Case No: 7MF00451

IN THE NOTTINGHAM COUNTY COURT

60 Canal Street
Nottingham Nottinghamshire
England NG1 7EJ

Friday, 26 August 2011

BEFORE:

HIS HONOUR JUDGE INGLIS

BETWEEN:

HENNING STEENBERG & MARILYN LOUDEN

Applicants/Claimants

- and -

(1) ENTERPRISE INNS PLC
(2) ANDREW CLIFFORD

Respondents/Defendants

MR P STOOKES (instructed by Richard Buxton Environmental & Public Law) appeared on behalf of the Claimants

MR T RUSSELL (instructed by Flint Bishop LLP) appeared on behalf of the Second Defendant

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Approved Judgment

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1. JUDGE INGLIS: This is an application by the claimants, Henning Steenberg and Marilyn Louden, made under part 38.6 of the Civil Procedure Rules for an order on discontinuance of the proceedings they had brought against the second defendant, Andrew Clifford, that they should not have to pay Mr Clifford's costs but that the order of the court should be that there be no order for costs between the parties.

2. The notice of discontinuance contemplated by part 38.6 has not yet been served in this case but I am satisfied that it is going to be served and this is not simply possibly an academic question about what would be the position of certain events and the court could enter into consideration of what the proper outcome would be even though the notice, which is intended to serve, has not yet been served, otherwise it might mean that today's hearing would have been wasted.

3. The claimants, until May of this year, lived at 144 Church Lane at Bagthorpe in Nottinghamshire. Next door to 144 is the Red Lion Public House and the Red Lion is owned by the former first defendant, Enterprise Inns, and the tenant, at all material times, has been the second defendant, Andrew Clifford. There have been longstanding complaints by the claimants of nuisance emanating from the public house and degrading their experience and enjoyment of their own property. There were previous proceedings based on allegations of nuisance in MF950204 that resulted in a settlement in the payment of a sum of money; a settlement of the case reflected in an order of 16 January 2001.

4. The claimants' case in the present proceedings was that by 2002, further nuisances had sprung up. I should say that the settlement was reached without prejudice to liability and that not having been resolved in five years of to-ing and fro-ing, these proceedings were issued on 2 March 2007 for an injunction and damages. The particular nuisance complained of is nuisance emanating from the kitchen in the public house, both the noise of the operation of the kitchen and the smells, it is said, not sufficiently filtered or deflected from infecting the neighbourhood, in particular 144 Church Lane. That was the nature of the nuisance.

5. District Judge Maw, on 19 July 2007, allocated the case to the multi-track and set it up for a trial and the trial came on before His Honour Judge Mithani on 3 November 2008 and he dismissed the claim. The hearing before the Judge had taken a number of unusual turns but one main plank of the defendants' case was that the settlement in January 2001 had been intended to and should be construed as having taken into account future nuisance of the same sort that had been complained of in those earlier proceedings; in other words, if it was a once and for all settlement. Whatever else had gone wrong with the trial, the Court of Appeal, when it came before them, decided that that stance taken by the second defendant was wrong and that it was open to the claimants to bring a new claim for nuisance in respect of matters that had arisen since the settlement was entered into; so that substantial plank of the second defendant's defence was demolished.

6. The claim had been brought against both Enterprise Inns and Mr Clifford but the claim against Enterprise Inns was discontinued by consent in November 2009. The Court of Appeal decision was on 11 March 2010. The court made a costs' order and ordered the second defendant to pay the costs of the appeal and also half the costs straightaway of the aborted trial. Those costs have not yet been quantified by the Costs' Office and no

process of assessment is in train but I am told that the ambit of the costs claimed under that Court of Appeal order is something in the region of £110,000.

7. The case then came back into management and was expected to be tried in the autumn of 2010; the second defendant, by this time, being a litigant in person but still contesting the case. Shortly before the trial was intended to take place at the end of October 2010, the case was stayed until January 2011 and then it was further stayed thereafter. The reason for the stay is that a proposal had been made by Enterprise Inns, who were no longer a party to these proceedings, that they should enter into discussions with the claimants about the purchase from them of 144 Church Lane, Bagthorpe. So the trial was put off to see if anything came of that and it did because on 5 May 2011, the sale to Enterprise Inns was completed and Mr Steenberg and Miss Louden, therefore, moved away and they have no further interest in any nuisance that might or might not be emanating from the Red Lion Public House and indeed, I think they would have no *locus standi* in continuing to ask for what their main remedy was; an injunction. They have a claim for damages. I think it is right to describe that as a subordinate claim in any event.

8. In the skeleton argument and material put before the court for this application, Mr Stookes acknowledges that the damages that would be awarded on an annual basis, were this particular nuisance proved, would be modest, not more perhaps than £2,000 at the top weight per year, so we would only be talking about a claim for damages of £15,000 or £20,000 and the main remedy being the injunction.

9. In addition to those events of the spring of this year, which meant that the main purpose of the claim fell away, Mr Clifford had indicated clearly that he was very heavily in debt and was having to consider bankruptcy.

10. The claimants resolved to discontinue the case, their main plank no longer possible to pursue because the claimants had moved away and the claim for damages was one that was not realistic to continue with any prospect of advantage and they were not minded to do what, in any event, the court does not approve of when it is given an opportunity to express approval or disapproval: that is litigation continuing simply for the purpose of deciding the question of costs. So the case comes before me today on the basis that part 38.6 provides that on discontinuance, which is going to happen, the claimant is liable for the costs against which a defendant against whom the claimant discontinues incurred on or before the date on which discontinuance was served on the defendant unless the court orders otherwise. I am being asked to order otherwise.

11. A case for the claimant has been put clearly and cogently by Mr Stookes both orally and in his skeleton argument. He has produced a bundle of authorities, the first of which evidences the hurdle over which he must get and is the leading and recent authority in this field of Brookes v HSBC Bank Plc [2011] EWCA Civ CA354. The skeleton argument is one that he has referred to. He says this is not an ordinary case. It is one where the starting point that the claimant will pay the defendants' costs on discontinuance should be displaced. He says, first of all, that the claim for injunctive relief became academic so that the foundation of the case, the realistic foundation of the case had fallen away and in developing that submission, he points out the particular difficulties that may be faced by a claimant who brings a claim for an injunction as the main remedy but a number of matters might intervene before the trial, perhaps shortly

before the trial, that make it unrealistic or impossible even to continue with the claim for an injunction. Discontinuing at that stage is inevitable but he submits that someone in a position of a claimant such as these claimants is not in the same position as someone, for example, who has a money claim for a commercial claim. There is a particular problem with someone who seeks an injunction. The purpose of the application is, by one reason or another, negatived before the case comes on for trial, so there is no realistic choice but to abandon it. He submits that consideration should shift the court in favour of considering a different outcome than that provided for by 38.6.

12. He submits that the continuing plank for past nuisance, that is the claim for damages, would be disproportionate and indeed, I have indicated it was unrealistic anyway. It is not really what the case was about and the second defendant is plainly on the border of being insolvent and the case would be expensive and disproportionate and not sensible to litigate. All that is true. He says that any residual claim for damages would be disproportionate to proceeding the trial, which is plainly right.

13. He refers to the Aarhus Convention which is an United Nations Regional Convention relating to Europe which was done at Aarhus in Denmark on 25 June 1998 and, I am told, ratified by this country in 2005. It deals with access to information, public participation and decision making, and access to justice in environmental matters and so deals with a wide range of matters, but in article 9, it deals with remedies that the contracting states shall afford to their citizens and in 9.4, it is provided that procedures shall provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable and timely and not prohibitively expensive.

14. I assume and indeed, it has been observed in the Court of Appeal by Carnwath LJ that a private law proceeding in courts in this jurisdiction for an injunction to enforce environmental concerns comes within the convention. The convention, however, is not part of the law of England. I do not take it to have qualified the approach of the court under part 38.6 or under the Civil Procedure Rules generally. It may be observed that there are a number of remedies that are afforded in conformity with the Aarhus Convention, for example, as I believe has happened here, in enlisting of the help of statutory local authorities. It is also the case that even though sums of costs in civil litigation may come to be very large, by the rules there is an overall requirement that such costs are proportionate which provides sometimes a modest but real safeguard. I do not think that appealing to the Aarhus Convention really affects the decision of the court. To invoke it in favour of the person who had asked for an injunction misses out the most important feature of the operation of part 38.6 namely that another party, against whom proceedings did not conclude, is being left out of pocket unless the rule operates as is provided.

15. In developing his submissions, Mr Stookes referred to authorities that may be broadly in this area of the circumstances in which someone should be paying costs but they are not, it seems to me, in point. He refers to the position under judicial review where, as a result of bringing the proceedings, a public authority defendant provides the remedy that the court is being asked to provide by judicial review. In those circumstances under principles developed in the case of Boxall and explained more fully very recently in Bahta & Ors (R on the application of) v Secretary of State for the Home Department & Ors [2011] EWCA Civ 895, it is established that where the remedy sought against a public authority is achieved not having been achieved by the operation of the pre-

action protocol, it may be appropriate for the public authority concerned, on the claimant's discontinuance, to pay the claimant's costs. That particular area of jurisprudence and practice seems to me to be far removed from the position we are in here.

16. Another case I was referred to is a case where the parties had settled subject to asking the court to deal with the question of what would be any proper outcome on costs in the light of the settlement that had been reached and there have, of course, over a period of time, been different views about this. One is that if they have not settled the costs, the parties have not settled, so the court should not entertain it. Another is that where an outcome has been achieved, and been an outcome that the court might have arrived at after hearing the case and after a judgment, a court can, if it wishes to do so, decide what the fair order for costs would be, the case having been disposed of.

17. Another area was the case of probate and someone bringing an action against an estate whether, if that action is discontinued, they should be liable to pay costs or alternatively should get their costs out of the fund. Probate actions, in my judgment, involve different considerations. The particular difficulty of someone bringing a claim for an injunction and finding that it is fruitless is, as I have indicated, raised as a difficulty by Mr Stookes and I think is often the position in bringing environmental claims for injunctions.

18. The other side of the case can be referred to by reference to the authority of Brookes. Before going to that, I mention briefly the matter of merits. It seems to me to be well established that in deciding what the right order is under part 38.6, the court does not conduct a mini-inquiry into what would have been the outcome of the case. No doubt, at each end of the spectrum, the answer may be simple and clear. At one end, it may be clear that the claimant would have lost or be likely to lose in which case the starting point under part 38.6 is really final. On the other, there may be cases, although perhaps they are not that easy to imagine, where on the agreed facts, or not seriously disputed facts, the claimant was clearly going to win. This case is a case where the claimants' side of the case felt they had a strong case that is likely to have proceeded to win at trial. They have got very reputable expert evidence in their favour. There has been a long history and the steps that it have been identified, that it is submitted that Mr Clifford could have taken but did not take to abate the nuisance and prevent it happening. All these things lent against him.

19. The fact, however, is that this case did not come to trial. It was contested by him and although it may be the case that the court could properly take the view that the claimant had a good prospectus of success at the trial, although even that is difficult for me to assume without going into the evidence which I have not gone into, nonetheless it seems to me that is not something that can particularly weigh on the court in deciding what the outcome should be here.

20. In Brookes v HSBC Bank, Judge Waksman, in the Mercantile Court at Manchester, set out a number of propositions which were approved by the Court of Appeal:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover

his costs; the burden is on the claimant to show a good reason for departing from that position;
(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;
(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

20. Having approved that list as being a fair summary of the effect of the authorities, Brooke LJ also referred to some other authorities including the case of Menny v Lenny where, at paragraph 10 of his judgment, Brookes LJ summarises what Proudman J is recorded as saying namely that a claimant who commences proceedings takes upon himself the risk of litigation. If he succeeds, he can expect to recover his costs. If he fails or abandons, the claimant, at whatever stage of the process, it is normally unjust to make the defendant bear the cost of proceedings which were forced upon him which the claimant is unable or unwilling to carry through to judgment. That, in my view, points up what is really missing from the considerations that Mr Stookes puts before me namely the position that the defendant finds himself in, having faced proceedings which have not come to trial which are being abandoned but which have caused the defendant to incur substantial costs and that consideration must underpin the starting point of the outcome provided for by part 38.6 because, in the normal way, and absent, it seems to me, probably unusual circumstances, it will be unjust to leave a defendant in that position, the case never having been tried, bearing his own costs.

21. I acknowledge the practical difficulty that someone faces bringing a claim for an injunction when it becomes, before trial, fruitless for one reason or another for the claim to be proceeded with, so that someone seeking such leave takes a particularly obvious risk but that does not, in my judgment, make it just for someone who is on the receiving end of the claim and who has incurred costs to bear their own costs in a case that is forever untried and which was contested.

22. The order of the Court of Appeal as to costs, of course, remains, so the starting point will be that Mr Andrew Clifford will remain liable to pay whatever sums are assessed, as I say, on the face of it, likely to be quite a considerable sum of half the costs thrown away at the trial before judgment and the costs of the claimants in the Court of Appeal but, on the other side of the book, it does seem to me to be just and right that the outcome provided for in part 38.6 should not be displaced and subject to that substantial order for costs that has already been made against him, Mr Clifford should have the costs of this action from the claimants on discontinuance of the claim and that is what I order.