Neutral Citation Number: [2018] EWHC B11 (Costs)

Case No: C01CL486
SCCO Reference: CL1706023

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 6/07/2018

Before:

MASTER LEONARD

- -

Between:

Mohammed Arjomandkhah	**Claimant**
- and -	
Maryam Nasrouallahi	**Defendant**

- -
- -

Virginia Rylatt (Rylatt Chubb) for the **Claimant**
Dr Russell Wilcox (instructed by **Sabeers Stone Green**) for the **Defendant**

Hearing date: 31 May 2018

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Judgment Approved

Master Leonard:

1. This is an appeal from a detailed assessment by Costs Officer Piggott of the Defendant's costs, payable by the Claimant under an order of District Judge Price dated 15 June 2017. The appeal, being brought under CPR 47.21, is a re-hearing (CPR 47.24(a)).

2. The Defendant's bill of costs was drawn at £34,985. For the purposes of the appeal, both parties accept Mr Piggott's assessment of the Defendant's reasonable costs at £23,253.80. Excluding VAT, the amount allowed would appear to be £19,660, including £486 for the preparation of the Defendant's bill.

3. The parties also accept (subject of course to the outcome of this appeal) Mr Piggott's award to the Defendant of the costs of the detailed assessment at £3335.40. The Claimant takes issue on the appeal only with Mr Piggott's refusal to reduce the Defendant's assessed costs further on proportionality grounds.

4. On 30 January 2018 the court sealed a Final Costs Certificate requiring the Claimant to pay to the Defendant within 14 days the sum of £26,589.20 plus interest. In his notice of appeal, sealed on 12 February 2018, the Claimant applied for a stay of execution. The Claimant relied upon a letter from his solicitors dated 13 February 2018 confirming that they hold a sum of £27,837.20 and undertaking to pay, up to the

amount of that sum, such amount as the Claimant would be ordered to pay following the appeal.

5. The Claimant's application was supported by a witness statement by the Claimant confirming his understanding that the Defendant had at all relevant times been a student; that judging by correspondence between the parties in the course of the litigation (referred to below) she was of very limited means; and that she seemed likely to owe money to her solicitors, lacking as she does the resources to pay their fees. He also expressed some concern that the Defendant, who comes from Iran, might return there with the money should she receive it pending the appeal.

6. On 1 March 2018 I made an order staying enforcement pending the hearing of the appeal. I should say that I did so primarily because it seemed to me right to stay on enforcement pending the conclusion of the proceedings in the SCCO, not because of the concerns expressed by the Claimant. The money due to the Defendant will be received by her solicitors in the usual way. If, as the evidence indeed suggests, it is needed to pay their fees the Defendant will not be taking it abroad.

The Underlying Proceedings

7. On 16 September 2015, Knowles J made an order for an interim injunction prohibiting the Defendant from contacting the Claimant, his wife and/or children, directly or indirectly; from showing images of the Claimant to any other person; and from causing any person to obtain, possess, share or view any images of the Claimant.

8. The order was based on draft witness statements from the Claimant; Mr Massoud Nili, a mutual acquaintance of the Claimant and the Defendant; and one Sophie Williams.

9. The Claimant and the Defendant had been in a close relationship between about the middle of 2013 and July 2015, at which point each of them claimed to have finally terminated it. According to witness statements made by Mr Nili on 15 September 2015 and 16 July 2016, the Defendant had visited the offices of Mr Nili on 11 September 2015 and said that unless the Claimant paid her £100,000 in two instalments, one by the following Monday at noon, she would go to the police and say that the Claimant had raped her. She also claimed to have a collection of images of the Claimant and the Defendant together, some of which she described as very explicit, which the Defendant said she would show to the Claimant's wife and children if she was not paid. The Claimant sought a permanent injunction against the Defendant.

10. The Claimant's Particulars of Claim, dated 17 September 2015, ran to two pages, repeated the allegations made by Mr Nili and sought a final injunction.

11. The Defendant in a three-page defence denied ever demanding money or making any of the threats alleged by the Claimant, denied ever taking any explicit photographs or being in possession of any, and averred that the Claimant's wife had been aware of the relationship between the Claimant and the Defendant since 20 June 2013, when she had found the Defendant's picture and text messages between them. The Claimant's wife having then undertaken extensive research on the Defendant and found her home address, social media profiles and an old TV presentation, the Defendant on the Claimant's instruction had deleted or changed the name of her

social media accounts and persuaded the TV station to remove her name and other details from its website.

12. As for the meeting with Mr Nili on 11 September 2015, according to the defence that followed promises by Mr Nili of financial and personal support and concerned only that offer. The Defendant averred that the Claimant had no need to seek protection from the court. The Defendant, rather, had reason to fear for her safety, the Claimant being wealthy and powerful both in Iran and the UK and having telephoned the Defendant's mother in Iran warning her of the Claimant's extensive connections with the Iranian police, who could do her harm and make her life miserable. The Defendant requested the court to set aside the injunction and dismissed the claim as "a product of paranoia, fabrication and an attempt by a rich and powerful man to silence a younger woman who has been used by him and whose use he requires no more".

13. The Claimant evidently took the view that the Defendant's case needed to be clarified. A list of fourteen Part 18 questions, together with a request for full-sized copies of thumbnail photographs exhibited to the defence, was served by the Claimant on 22 December 2015, most of which were described as already adequately addressed in a two-page response from the Defendant's solicitors on 6 January 2016. The Claimant's solicitors, in a letter dated 19 January, characterised this response as inadequate and notified the Defendant's solicitors that an application would be made to the court.

14. The Defendant's letter of 6 January 2016 incorporated three Part 18 requests from the Defendant. They were rejected by the Claimant's solicitors. The tone of the correspondence between the parties' solicitors on this and other matters was notably ill-tempered, incorporating much complaint by each about the other's conduct.

15. The parties' solicitors also clashed on disclosure. The Defendant's solicitors complained that the Claimant's disclosure list was lengthy and excessive. The Claimant's solicitors responded to the effect that the parties were under a duty to disclose all information in the possession material to the claim. It was, they said, part of the Claimant's case that the Defendant had, over the period they were together, benefited from and relied heavily upon the Claimant's financial assistance and that it was because she did not want to give up that lifestyle and those benefits that she resorted to a threat of blackmail. The Claimant, accordingly, was they said under a duty to disclose all material in his possession in support of that contention. They argued that the Defendant had failed to fully comply with her disclosure responsibilities, and complained of her being late with the disclosure she did offer.

16. This approach is consistent with the witness evidence offered by the Claimant; whose witness statement of 17 October 2016 ran to 123 paragraphs, with 16 pages of exhibits. The Claimant produced two witness statements dated 11 October 2015 and 13 October 2016 which between them came to 79 paragraphs, though with more exhibits. Much of the evidence was intended to support each party's account of their relationship and their respective temperaments. The Defendant's evidence, for example, characterised the Claimant as controlling, insecure and infuriated by her ultimate rejection of him, whereas the Claimant characterised the Defendant as manipulative, jealous, volatile and motivated by money.

17. On the crucial matter of the meeting between the Defendant and Mr Nili on 11 September 2015, the Defendant's evidence was that she had finally terminated her

relationship with the Claimant in July 2015 upon finding that he was involved with another woman (not his wife). This had provoked a furious and abusive response from the Claimant, leaving her in fear. She had believed that she was being harassed by him, either directly or through third parties. Mr Nili had said that if she ever required any help she should contact him, so she did. She went to see on 11 September to ask him to persuade the Claimant to leave her alone. He promised to help financially, requesting her account details which she wrote on the back of his business card. Mr Nili had said in his evidence that the Claimant provided the account details for the purposes of her demand for payment of £100,000.

18. I am also advised by Dr Wilcox, counsel for the Defendant, that the Claimant served a very large number of additional documents shortly before trial, so causing much additional work to be incurred, although I have insufficient information in the papers before me to attach much weight to that.

19. The matter was transferred to the County Court at Central London, the interim injunction remaining in place in the meantime.

20. The Claimant, in the meantime, also took his complaint to the police. The Defendant was arrested and detained for over 12 hours on 24 November 2015. The police confiscated the Defendant's mobile phones and conducted a search, but found no sexually explicit or intimate photographs of the Claimant and the Defendant. The Defendant was questioned for two hours before being released.

21. An allocation hearing took place on 5 September 2016. The case was allocated to the fast track, standard directions being given including requirements for disclosure and the service of evidence from all the witnesses upon whom the parties intended to rely. The order also provided that at all stages, the parties were to consider settling the litigation by any means of Alternative Dispute Resolution (including Mediation); that any party not engaging in such means proposed by the other must serve a witness statement giving reasons within 28 one days of that proposal; and that any such witness statement was not to be shown to the trial judge until questions of costs arose.

22. The Claimant, in advance of the allocation hearing, prepared a costs budget in Precedent H format dated 29 August 2016 and showing total incurred and estimated costs to trial of £59,222.

23. On 31 October 2016, the Claimant's solicitors wrote to the Defendant's solicitors, referring to the parties' obligations to consider settlement and proposing mediation on the basis that each party pay half of the cost. The letter was sent by email, and the Defendant's solicitors responded on the same day to the effect that the case against the Claimant had been fabricated by the Defendant and Mr Nili. Whilst instructions had not yet been taken, the Claimant's Solicitor suggested that as the Defendant (being a student) could not afford to pay for the costs of mediation, it should be a precondition that the Claimant meet the full mediation costs.

24. This was rejected on 7 November, the Claimant's solicitors arguing that the should be no precondition to any form of mediation and that both parties should contribute to the cost. They added:

> "alternatively, if your client does not wish to pay, we suggest our respective counsel take instructions from their clients to their solicitors and speak directly to each other to see if a settlement can be achieved."

25. On the same day the Defendant's solicitors replied:

> "As previously stated, our client is a student and is unable to make any financial contribution towards the costs of the mediation at the moment. We have examined your client's case once again and found that that it lacks substance in every material particular. Further we have unassailable evidence of your client's antecedents, character and conduct which clearly undermines his credibility as a witness of truth. Your client's allegation against our client is at best a 'hear say' from his best friend Mr Nili whose credibility as a witness of truth has been comprehensively undermined by the inconsistencies in his witness statements…
>
> While we respect the CPR provisions in terms of mediation and settlement, we believe that our client will be prepared to settle if your client pays our legal bills to date plus compensation for the unlawful arrest and detention of our client based upon your client's malicious and trumped up accusations of blackmail…"

26. Following a reminder, the Claimant's solicitors responded on 24 January 2017 to the effect that the offer made on behalf of the Defendant was not sensible and was entirely rejected. The Defendant's solicitors responded on 2 February 2017 inviting a counter-offer. This came on 6 February:

> "Our client's offer is… Both Parties incur their own legal costs… The injunction remains in force with your client giving an undertaking that she will not contact our client's friends, family and business associates…
>
> If it is your client's genuine case that she never had any intention to cause reputational damage to our client, then we see no problem with her agreeing to this further proposition and accepting the injunction…
>
> We believe our client will succeed at trial, which will mean that not only will our client's injunction… remain in place, but your client will incur the substantial legal costs incurred by our client in this case, which is now in excess of £55,000. Our client will seek to enforce these costs against your client fully. However, our client is considered your client's current financial position as a student and therefore invited to settle this case before further substantial costs are incurred by both parties…
>
> Your client's offer, which was rejected, suggested that she should be awarded compensation. Please refer to your Statement of Defence which includes no counterclaim… This explains why your offer was simply unrealistic…"

27. The matter came to trial on 15 June 2017 before District Judge Price. In the course of the hearing before me, Ms Rylatt for the Claimant sought to rely upon a note of DJ Price's judgment taken by Mr John King, counsel representing the Claimant. There

was some initial concern about this, because the document had not previously been disclosed by the Claimant and was characterised as an advice on appeal. Subsequently however it was agreed that the note could be referred to insofar as it serves as a record of the judgment.

28. According to Mr King's note, DJ Price stipulated at the outset of the hearing that he did not want history of the relationship between the Claimant and the Defendant rehearsed in open court. He indicated that he had read all the documents in the case and did not need the assistance of an opening note prepared by counsel for the Claimant.

29. Oral evidence was heard from the Claimant and Mr Nili, and the Defendant gave oral evidence through an interpreter. No other witnesses were called.

30. In his summing up, the judge noted that the relationship between the parties had been "stormy" but that that was largely irrelevant to the task in hand, which was to undertake an appraisal of the interim injunction that had been granted. He accepted that the Defendant had received funds from the Claimant, who had given her a way of life "beyond the ordinary". He also found that in the course of their relationship, the Defendant had acquiesced in ensuring that her presence in the Claimant's life was not publicised, adjusting her social media accounts accordingly and persuading third parties to do the same.

31. In assessing the Claimant's evidence, the judge commented that he found it odd that a significant event of July 2015, when the Claimant claimed to have discovered in the course of a telephone call that the Defendant and her mother had been colluding against him (which, according to the Claimant's witness statement, had led directly to his parting company with the Defendant) had not been referred to in his first witness statement.

32. This, I think, must have been a reference to the Claimant's statement prepared for the purposes of obtaining the interim injunction, which I have not seen. In any event, DJ Price formed the view that for the continuation of the injunction to have any prospect of success, an account of that telephone conversation should have been included in the Claimant's first statement.

33. As for Mr Nili, he had accepted in oral evidence that he had known the Defendant only for 3 years, having met her through the Claimant in 2013, contradicting his written witness statement to the effect that he had known her for many years as a personal friend, and that his friendship with the Defendant had nothing to do with the Claimant.

34. DJ Price concluded that Mr Nili had exaggerated the length of his friendship with the Defendant. This caused him to question Mr Nili's credibility closely, and he found that Mr Nili had offered to assist the Defendant financially, so rejecting his evidence on that issue as well. He accepted the Defendant's evidence that she had provided her account details because to Mr Nili offered financial help, not for the purposes of blackmail: her evidence to the effect that he had offered to help her financially had the "ring of truth" about it.

35. DJ Price also found that the police had found no incriminating photographs in the possession of the Defendant, who had always been discreet and had not sought to disseminate any pictures, in contrast with the Claimant who continued to appear on social media with at least one other woman who was not his wife, prompting comments from others including Mr Nili.

36. DJ Price found, on the balance of probabilities, that the evidence did not justify the imposition of an injunction. The claim was dismissed, the injunction was discharged and the Claimant was ordered to pay the Defendant's costs.

The Test of Proportionality

37. The Defendant's costs are being assessed on the standard basis. In accordance with CPR 44.3(2), the court will only allow costs which are proportionate to the matters in issue and will disallow costs which are disproportionate in amount even if they were reasonably or necessarily incurred. Any doubt as to whether costs were proportionately incurred, or are proportionate in amount, will be resolved in favour of the Claimant as paying party.

38. CPR 44.4(1) requires the court to have regard to all the circumstances in deciding whether costs were proportionately incurred and proportionate in amount, having regard to a number of matters specified in CPR 44.4(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 to resolve the dispute;
>
> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the case;
>
> (g) the place where and the circumstances in which work or any part of it was done; and
>
> (h) the receiving party's last approved or agreed budget."

39. CPR 44.3(5) provides 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 reputation or public importance."

40. The significance of each of the criteria set out in the above rules will vary according to the facts of the case. I shall apply those that have the most bearing upon this case.

The Claimant's Submissions

41. Ms Rylatt for the Claimant argues that in order to judge proportionality, the court must consider and make a finding about the value of the claim. The particulars of claim seek only a final injunction, not damages or costs. That gives the claim a nominal value of between £3000-£5000.

42. The disproportionality of the Defendant's costs is, says the Claimant, exacerbated by the disclosure by the Defendant of documents not relevant to the issues as pleaded, which turned upon a short meeting between the Defendant and Mr Nili on 11 September 2015. DJ Price, it is submitted, rightly criticised both parties for introducing irrelevant matters.

43. The same, it is submitted, is true of the Defendant's unwillingness to enter into mediation or otherwise engage in ADR. The parties could have explored whether the Defendant would be prepared to give an undertaking to the court or agree with the Claimant that although she had not done the things complained of, she would not do them in the future. There is little point in relying, as the Defendant does, upon the potential effect on her reputation when that issue was not raised in the proceedings.

44. Ms Rylatt, in oral submissions for the Claimant, said that the Defendant's case was adequately set out in the Defence. The proportionality of the costs involved must be measured by reference to the pleaded case. There was no pleaded claim for damages, and none for costs, so the Defendant was never at risk as to costs. An adequate measure of the value of the claim, for proportionality purposes, might be reached by considering the damages payable for unlawful detention; at most, between £1000 and £2000.

45. The approach of both parties to the litigation, including disclosure and witness evidence was, she said, disproportionate. This case turned on factual evidence as to the events of one meeting. It was not legally complex. It was not necessary to enter into lengthy disclosure and witness evidence about the history of the relationship between the parties: DJ Price found that to be irrelevant. In fact, suggests Ms Rylatt, the case should have been allocated to the small claims track.

46. Ms Rylatt's point is that two wrongs do not make a right. A disproportionate approach on the part of the Claimant does not justify a disproportionate approach on the part of the Defendant. The Defendant's solicitors could, for example, have drawn a line and simply ignored irrelevant disclosure by the Claimant.

47. Nonetheless, she says, the Claimant is not to be blamed for honestly believing the evidence of Mr Nili. He took the case in good faith and should not be obliged to pay disproportionate costs as a result.

The Defendant's submissions

48. Dr Wilcox, for the Claimant, refers me to the judgment of HHJ Dight in *May v Wavell Group Ltd & Anor* [2016] EWHC B16 (Costs), *Kazakhstan Kagazy Plc v Zhunus*, *Mohidin v Commissioner of Police of the Metropolis* [2016] 1 Costs L.R.71, *Stocker v Stocker* [2015] EWHC 1634 (QB), *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB) and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

49. It is not, he submits, required in an action such as the present one for an assessment to be made as to the monetary value of the claim in order to arrive at a proportionate overall costs figure. Nor, as is clear from the authorities upon which the Defendant relies, can it be right to judge proportionality only by reference to a notional arithmetical value. HHJ Dight in *May* recognised that although proportionality requires an assessment to be made with regard to the five factors set out at CPR 44.3(5), it will sometimes be appropriate to attach no weight to one or more of them. This, he submits, is such a case. No sums were in issue other than costs. No weight should be attached to 44.3(5)(a): the value of the case has to be considered solely in non-monetary terms.

50. In any event, he submits, one cannot properly exclude, when considering "the sums in issue", the potential costs liability of both parties.

51. As for the Defendant's purported refusal to mediate, this was an "all or nothing" claim. Other than in relation to costs, there were only two potential outcomes. Either a final injunction would be granted against the Defendant or it would not. It was not incumbent upon the Defendant to agree to the grant of an injunction, nor did she ever intend to do so. On the contrary, she justifiably felt that she had a very strong case and was vindicated by the final outcome at trial.

52. That aside, the Defendant simply could not afford the cost of a mediator. She was, expressly, willing to negotiate, albeit on stringent terms, with a view to halting an entirely unmeritorious claim. No application was made to the trial judge for any penalty to be imposed upon the Defendant as a result of a refusal to mediate.

Conclusions

53. As I have indicated, in judging the proportionality of the Defendant's costs I must have regard to all the circumstances. Before moving on to some of the specific criteria set by the rules to which I have referred, it is appropriate to consider the context in which the Claimant incurred the costs that, as both parties now accept, have been reasonably incurred and are reasonable in amount.

54. In doing so, I bear in mind the recorded findings of DJ Price. Although I have been invited by both parties to reach my own conclusions on aspects of the parties' evidence, I do not consider it necessary to go beyond his findings. Nor, bearing in

mind that the District Judge had (as I have not had) the opportunity to see the parties' evidence tested under cross-examination, does it seem to me to be appropriate to do so.

55. The relationship between the Claimant and the Defendant, on both parties' evidence, had terminated by the end of July 2015. The Defendant was not, however, left alone by the Claimant. She was instead subjected to an injunction, and continuing court proceedings, based upon allegations of the most serious kind which were ultimately rejected by the court, primarily on the basis that the person making the allegations was not a credible witness. Mr Nili's account of the events of 11 September portrayed the Defendant in the most unflattering light, from her allegedly "provocative" dress to her (fictitious) declaration of her willingness to send explicit pictures of herself and the Claimant not only to the Claimant's wife but to the Claimant's children.

56. DJ Price did not appear to make any express finding to the effect as to the credibility of the Claimant's own evidence, although he clearly considered it so unsatisfactory in itself as to defeat any prospect of the continuation of the injunction.

57. The potential consequences to the Defendant of a successful claim, had the evidence submitted on behalf of the Claimant been accepted, would have extended well beyond her being subjected to an unjustified injunction. She would have been on record as a blackmailer of a ruthless and sleazy disposition. Although the Claimant's attempts to have her prosecuted had failed, such a finding could have had devastating consequences for the Defendant, both in the UK and in Iran. It could have blighted her life both personally and in career terms.

58. Ms Ryaltt's submissions invite me, contrary to the clear provisions of the Civil Procedure Rules, to judge proportionality only by reference to a notional financial value derived from the pleaded claim, ignoring the wider criteria expressly set out in the rules. CPR 44.3(5)(e) and CPR 44.4(3)(c), given the potential effect of the claim upon the Defendant's reputation, are of much more significance in this case than the fact that the Claimant was not seeking an award of damages. Mr Piggott, in concluding that her reasonable costs were not disproportionate, put some emphasis on the importance of the matter to the Defendant, and he was right to do so.

59. I agree with Dr Wilcox that it is inappropriate to judge proportionality only by reference to a notional financial value when money is not the point of the claim. If I were to do so, however, it would have to be measured by reference to all of the criteria set out at CPR 44.4(1) and CPR 44.3(5). It would therefore have to take into account the probable permanent effect of a successful claim upon the Defendant which, as I have observed, could have been devastating.

60. The fact that the Defendant did not expressly plead a case to that effect, or seek compensation from the Claimant, is not to the point. I am required to have regard to all the circumstances, and the potential consequences for the Defendant are self-evident. The notional financial value of the claim on that basis would justify a finding that the costs as assessed by Mr Piggott are not disproportionate. I find Ms Rylatt's comparison with a monetary claim for a small sum, as put to me in her submissions, to be wholly inappropriate.

61. I also believe that Dr Wilcox is correct in pointing out that in assessing "the sums in issue in the proceedings", as required by CPR 44.3(5)(a), one must have regard to the costs claimed by the parties. Ms Rylatt is, of course, quite right in saying that one must not, in circular fashion, conclude that a party's costs are proportionate because disproportionate costs were a feature of the case. Nonetheless, the parties' claimed costs are not, and given the wording of the rules cannot be, irrelevant.

62. In contrast to the "small claims" approach now urged on me on behalf of the Claimant, he prepared a costs budget of almost £60,000 and indicated to the Defendant that he had every intention of seeking to recover against her costs at that level. That does not assist the Claimant now in arguing that base costs assessed at one third of that figure, incurred in defeating that claim, are disproportionate.

63. It is remarkable to hear it said on the Claimant's behalf that because his pleaded case did not mention costs, the Defendant was not at risk as to costs. The Defendant would have been justified in taking the Claimant's threats of enforcement at face value: if the only barrier to recovery had been a technical omission in the pleading he could have applied to amend. In any case the point is, I believe, wrong in principle. CPR 16.4 does not require particulars of claim to include a claim for costs and the court's statutory power to award costs does not depend upon whether a claim for costs is pleaded. Otherwise the Defendant (who did not plead a claim for her costs, either) would not now have an order for her costs.

64. Turning to the conduct of the parties, which I am obliged to consider both for the purposes of CPR 44.4(1)(a) and CPR 44.3(5)(d), I am invited by Ms Rylatt to consider the Claimant's conduct in the light of his honest belief in the evidence of Mr Nili.

65. There are two difficulties with that. The first is that, although Ms Rylatt relies upon the fact that DJ Price made no finding to the effect that the Claimant's evidence was deliberately dishonest, or that he colluded with Mr Nili, nor did he make any findings to the contrary. I do not consider that it is either necessary or appropriate for me to make any assumptions about what the Claimant honestly believed or whether he colluded with Mr Nili.

66. I say that because the Claimant's belief or disbelief in Mr Nili's evidence strikes me as irrelevant. I am required to consider the conduct of the Claimant, not the motives for his conduct. The Defendant does not bear any burden of proof in that respect. If the Claimant honestly relied upon Mr Nili in causing the Defendant to incur her costs, he can take it up with Mr Nili. The Defendant should not have to bear the consequences.

67. The Claimant's submissions in relation to both the Defendant's approach to evidence and her unreasonable approach to mediation and settlement seem to me to be unsustainable, for a number of reasons.

68. First, they seem to me to muddle reasonableness and proportionality. Whilst there may, in some circumstances, be some overlap between the two criteria, they are not the same. CPR 44.3(5) states in clear terms that costs <u>are</u> (my emphasis) proportionate if they bear a reasonable relationship to the specified criteria. That is not the same as whether they were reasonably incurred or reasonable in amount.

69. These points (the Defendant's approach to evidence and settlement) have already been considered by Mr Piggott when assessing the Defendant's costs as reasonably incurred and as reasonable in amount. As I have said, the Claimant has accepted that assessment. Whilst reasonable costs may nonetheless be disallowed as disproportionate, costs are not to be disallowed as disproportionate based only upon the proposition that they were unreasonable. Nor, having accepted that they are reasonable, is it open to the Claimant to advance such an argument.

70. Next, whilst I accept that a disproportionate approach on the part of the Claimant cannot justify a disproportionate approach on the part of the Defendant, there is rather more to the point than that. I am required by CPR 44.3(5)(d), in considering the proportionality of the Defendant's costs, to take into account any additional work generated by the conduct of the paying party. In interpreting that rule I must, in accordance with CPR 1.2, give effect to the overriding objective, which insofar as practicable requires the court to ensure that the parties are on an equal footing (CPR 1.1(2)).

71. For those reasons, it is not open to the Claimant to say (as Ms Rylatt submitted) that if he was to take a disproportionate approach to the litigation, that was a matter for him and has no bearing upon the proportionality of the Defendant's costs. The submission is also factually inaccurate. His approach to the litigation was inevitably going to have an effect upon the costs to be incurred by the Defendant.

72. The Claimant expressly relied upon evidence going to the entire history of the parties' relationship with a view to establishing a motive for blackmail, and pressed for a wide approach to disclosure and witness evidence. Only the Defendant's solicitor attempted to impose some limits upon the scope of the evidence to be considered, and his efforts were robustly rejected by the Claimant's solicitor.

73. It does not now lie with the Claimant to argue that the Defendant should somehow have ignored the Claimant's disclosure and witness evidence, even to the extent, as Ms Rylatt now suggests, of relying upon her defence rather than (as she was ordered to do) producing witness evidence. As Dr Wilcox submits, the Defendant's solicitor will have had no choice other than to consider carefully the evidence produced by the Claimant, even if his ultimate conclusion was that some of it was irrelevant. Mr Piggott reached that conclusion, and I agree.

74. The Claimant's argument also seems to me to offend the "equal footing" principle embodied in the overriding objective. It is common ground that the Claimant is a man of considerable wealth. It is also clear, on the evidence, that the Defendant is of very limited means. That was part of the Claimant's case in relation to a motivation for blackmail, and he has relied upon her lack of means further in requesting a stay of enforcement of the Final Costs Certificate. He could afford, if he wished, to conduct the litigation (as Ms Rylatt now says he did) in a disproportionate way. It would not be right if the Defendant, in consequence, were left with a debt to her solicitors that she could not repay.

75. All that aside, I do not regard the attempted criticisms of the Defendant's approach to disclosure and witness evidence to have any substance. The history of the relationship between the Claimant and the Defendant was not irrelevant, nor, on the evidence

before me, did District Judge Price find that it was. What he said was that he did not, having read the documentary evidence, want that history rehearsed in open court.

76. The fact that the relationship between the parties had been "stormy" was found to be irrelevant but other aspects of their mutual history, such as the fact that the Claimant had enabled the Defendant to enjoy a certain way of life, formed part of the District Judge's findings. I agree with Dr Wilcox that the parties could reasonably have anticipated that the he would need to understand the history of the relationship to put the allegations against the Defendant in context and to help him judge their truth. I have seen no record of his criticising the parties' approach to the scope of the evidence, as the Claimant asserts.

77. In my view the Claimant's criticisms of the Defendant's approach to mediation and to settlement also lack substance. The Defendant could not take up the Claimant's offer of mediation, because it was offered expressly on the basis that she contribute half the cost, and she could not afford to do that. This will not have come as a surprise to the Claimant.

78. In my view any responsible judge, when directions were given to move the matter forward to trial, would have pressed the parties to work upon some realistic means of settlement, but at that point the facts had not been established.

79. Ultimately the court rejected a case against the Defendant, based upon allegations of the most serious kind by a witness who was not found to be credible. Notably Mr King did not, after that finding had been made, see fit to make any application to DJ Price for part of the Defendant's costs to be disallowed on the ground that she reasonably refused to use either mediation or other forms of ADR. I do not find that surprising. Given the learned judge's findings, I do not believe that he would have made such an order.

80. I agree that the Defendant's solicitor's demand of compensation for a claim that was never pleaded was, as the Claimant's solicitors observed at the time, quite unrealistic, though this seems to have been his suggestion rather than the Defendant's. He was not, however, wrong about the merits of the Claimant's case, which effectively collapsed before DJ Price.

81. More to the point, it is difficult to see how any just settlement could have been achieved unless the Claimant was willing to withdraw his claim and pay the Defendant's costs, and it is not suggested that he would have been willing to do either. The best offer made to the Defendant by the Claimant in the course of the litigation was to bear her own costs and accept an injunction, which, given the findings of DJ Price, would have been a wholly unfair outcome.

82. Given those findings, the Claimant is not in a position to argue now (as he does) that the Defendant should have surrendered to the Claimant's threats of an injunction and debt proceedings to give an undertaking that was unjustified and unnecessary. She was fully entitled to proceed on the basis that the very serious allegations made against her must be either disproved or withdrawn.

Summary of Conclusions

83. For all the above reasons, my conclusion is the same as Mr Piggott's. Costs reasonably incurred and reasonable in amount may nonetheless be disallowed as disproportionate. Applying CPR 44.3(5) and CPR 44.4(3), however, it would be quite wrong to do so in this case.

84. I should add that in coming to that conclusion, it is my view that I should have regard only to the Defendant's "base costs" of just under £20,000, and there is at least an argument for saying that I should also disregard the cost of preparing the Defendant's bill of costs. Even on the all-inclusive figure of £23,253.80, however, I would reach the same conclusion.