

mrrn

the costs solicitors

Proportionality

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What is proportionality (and why do we have it)?

- Proportionality is the relationship between damages and costs.
- Purpose:
 - Control costs at all stages
 - Ensure the paying party's costs burden is limited

The old proportionality test

- The *Lowndes* test was formulated by Lord Woolf LCJ in *Lowndes v Home Office* (2002) EWCA Civ 365 and it requires the court to take the following two-stage approach:
 - Does the total costs figure appear to be proportionate? (The global approach.)
 - If yes, apply the reasonableness test to the assessment of each item. If no, apply additionally the stricter test of necessity to the assessment of each item. (The item by item approach.)
- Costs were proportionate if they were reasonable *and* necessary.
- Assessment via the Costs:Damages ratio

Proportionality in the CPR

- CPR 1.1 now carries on as follows:
 - (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
 - (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate-
 - (i) to the amount of money involved ;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly;
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
 - (f) enforcing compliance with rules, practice directions and orders.

Proportionality – The New Test

- CPR 44.3(5): Costs incurred are proportionate if they bear a reasonable relationship to –
 - (a) the sums in issue in the proceedings;
 - (b) the value of any non-monetary relief in issue in the proceedings;
 - (c) the complexity of the litigation;
 - (d) any additional work generated by the conduct of the paying party; and
 - (e) any wider factors involved in the proceedings, such as reputation or public importance.

Proportionality – How to apply it

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

Case Law

R v Supreme Court Taxing Office ex p John Singh and Co [1997] 1 Costs LR 49

- Judicial Training
- Back to the Future IV?
- Taking a “step back”
- LJ Henry acknowledged that he had been through the categories of work, and did not feel at any point that any particular attendance was unreasonable in length and he accepted that something was gained from almost all of the attendances. However, as well as considering all items, he felt it reasonable to take a step back and look at the totality of the time claimed and consider if, taken as a whole, the time claimed was reasonable

Case Law

- **Kazakhstan Kagasy Plc v Zhunus [2015] EWHC 404 (Comm)**
- Justice Leggatt: In a case where very large amounts of money are at stake, it may be entirely reasonable to spare no expense in order to achieve the result of the proceedings. However it was held that it does not follow that those costs would be regarded as reasonably or proportionality incurred on an inter partes basis.

Case Law

- **Hobbs v Guy's And St Thomas' NHS Foundation Trust [2015] EWHC B20 (Costs)**
- Claim settled for £3,500; costs were £32,329.12
- 2/3 reduction made on basis of reasonableness
- Further reduction made on basis of proportionality
- Total allowed: £9,879.34 (inc VAT)

Case Law

- **BNM v MGN Limited [2016] EWHC B13 (Costs) (03 June 2016)**
- Privacy case
- Damages awarded: £20,000
- Costs sought: £241,817.00.
- Line by line assessment allowed: £167,389.45
- Proportionate costs allowed: £83,964.80

Case Law

Dr Brian May v Wavell Group PLC & Bizarri [2016] EWHC B16 (Costs)

- ~~We will, we will rock you~~
- Damages awarded: £25,000
- Costs sought: £208,000
- Reasonable reduction: £99,655.74
- Proportionate figure: £35,000 + VAT
- “There is only so much finesse that can be employed when using a broadsword rather than a rapier. A concluding global assessment of proportionality as envisaged by the new approach involves the court wielding a blunt instrument rather than a precision tool”

Case Law Summary

- *BNM & May* are the most concerning of the recent cases but to be taken with a pinch of salt
- Judgments at first instance and are being appealed
- Neither case was viewed to be complex and no other Part 44.3(5) factors applied

Proportionality & Cost Budgeting

- Value of the claim considered against the total of the budget
 - Some Courts (TCC in particular) will consider the combined total of both parties' budgets against the value
- Proportionality test then applied
- Judges may cap costs budgets to the level of the claim
- If budgets are agreed, directions may be altered to minimise costs

Proportionality – How best to deal with it?

- Part 36 offers
- If you match or beat your Part 36 offer you will be entitled to apply to receive costs on an indemnity basis.
- Costs on an indemnity basis are not assessed with reference to proportionality, only reasonableness.
- Costs budgets are only in relation to standard costs so you will be able to exceed your budget

Proportionality – How best to deal with it?

- Clients need to be advised to proportionality at the outset
 - Check retainer to ensure costs information is accurate
 - Advise that proportionality means only a contribution to costs may be received
- Provide regular costs updates to client in relation to all potential costs and potential recovery
- Conduct reviews on proportionality factors
- Utilise ADR at an early stage to limit costs

Questions?

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Cannot resist....

- Is this the real life? Is it just fantasy? Caught in a proportionality argument, no escape from reality.
 - But now I've gone and thrown (my costs) all away
 - I want to break free (from Jackson)
- (....sorry)