Neutral Citation Number: [2019] EWHC 1455 (QB)

Case No: QB/0084/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2019

Before :

THE HONOURABLE MRS JUSTICE LAMBERT

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Between:

EAST SUSSEX FIRE AND RESCUE SERVICE	**Appellant**
- and –	
TIMOTHY AUSTIN	**Respondent**

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- -

Roger Mallalieu (instructed by **Clyde & Co**) for the Appellant
Mark James (instructed by **Thompsons**) for the Respondent

Hearing dates: 17 May 2019

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JUDGMENT

Mrs Justice Lambert:

1. This is an appeal from a detailed assessment of costs by the Senior Costs Judge, Master Gordon-Saker. The appeal is brought by the paying party, the East Sussex Fire and Rescue Service, the Second Defendant in the underlying litigation. The appeal proceeds with the permission of Foskett J. For the purposes of the appeal, I sat with an assessor, Master Jason Rowley, to whom I am indebted for his advice and assistance.

2. The Appellant was represented by Mr Roger Mallalieu and the Respondent by Mr Mark James.

The Underlying Litigation

3. The action arose from a large firework explosion which had occurred at Marlie Farm near Lewes in East Sussex on 3 December 2006. A fire had broken out at the farm and the emergency services were called. During the course of the emergency response, a large cache of fireworks which had been stored at the farm in a steel shipping container exploded, killing two men, Mr Wicker (a firefighter) and Mr Wembridge (a video technician employed by the East Sussex Fire & Rescue Authority) and injuring a number of other emergency responders. One of those injured was Mr Timothy Austin, a firefighter. He was not physically injured during the explosion but suffered a significant psychological reaction having witnessed the explosion and the aftermath.

4. The action was brought by two groups of Claimants, the "Wembridge Claimants" and the "Wicker Claimants," and by Mr Austin. Mr Austin was separately represented because of a potential conflict of interest arising with other firefighters due to Mr Austin's seniority and operational role on the day. There were three named Defendants in the litigation but the First and Third Defendants had insufficient assets to satisfy any judgment and were not present or represented at the trial. The Second Defendant was the East Sussex Fire and Rescue Service, the employer of the firefighters.

5. The claim was brought in negligence and for breach of statutory duty. At trial, the primary facts were not in issue, subject to some points of detail and interpretation, but a number of substantive pure law issues were raised by the Second Defendant in its Defence. The issues included whether the target duties imposed on the fire service by the Fire and Rescue Services Act 2004 were justiciable by way of private law action and whether decisions made by the Incident Commander on the fireground should be immune from claim (the so-called "battle-field immunity" defence). In addition to the various legal defences raised by the Second Defendant, there were, as the trial judge, Irwin J (as he then was) observed, important issues arising from the application of the law to the particular facts. I agree with Master Gordon-Saker's observation during the course of the detailed assessment, that the action was not, by any stretch, a typical "run of the mill" personal injury action.

6. The action had been listed for 15 days in February/March 2013 but, in the event, the evidence and submissions were concluded in 9 days. Three expert witnesses were called. As the potential conflict of interest did not materialise, Mr Austin's legal team instructed an expert jointly with one of the Claimant groups. The judgment (running to 247 paragraphs) was handed down in favour of the Claimants on 30 July 2013 (see [2013] EWHC 2331 (QB)). At trial, the Wembridge Claimants were represented by Mr Martin Seaward, a senior junior instructed by Thompsons; the Wicker Claimants were represented by Mr Frank Burton QC, Andrew Roy and Ms Vanessa Cashman, instructed by Slater and Gordon; Mr Austin was represented by Lawrence West QC and Mr Adam Heppinstall instructed by Goldbergs. The Second Defendant was represented by Lord Faulks QC, Muhammed Haque and James Sharpe instructed by Clyde & Co.

7. Following judgment on liability, in December 2014, a Part 36 offer was made by the Second Defendant in the sum of £25,000 in respect of the Austin claim. The offer was in the usual terms: to include costs to be the subject of detailed assessment if not agreed. This offer was accepted by Mr Austin on 3 July 2015. The Second Defendant's appeal from the judgment of Irwin J was discontinued at the same time.

The Detailed Assessment

8. The detailed assessment of Mr Austin's costs came before Master Gordon-Saker ("the Master") in March 2018. The base costs were £275,000. Gross of success fees, insurance premium, the costs of preparation of the bill of costs itself and VAT, the bill of costs was £798,554.

9. It was common ground between the parties that, as the claim had commenced before April 2013, the assessment should be undertaken by reference to the Civil Procedure Rules before the rule changes enacted following Jackson LJ's Review of Civil Litigation Costs.

10. During the course of the assessment, the Master made a series of ex tempore rulings which included the following decisions which are now the subject of appeal:

    a. that the base fees, viewed globally, were not disproportionate;

    b. that the instruction of leading counsel was reasonable; and

    c. that leading counsel's brief fee (of £50,000) was reasonable.

a) The Proportionality of the Base Fees

11. The Master recorded that the "*old test of proportionality*" was to be applied to his assessment of proportionality of the base costs. He reminded himself that the test to be applied was stated by the Court of Appeal in *Lownds v Home Office* [2002] EWCA Civ 365 and that the first question he had to ask himself was whether the base costs appeared to be disproportionate. The Master addressed the relevant factors set out in CPR 44.5(3) as in force in April 2013, noting the following points:

    a. Conduct: that there was no question of misconduct by either party but the Second Defendant had pursued the case against Mr Austin to trial even though his claim was modest in value in comparison with the claims brought by the other Claimants and could have been "picked off."

    b. The importance of the matter to the parties: the way in which the case had been fought, leading to a trial before an experienced judge, reflected that the parties considered the action to be of significant importance.

    c. Complexity: the Second Defendant had chosen to argue that it should be immune from suit in respect of the decisions made and had taken technical arguments in respect of the validity of regulations and the duty of care. The case was therefore a more complex case than the "*run of the mill personal injury case*." He noted that the same factors were relevant to his consideration of the skill, effort specialised knowledge involved.

    d. The value of the claim: the Master noted that the sum recovered by Mr Austin was relatively modest but was nonetheless a sum of importance to him. There had been some prospect of Mr Austin obtaining a higher award, depending upon the outcome of investigations into the cause of his epileptiform seizures, but as this larger claim was only ever a possibility, the Master did not attach significant weight to this factor.

12. The Master recorded that, in conducting the proportionality exercise at the outset of the assessment, he had to balance the modest nature of the award against other factors; namely an eight-day trial, complex legal arguments and the importance of the matter to Mr Austin. At paragraph [12] of his ex tempore ruling he made the following comment:

"*It is difficult that the law requires us to step back in time when applying the old proportionality test, because we are becoming more used to applying the new proportionality test and I have to say that if we did apply the new proportionality test to this case the inevitable conclusion would be that the costs claimed are indeed obviously disproportionate. The old proportionality test was rather gentler and more generous*."

This statement is the root of the first ground of appeal.

13. The Master then concluded that, doing the best he could, the base costs were not disproportionate having regard to the fact that the parties took the case to trial and the complexity of the arguments. He observed that the costs claimed were very high and that it would be open to the paying party to contend on an item by item assessment that particular items or particular aspects of the costs incurred were themselves disproportionate.

(b) The Instruction of Leading Counsel

14. At the detailed assessment, the Second Defendant submitted that it was not reasonable for Mr Austin to have instructed leading counsel as the claim was always going to be small in value and that junior counsel acting on Mr Austin's behalf would have been able to rely upon the advocacy of leading counsel instructed on behalf of the other Claimants; any questioning or submissions which were specific to Mr Austin could be picked up by junior counsel; although the case involved important issues of principle for the Second Defendant, the only significance of the case from Mr Austin's perspective lay in its monetary value.

15. In dealing with the points, the Master noted that leading counsel had been instructed relatively late in the day, only 10 weeks before trial, and that his principal purpose had been to attend trial, prepare written submissions and to consider the Second Defendant's grounds of appeal. He reminded himself of the case of *Juby v London Fire and Civil Defence Authority* [unreported 1990 Lexis Citation 2078] which set out the factors which were likely to affect the decision whether or not to instruct leading counsel. He went through those factors, observing that that at the time of instructing leading counsel the trial was known to involve difficult questions of fact; that the claim was important to the client who had lived through the events of the fire; that the trial involved difficult issues of law particularly in connection with the battle field immunity defence which would require greater than average advocacy skill and that the fact that the Second Defendant had instructed leading counsel was a relevant although not determinative factor. He concluded that Mr Austin was entitled to be represented separately by a team which was capable of handling the weight of the case given the issues. Because of the weight of the case it was reasonable to instruct leading counsel and not disproportionate to do so, in spite of the relatively small value of the claim.

(c) Leading Counsel's Brief Fee

16. The Master reduced Mr West's hourly rate down from £500 to £400. He noted that brief fees were still not calculated according to hours and hourly rates but by reference to the approach in *Simpsons Motor Sales v Hendon Corporation* [1964] AC 1088 and that the court should allow the fee which hypothetical counsel, not of pre-eminence, would be prepared to accept. He noted that Mr Seaward's fee was £38,750 and that he would expect leading counsel's fee to be higher, even when supported by junior counsel. In this context, he reduced Mr West's brief fee from £50,000 to £45,000.

The Appeal: Ground 1

17. Mr Mallalieu submitted that the Master was wrong to conclude that the base costs were proportionate. He submitted that they were disproportionate, and obviously so, and that the Master had misdirected himself on the correct approach to proportionality. In paragraph 12 of his ruling the Master stated that the "*new test*" of proportionality was different to the "*old test*", the old proportionality test having been "*rather gentler and more generous*." This was an error.

18. Mr Mallalieu submitted that the factors to be considered in assessing proportionality are not materially different under the current Rules: it is the consequences of the application of the proportionality test which have changed. Under the old regime, if the costs judge considered that the costs were disproportionate on a global assessment, the item by item assessment would be undertaken by reference to the tests of necessity and reasonableness. The result of the global proportionality test would thus drive the approach to the item by item assessment. Mr Mallalieu accepted that, formerly, even costs which were considered to be disproportionate might nonetheless be recovered by the receiving party if on an item by item approach, the costs satisfied the necessity and reasonableness test. Under the current rules, costs which are considered disproportionate would not be allowed, even if necessary and reasonable. In this way, the current regime was different and stricter than that which pre-dated the reforms. However, he submitted that although the effect of the application of the global proportionality test might now be different, the factors influencing that proportionality judgement are not materially different to those which would be applied under the old rules. Under the relevant pre-April 2013 Rules (CPR 44.5(3)) the Court would take into account all of those factors colloquially known as the "seven pillars". Under the new regime similar factors are to be taken into account, see CPR 44.3(5) and CPR 44.4(3). For this reason, he submitted that if the costs claimed were considered by the Master to be disproportionate under the new regime then it follows that the costs should have been considered to be disproportionate under the rules which the Master was applying under the old regime.

19. Mr James made two submissions in response:

    a. The Master's ruling on proportionality had to be looked at as a whole. It would be wrong to take a few words from the ruling and read them out of context. There was nothing in the ruling which suggested that the Master had taken a wrong turn in conducting the proportionality assessment. He demonstrably took into account the relevant factors set out in CPR 44.3(5), the "seven pillars" and made a series of logical observations in connection with each factor. There was no error in his approach and his conclusion on the point could not be impugned.

    b. In any event, the comment made by the Master that the current regime is less generous than the old regime is correct. Under the old approach, costs even though disproportionate could nonetheless be recovered provided that on an item by item assessment, the costs withstood the test of necessity and reasonableness. There were also differences in the factors to be taken into account in assessing proportionality. The differences may be subtle but there is now additional guidance on the approach in CPR 44.3(5) (a) to (e).

The Legal Framework

20. I set out the legal framework below. For the most part, it is not contentious.

21. The proceedings were commenced before 1 April 2013 and the detailed assessment was to be undertaken in accordance with the Civil Procedure Rules before the re-enactment of Part 44 by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262). The relevant CPR 44.4(2) set out that where costs are to be assessed on a standard basis (as in this case) then 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. In determining the amount of costs, the court must have regard to all of the

circumstances in deciding whether costs were proportionately and reasonably incurred or were proportionate and reasonable in amount.

22. Although all of the circumstances are relevant, the rules identify seven factors to which the court must have regard in CPR 44.5(3):

    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 and resolve the dispute;

    b. *The amount or value of any money or property involved;*

    c. *The importance of the matter to all the parties;*

    d. *The particular complexity of the matter or the difficulty or novelty of the questions raised;*

    e. *The skill, effort, specialised knowledge and responsibility involved;*

    f. *The time spent on the case, and*

    g. *The place where and the circumstances in which work or any part of it was done*.

23. In *Lownds v Home Office* [2002] EWCA Civ 365 Woolf CJ prescribed a two-stage approach to the detailed assessment process: a global proportionality assessment and then an item by item assessment. The global approach would indicate whether the total sum claimed was or appeared to be disproportionate having particular regard to the considerations in CPR 44.5(3). If the costs are not disproportionate then all that would normally be required is that each item should have been reasonably incurred and the costs for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item should be necessary and, if necessary, that the cost of the item was reasonable.

24. In *Giambrone v JMC Holidays Ltd* (Costs) [2002] EWHC 2932 (QB) Morland J observed that the preliminary finding of proportionality or disproportionality would determine the manner of the detailed assessment and that a finding of disproportionality was like "*hitting a red light.*" But he noted that the Costs Judge who had, at the initial stage, ruled that the bill as a whole is not disproportionate, was not precluded from deciding that an item, or a number of items, were or appeared to be disproportionate and then applying the twin test of sensible necessity and reasonableness to an item. Morland J considered that the assessment should not involve the Costs Judge in a minute dissection of a "*gargantuan mass of material*" and that even in complex litigation an experienced Costs Judge should be able to determine overall proportionality within an hour or less. This last point was picked up by the Court in *Cox and Carter v MGN* [2006] 5 Costs LR 764 where Eady J at [22] noted that the *Lownd*s "stage one" or the "global approach to proportionality" was well known to involve a "*relatively brief and impressionistic appraisal of the costs having regard to the nature of the litigation*" and that the exercise was inevitably to some extent to be "*rough and ready*." Eady J's view was that, for this reason, such preliminary findings would only unusually be overturned on appeal.

25. As Master Gordon-Saker noted in his ruling, the old approach to assessment of proportionality did not work: even disproportionate costs could be recovered if at stage two of *Lownds* the receiving party was able to satisfy the stringent test of necessity and reasonableness. The mischief was noted by the Court in *Lawrence v Fen Tigers Ltd*, [2015] UKSC 50, [2015] 1 WLR 3485 at [36]*:* "*where*

base costs were incurred which were necessary, they would be treated as being proportionate even if in fact they were not proportionate to the matters in issue."

26. It was against this background that the Jackson Review recommended changes to the CPR so that costs which were disproportionate to the circumstances of the claim did not become proportionate just because they are necessary. Jackson LJ recommended that 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 44.5(3). The Court should then stand back and consider whether the total figure is proportionate. If not, then it should make the appropriate reduction.

27. Under the current relevant rules, necessity and reasonableness do not trump disproportionality. Under CPR 44.3(2)(a) the Court will "*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*." CPR 44.3(5) sets out that 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 relation or public importance. CPR 44.4(3) sets out the (now) 8 pillars of wisdom, the additional factor being the receiving party's last approved or agreed budget.

Discussion and Conclusion:

28. An appeal lies if the decision of the lower court was wrong or unjust because of serious procedural or other irregularity under CPR 52.21(3)(a) and (b). Mr Mallalieu relies upon 52.21(3)(a) only. The error identified being the alleged misdirection by the Master at paragraph [12] of his ruling and the two observations that, although under the current regime the costs would be disproportionate, they were not disproportionate under the old regime and that the old test was gentler and more generous than the current regime.

29. I am against Mr Mallalieu, notwithstanding his cogent submissions, for two reasons:

    a. first, Mr Mallalieu's submission requires me to consider a short section of the ex tempore ruling in isolation from the observations of the Master which came before and after.

    b. Second, although it must be accepted that the meaning of the impugned section of the ruling is not immediately clear on a superficial reading, a closer scrutiny in context leads to the conclusion that the Master was drawing attention only to the fact that the global assessment of proportionality is now undertaken (typically) after, rather than before, the item by item assessment and that generally the current regime is tougher than the regime it replaced. Neither of these observations is wrong.

30. The immediate linguistic context of the section of the ruling in issue is the Master's consideration of each of the relevant factors set out in CPR 44.5(3) as in force before 1 April 2013 and his summary conclusions in respect of each of those factors. The Master identified the relevant factors; he considered them in turn and reached preliminary conclusions which were open to him on the basis of the information available to him. Having done so, the final paragraph of the ruling makes plain that the factors which weighed most heavily in his judgement on global proportionality were the complexity of the legal arguments which the Claimants faced at trial, that the trial was listed for several weeks and that the case was of importance to Mr Austin. The Master's approach was correct. There is no suggestion in paragraphs 1 to 11 of the ruling or in the concluding comments of paragraph 12 that the Master took a wrong approach to the proportionality assessment.

31. Although Mr Mallalieu challenged the Master's views on the relevant factors in CPR 44.5(3), they amounted to no more than quibbles. For example, Mr Mallalieu sought to persuade me that the Master was wrong to find that the case was of importance to Mr Austin, submitting that whilst the case may have been important for the Second Defendant which would be concerned with issues of principle of wider application to the Service, this consideration did not apply to Mr Austin. However, the Master was entitled to find that the damages recovered were of importance to Mr Austin. He was also entitled to find that the claim was important to him for non-monetary reasons given his experiences on the day of the fire. Although not stated in the ruling, the Master was aware that Mr Austin had seen the bodies of two of his colleagues and that he had experienced at first hand the aftermath of the fire having remained on site for 2 or 3 hours to continue his duties. These were all features of the underlying litigation which the Master was entitled to take into account in assessing the importance of the case to Mr Austin.

32. Mr Mallalieu also reminded me that the trial, although listed for 15 days, was concluded in only 9 days and that much of what happened on the day of the fire was not in dispute. I accept these points. However, the complexity of the case arose not from any factual issues but from the legal defences raised by the Second Defendant and the application of the law to the agreed facts (or such facts as found). The difficulty of the case is demonstrated by the judgment which ran to many pages and the topics covered in the judgment. Again, these were matters known to the Master and ones which he was required to evaluate as part of his judgement on global proportionality. His conclusion that the case was complex and required skill, effort and specialist knowledge was one which was open to him.

33. I turn then to the comment in paragraph 12 of the ruling that the Master would have found the costs to be obviously disproportionate if he were applying the "*new proportionality test*" but not disproportionate adopting the "*old test*." I agree with Mr Mallalieu that, at first blush, it is not clear exactly what the Master is here alluding to. I also agree with Mr Mallalieu (to the extent that it is necessary for me to do so) that, if the Master were stating that the factors to be taken into account under the current rules were different to the factors to be taken into account under the former CPR 44.5(3), then he would be wrong to do so. The current equivalent provision in the CPR (44.4(3)) is similar to its predecessor. Whilst the current CPR 44.3(5) gives additional guidance on proportionality and spells out that proportionality concerns the reasonable relationship between costs and the five factors listed, I agree with Mr Mallalieu that those five factors add nothing new of substance to the global proportionality assessment.

34. However, although the Master referred to the "*new test*" and the "*old test*," I do not find that the Master was, in using those terms, suggesting that different factors informed the global proportionality assessment under the former and current rules. Viewed in context, the Master was simply making the point that the global proportionality assessment under the former rules was undertaken at the first stage of the detailed assessment and that it preceded the item by item assessment, whereas under the current rules the proportionality assessment is typically undertaken after the item by item assessment. The Master was observing that if the figure of £275,000 had been the costs figure which was left following the item by item assessment of reasonableness then it would be disproportionate. He recognised however that under the old regime, or using the "*old proportionality test*," the item by item assessment had yet to be undertaken and that the figure of £275,000 was likely to be reduced, possibly substantially. This interpretation is confirmed by the final sentence of the ruling in which the Master observed that the costs claimed were very high and that it would be open to the paying party to challenge individual costs on the line by line assessment and that the challenge could include in respect of individual items a challenge to proportionality and the need to consider necessity.

35. Viewed in this light, the observation that the costs claimed would fail the proportionality test under the current rules, but were not obviously disproportionate under the former rules, makes sense. Nor is there anything wrong in the observation. A Costs Master undertaking the impressionistic, or "rough and ready" global proportionality assessment at the outset of the detailed assessment under the pre-April 2013 Rules would have in mind that there was to be a detailed item by item assessment to follow which would reduce the costs by reference to reasonableness, or necessity and reasonableness if targeted items

were criticised on proportionality grounds. In contrast, under the current CPR, the Costs Master will have in mind that he or she is making the proportionality assessment from "the other end of the telescope" (to use Mr Mallalieu's analogy), and that what he or she is assessing for proportionality is the net figure following the detailed item by item scrutiny. As such, the comment is no more than a common-sense reflection upon the different point in the detailed assessment at which the global proportionality test is currently undertaken.

36. This disposes of one of Mr Mallalieu's challenges to paragraph 12 of the ruling. His further point is that the Master was wrong to say that the old proportionality test was "*rather gentler and more generous*." I agree with Mr Mallalieu that there is nothing about the proportionality assessment itself which is substantially different under the current rules. But I find that the Master was here making the uncontroversial comment that the new regime is generally tougher than the old in that, under the current rules, necessity and reasonableness do not trump proportionality. The section of the ruling may not have been particularly clearly expressed and it would have been preferable if the Master had mentioned specifically that disproportionate costs will now be reduced so that they bear a reasonable relationship to the factors now set out in CPR 44.3(5), irrespective of necessity and reasonableness, but allowance must be made for the fact that this was an ex tempore ruling and that the Master was using the phrases "*old proportionality test*" and "*new proportionality test*" as short hand for the general approach to assessment under the old and new rules.

37. I therefore refuse this ground of appeal. There are two sentences in the ruling which might have been expressed more clearly but, when viewed in context, they reveal no error of law.

Ground 2:

38. I can deal with this ground shortly. The essential point made by Mr Mallalieu is that there was a community of interest between all of the Claimants in the action and that, given the heavy-weight expertise instructed on behalf of the two Claimant groups, it was not reasonable for Mr Austin to have the benefit of leading counsel. His interests could have been served by the continued instruction of Mr Heppinstall who was an experienced and highly competent junior with an excellent reputation.

39. This ground of appeal fails also. There was no error of law in the approach taken by the Master who correctly directed himself on the *Juby* factors relevant to the reasonableness of the instruction of leading counsel. The Master noted his view that the case was a "*heavy case*" involving difficult questions of fact, expert evidence and difficult issues of law in relation to immunity and the nature and extent of the second defendant's duty of care. He rejected the submission that Mr Heppinstall could reasonably have played "*tail end Charlie*" (as it was put) to the other more senior advocates acting on behalf of the Claimant groups. His view was that, if it was reasonable for Mr Austin to be separately represented, then it was appropriate for him to be represented by a legal team capable of handling the weight of the case given the issues raised by the Second Defendant. He noted that Mr Austin would have had no degree of control over leading counsel instructed on behalf of the two Claimant groups. The Master was entitled to conclude that it was, taking these factors into account, proportionate to instruct leading counsel even though the claim was of limited value. In these circumstances I do not interfere with the ruling on the point.

Ground 3:

40. Again, I can take this ground shortly. Without intending any disrespect to Mr Mallalieu's submissions, it seems to me that the appeal from the Master's ruling on leading counsel's fees is something of a make-weight.

41. Mr Mallalieu submits that the reduction in leading counsel's brief fee from £50,000 to £45,000 was insufficient. The basis for the appeal on this ground is that the brief fee was, when judged by the fee note, apparently calculated by reference to the number of hours' preparation required for the trial.

Therefore, having reduced the hourly rate by around 20%, the Master should have reduced the brief fee accordingly to around £40,000 (consistent with 100 hours' work including the first day of trial).

42. Mr Mallalieu's difficulty here is that, although there was discussion during the hearing of the brief fee and various formulations of hours spent in preparation, the Master acknowledged that brief fees are not calculated by reference to hourly rates and that the proper measure of counsel's fees is to estimate what fee a hypothetical but not pre-eminent counsel, capable of conducting the case effectively, would be content to take on the brief. This is a matter for the judgement of the Costs Judge using his or her knowledge and experience (see *Simpsons*). The Master set out the test: "*effectively here we are looking at a reasonable fee for leading counsel for three weeks work, two weeks of hearing and a week of preparation*." I do not therefore accept that the Master when making his reduction in the brief fee was doing so exclusively by reference to hourly rates and the number of hours of preparation involved. For this reason, this ground of appeal also fails.

43. I therefore dismiss the appeal.