpose of considering what order should now be made as regards the costs of the proceedings in the county court, I can move forward to the order which I made on

31 July 2018 following my decision on the appeal from the order in the county court. I allowed the appeal in part and my order replaced the order made in the county court. The injunctions I granted were more limited than the injunctions granted by the county court. My order:

i) restrained trespass on the Claimant's Land, which included the river wall;

ii) restrained trespass on the walkway;

iii) restrained mooring by the Defendants which interfered with Hounslow's access to the Claimant's Land and to the walkway;

iv) restrained other acts by the Defendants;

v) provided for what was to occur in relation to the Defendants' boats if and when Hounslow wished to remove piles etc from the river bed;

vi) remitted the question of damages to Judge Wulwik.

11. In the result, the appeal has produced a better result for the Defendants than the order made in the county court in that the orders I made as regards the Defendants' mooring to the posts and piles in the river bed were less onerous and the Defendants obtained a right to have the award of damages reviewed in the light of my judgment on the appeal and that review might lead to a reduction in the damages payable by the Defendants.

12. I heard submissions as to the practical consequences for the Defendants of the more limited orders I made as compared with the order made by Judge Wulwik. The Defendants have claimed that they are much better off as a result of the orders against them being more limited than before. My reaction to those submissions is that I am doubtful whether the Defendants are much better off in practice although the precise legal analysis which applies to them and the extent of the injunctions granted has been altered by my judgment and the orders made following the appeal.

13. The parties have approached the question of costs on the basis that the court should make the same order for costs in relation to the proceedings in the county court and in relation to the appeal, although they are very far apart as to what order should be made. Although there was a common approach in this respect, and with due deference to the wishes of the parties, I am not persuaded that it is the right approach. The allocation of the costs of the proceedings in the county court and the costs of the appeal raise quite different considerations as the issues in the county court were much wider than the issues raised on appeal. Further, the size of the costs in the county court is likely to be very different from the costs of the appeal. I consider that it is unavoidable that I should consider the costs of the proceedings in the county court separately from the costs of the appeal. I also consider that I am not constrained to adopt a different approach because both parties invited me to treat all of the costs together and in the same way.

14. In view of the fact that I allowed the appeal in part, it is accepted that I am able to, and ought to, review the order for costs made by Judge Wulwik. When he made his order for costs, the position was that the Defendants had failed on essentially all the

issues whereas, from a legal standpoint, the Defendants have now improved their position following the appeal. The position is therefore not the same as it was when Judge Wulwik made his order for costs. Having regard to the orders made following the appeal, I consider that the right order to make in relation to the costs of the proceedings in the county court is that the Defendants should pay to Hounslow 80% of those costs. This was the percentage contended for by Hounslow although I recognise that it put forward that percentage on the basis that it also received 80% of the costs of the appeal which, as will be seen below, it will not receive. I consider that 80% is appropriate when one has regard to the full range of issues in the county court, which were more extensive than the issues raised on the appeal.

15. As regards the costs of the appeal, the appeal succeeded in part and failed in part. The submissions of the parties have described their respective success and failure in radically different ways. It is right that the Defendants did not challenge all of the orders which had been made by Judge Wulwik and it is also right that the legal analysis in my judgment and the orders which I made have resulted in less extensive orders being made against them. The different legal analysis might, or might not, turn out to be significant when it comes to the assessment of the damages payable by the Defendants. As against that, apart from the possible effect on the assessment of damages, Hounslow is probably right to submit that the practical consequences of the changes in the injunctions as a result of the appeal are unlikely to be very significant for any protracted period of time.

16. In a case where the appeal succeeded in part and failed in part (the converse being that the opposition to the appeal succeeded in part and failed in part) it would in principle be open to me to make an order that the Defendants receive all or a part of their costs or that Hounslow receives all or a part of their costs. In this case, it would not be right to award any party all of their costs of the appeal so that the questions become: who should be the receiving party and to what extent? Although this assessment is not an easy one, having regard to the degree of success and failure, my overall view is that Hounslow should pay the Defendants 20% of their costs of the appeal.

17. I need to deal separately with an application made by Mr DeVere on 3 April 2018 for permission to adduce further evidence. That application failed and I will order Mr Devere to pay to Hounslow its costs of that application.

18. Hounslow has asked for an order that the Defendants make a payment on account of costs. Judge Wulwik held that the Defendants should pay £150,000 on account of costs on the basis that the Defendants would pay 100% of Hounslow's costs of the proceedings in the county court. I would accept Judge Wulwik's figure of £150,000 if the liability had been to pay 100% of Hounslow's costs. As I have ordered that the Defendants should instead pay 80% of Hounslow's costs, the payment on account of the costs in the county court would instead be £120,000. I then need to reflect the fact that I have decided that Hounslow should pay 20% of the Defendants' costs of the appeal. I do not have a reliable figure as to the Defendants' costs of the appeal. In those circumstances, I consider that the fair allowance to make against the payment on account due from the Defendants is £10,000 to reflect the order as to the costs of the appeal. The net result is that the Defendants will be ordered to pay to Hounslow £110,000 on account of costs.