PROPORTIONALITY – WHERE ARE WE NOW?

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THE OLD REGIME

Prior to 1st April 2013 and indeed for cases which were subject to proceedings issued prior to that date proportionality was expounded under what became known as the Lownds Principle. Under Lownds v Home Office (2002) EWCA CIV 365 necessity trumped proportionality. If a step in the proceedings was necessary in order for the Litigant to achieve justice, then the costs were recoverable, even if that meant that the total costs of the action became disproportionate.

The Lownds test became known as the "eyebrow test". A Costs Judge at the beginning of an assessment was required to look at the global amount of costs that were presented and decide whether or not that level of costs raised his or her eyebrows. If it did, then the costs were declared disproportionate and the assessment proceeded on the necessity test. If they did not, then the assessment proceeded on the basis of the reasonableness test.

In assessing proportionality, the Costs Judge was to take into consideration base profit costs and disbursements and to exclude Success Fees, ATE Premiums and VAT. Judges were precluded from applying double jeopardy, i.e. by assessing the bill item by item and then deciding if the outcome had resulted in a proportionate amount of costs. Once the item by item assessment had been carried out that was it and there were deemed to be no further reductions permitted.

THE CURRENT TEST

This applies where proceedings have been issued after 1st April 2013 regardless of whether or not instructions had been received from the Claimant prior to that date.

WHAT DO THE RULES SAY ABOUT THE CURRENT PROPORTIONALITY TEST?

CPR 1.1 provides as follows:

In 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 the money involved
(ii) To the importance of the case

(iii) To the complexity of the issues

(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

(f) Enforcing compliance with the rules, Practice Directions and Orders

It will be noted that saving expense is right up at the top of the list of aims and that the first focus of the proportionality test is on the amount of money involved.

This came about as a result of the comments of Lord Justice Jackson in his final report when he said:

"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 44.3(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".

The reversal of the Lownds test is effected by CPR 44.3(2):

Where the amount of costs is to be assessed on the Standard Basis the Court will:

(a) 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.

The Costs Rules define proportionality in 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

(e) Any wider factors involved in the proceedings, such as reputation or public importance

HOW TO DEAL WITH PROPORTIONALITY IF YOU REPRESENT THE RECEIVING PARTY

INDEMNITY COSTS

Proportionality only applies to costs incurred that are subject to assessment on the Standard Basis. If it is possible to secure an Indemnity Costs Order, you will avoid the entire problem.

PART 36

This is perhaps the best weapon in the armoury of any litigator in avoiding proportionality. A well thought out Part 36 offer either on liability or quantum may well result in an Order for indemnity costs.

CONDUCT

One other way of achieving an Indemnity Costs Order is if you can establish that the conduct of your opponent has been such to justify it.

HOW BEST TO DEAL WITH A PROPORTIONALITY CHALLENGE

If you are stuck with a Standard Basis Costs Order and the proportionality test applies, then you have to impress upon the Costs Judge that you consider that the test is satisfied as a result of:

(a) The importance of the case to the parties
(b) The complexity of the case
(c) The difficulties that you faced including difficult hurdles that you had to overcome to achieve the outcome that you did
(d) The conduct of the dispute by your opponent both at the pre-action stage and during the proceedings

Look to argue that it has been the approach of your opponent to the litigation that has resulted in the extent of work that was required to get your client over the line.

Consider whether or not there were aspects of the case that could be characterised as wider factors for the purposes of CPR 44.3(5)(e).

Set out why the tasks involved in the litigation were more difficult for your client than for your opponent, thereby undermining any comparison with their level of costs.

HOW TO DEAL WITH PROPORTIONALITY IF YOU REPRESENT THE PAYING PARTY

The job for the Paying Party is usually much easier. They usually will focus on:

(a) The amount of damages involved as it is often easier to apply a direct relationship to value
(b) The factually simple nature of the case, i.e. limited medical evidence, witness evidence and lack of expert liability evidence
(c) The extent to which this was standard litigation that the Receiving Party's legal advisors were well used to dealing with
(d) The level of their costs
(e) The relationship between time and cost. Cost Judges usually accept the higher grade the Fee Earner the less time they should be able to spend on case preparation, highlight excessive tranches of time and draw the Costs Judge's attention to what was achieved, i.e. 9hrs for preparing a three-page witness statement

OVERALL CONCLUSION

Proportionality is all about a Judge's feel for the case. If the case feels to the Judge like an exceptionally difficult or important piece of litigation a high costs bill may well be both reasonable and proportionate. However, if the case feels like a standard piece of litigation of which the Receiving Party has made heavy weather of, then you run the risk of the bill being slashed.

DISAGREEMENT IN THE RANKS

There has been significant disagreement between both Costs Masters in the Senior Court Costs Office and even Regional Costs Judges, the specialists in the provinces, as to how proportionality should be applied under the current test.

Take a look below at some of the published decisions:

Hobbs v Guys and St. Thomas NHS Foundation Trust (2015) EWHC B20 (Costs)

Master O'Hare ruled in this case that proportionality trumps necessity where in a clinical negligence case costs were claimed at ten times the amount for which it settled. He disallowed three items in a bill that he considered reasonable for the Claimant's Solicitors to have incurred, but which were unfair to make the Defendant pay for.

The Claimant claimed costs of £32,329 which Master O'Hare reduced on provisional assessment, first on the grounds of reasonableness and then proportionality to £9,879. He carried out the first limb of the assessment and concluded that a proportionate amount of costs would have been

£11,000 plus VAT, but that that sum was disproportionate to the issues in the case and the damages of £3,000 recovered pre-issue and reduced the bill to £9,879.

BNM v MGM Limited [2016] EWHC B13 (Costs)

The Claimant was a primary school teacher who had a relationship with a premiership footballer. Her phone was stolen and found its way to an Assistant Editor of one of the Defendant's newspapers who ran the story thereby revealing the relationship. The Claimant issued proceedings seeking damages and an injunction preventing publication. She was granted an Anonymity Order and the claim settled on the basis of an undertaking, £20,000 in damages and costs to be assessed.

The Claimant then presented a somewhat eyewatering bill in the total sum of £241,817. The costs assessment came before the Senior Costs Judge. Over a two-day Detailed Assessment Hearing he made an item by item ruling that reduced the bill to £167,389, including recoverable Success Fees and an ATE Premium.

The Costs Judge then considered the provisions of CPR 44.3 and concluded that the base profit costs of £46,000 for the Solicitors and Counsel's fees of £14,000 were disproportionate and elected to reduce them by 50%. More radically, having found that the ATE Premium which was necessarily incurred at £61,480 to cover unrecovered disbursements and adverse costs if the claim failed, he reduced that to £30,000. The outcome was that the bill was reduced to just under £84,000. The Court of Appeal are due to rule on that decision in October 2017.

King v Basildon & Thurrock University Hospitals NHS Foundation Trust [2016] EWHC B32 (Costs)

Master Rowley considered the issues in this case in August 2016. The Claimant following litigation had recovered £35,000 in damages. Her bill straddled the old and new proportionality tests. Master Rowley assessed the bill of £326,404 at £249,889 on an item by item by basis as having been reasonably incurred and reasonable in amount. He then stood back to consider the test of proportionality. Having heard the parties' submissions, he decided that it was.

His first finding was that where a clinical negligence claim went to a three-day trial, base costs of £88,337 were almost always going to be proportionate for a clinical negligence case that reached a three-day trial. He disagreed with the Senior Costs Judge who had decided in BNM that in assessing proportionality for work done post 1st April 2013, additional liabilities had to be considered. In

arriving at that decision, he indicated that he was reinforced by the fact that when the Court set a budget under the costs management process, it excluded:

(a) Success Fee
(b) ATE Premiums
(c) The cost preparing the bill
(d) VAT

Not surprisingly, this is the Receiving Party's favourite case to rely upon in respect of proportionality.

Dr. Brian May & Anor v Wavell Group Plc & Anor [2016] EWHC B16 (Costs)

This was another case decided by Master Rowley. The former Queen guitarist brought proceedings against the Defendant for private nuisance. The Claimants accepted the Defendants' Part 36 offer of £25,000 prior to the Defendants' entering their defence. A deemed Costs Order in accordance with CPR 44.9 resulted from that acceptance and the Claimant commenced Detailed Assessment proceedings as a result. The Claimant's bill came to £208,236. The current proportionality test applied throughout.

Master Rowley carried out an item by item assessment and assessed the bill at £99,655. He then stood back and decided whether or not that was a proportionate sum.

In carrying out an assessment of the five factors in CPR 44.3(5) he concluded that this was a case worth £25,000 and for which there was a modest prospect of an injunction at an early stage. There was no noteworthy complexity in the litigation of either a legal or factual nature. There were no additional costs caused by the Defendants' conduct, nor were there any wider factors to be considered. The Defendants' had hung their hat on value and argued that the costs allowed should never exceed the damages. Whilst the Judge did not accept that submission he did then adopt Lord Justice Jackson's guidance, stood back and concluded that the proportionate amount of costs to allow was £35,000 plus VAT.

There was then an attempt made by the Receiving Party to separate the cost of preparing the bill from that overall assessment for the reasons outlined above but Master Rowley declined and included the bill preparation figure in his overall proportionality assessment.

Following the decision (which will of course have left Dr. May significantly out of pocket) he was quoted in the press about how hard done by he had been and was going to appeal. To the best of my knowledge however no appeal has been made.

Murrells v Cambridge University Hospitals NHS Foundation Trust [2017] EWHC B2 (Costs)

In December 2016, the recently appointed Master Brown conducted a Detailed Assessment of the Claimant's bill. The claim settled for damages of £9,650 shortly after the service of a defence and before any costs and case management conference took place.

In his Bill of Costs, the Claimant sought £163,358 on behalf of the Estate of his late wife, inclusive of VAT. The exclusive figure was £140,539. Of that sum £59,520 was subject to the old proportionality test and £81,048 under the current test. Master Brown following his item by item assessment which included the reduction of the Claimant's Solicitors Success Fee from 100% to 82%. There was no challenge to the reasonableness of the ATE Premium, which was £22,737.

The item by item assessment resulted as follows:

PART I	
Base Profit Costs	£12,761.25
Success Fee 82%	£10,464.23
VAT on Profit Costs	£4,645.10
Disbursements	£4,400.00
VAT thereon	£550.00
Sub Total	£32,820.58

PART II	
Base Profit Costs	£14,862.75
Success Fee 82%	£12,187.46
VAT on Profit Costs	£5,410.04
Disbursements	£5,470.50
VAT thereon	£683.35
ATE Premium	£22,737.00
Sub Total	£61,351.10

TOTAL **£94,171.68**

Having determined the item by item assessment in that sum Master Brown then considered whether or not those costs were disproportionate.
His first finding was to disagree with the views of the Senior Costs Judge in BNM as to the application of the new proportionality test to additional liabilities and to concur with Master Rowley that these should be excluded.

His next finding was that the claim in question was always going to be modest in value but that was counter balanced by the significant degree of complexity in the issues to be determined. He bore in mind the fact that the Defendants' cost budget served just before settlement amounted to £66,662 were the case to have gone all the way to trial. He indicated that this led him to confirm his initial belief that this was a relatively complex claim even by the standards of other clinical negligence claims. He also noted that the budget appeared to confirm that the Defendant was prepared to commit substantial resources to defending the matter on account of the claim's complexity. In all the circumstances, he concluded that the base costs of £20,436 in Part II (Profit Costs and disbursements) were proportionate because they were necessary to achieve recovery of the damages.

ATE PREMIUM

Master Brown rejected the Defendants' attack on the premium as being disproportionate to the sums at stake. He accepted the submission of the Receiving Party that given the Defendants' denial of liability and the costs that they were seeking in their budget, the premium of £22,737 could not be said to be disproportionate to the risks faced by the Insurer.

Mather v Doncaster & Bassetlaw Hospitals NHS Foundation Trust Kingston upon Hull County Court February 2017

This was a decision of the Regional Costs Judge in Hull. He ruled that a Court faced with a Bill of Costs that straddles the Jackson reforms should consider both the pre and post April 2013 costs when deciding whether it is proportionate but, again disagreeing with the Senior Costs Judge ignore any additional liabilities when coming to that decision.

The Claimant in that case recovered £60,000 in damages. His bill including additional liabilities, disbursements and VAT was £514,700. Having assessed the bill on an item by item basis the Regional Costs Judge reduced it to £332,229. He then went on to consider proportionality.

He agreed with Master Rowley and Master Brown and disagreed with the Senior Costs Judge. He concluded that in assessing proportionality (as opposed to reasonableness) of the ATE Premium, this should be excluded. Taking out those figures reduced the base costs to £72,253 for the Solicitor and £25,181 for Counsel. He went on to say:

"*In my judgment, the base costs incurred of £97,434 for the amount recovered with the number of experts as to causation and the stage at which the matter settled are proportionate. In reaching this conclusion, I have had regard to the range of figures a similar case would be budgeted at.*

Whilst I accept that the action settled for less than half of the pleaded case, I do not accept that the claim was exaggerated. The amount accepted no doubt reflected litigation risk and that some aspects of the claim were more speculative than others. The acceptance of a lower amount was a justified compromise.

The Court, when managing the claim was satisfied that seven experts were necessary. Again, this indicates that the issues had a complexity beyond a mere factual dispute. Having regard to all the factors I find that the relevant costs are proportionate and I do not propose to make any further reduction."

Upon being told that permission to appeal had been granted against Master Rowley's similar decision in King, the Regional Costs Judge elected to also grant permission to appeal in this case as well so watch this space.

Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust [2017] EWHC B5 (Costs)

This is the most recent reported costs judgment being delivered by Master Simons in the SCCO on 17th February 2017.

By a Consent Order, judgment was entered for the Claimant in the sum of £3,250 in this clinical negligence claim. The claim was brought as a result of the Defendants' failure to refer the Claimant

for imaging as it was alleged that had they done so a pituitary tumour would have been found nine months earlier than was the case.

The Defendants' admitted breach of duty but denied causation. Proceedings were issued in October 2014. The proceedings were served in January 2015. The claim settled on 8th July 2015 for the £3,250 in damages referred to above.

The Claimant's Solicitors served their Bill of Costs in the sum of £72,320.

On 21st July 2016 Master Simons provisionally assessed the bill in the sum of £24,604. He did so on the basis that:

(i) The overall bill was disproportionate

(ii) The ATE Premium was disproportionate at £31,976 and which was reduced to £2,120

The Master reduced the profit costs.

The Master reduced Counsel's fees.

The Master reduced the medical fees.

The Receiving Party sought an oral review. The Master was unmoved. He found that costs of £72,320 for a low value medical negligence claim were disproportionate. He found that they did not bear a reasonable relationship to the sums in issue in the proceedings, the litigation was not particularly complex, no additional work had been generated by the conduct of the Paying Party and there were no wider factors involved in the proceedings.

ATE PREMIUM

The Defendants' submitted that the premium was not proportionate as it did not bear a reasonable relationship to the sums in issue in the proceedings. The Claimant's best case was a value of £5,000 in damages so they submitted that a premium originally put at £30,000 bore no relationship whatsoever to that sum. Upon further enquiries, the Claimant's position was somewhat weakened by the fact that the premium its self had been miscalculated and the Court was told that the correct premium was actually £22,225. Master Simons had no difficulty in concluding that the Court was entitled to consider whether or not a discreet item in the bill was proportionate and it would appear

even less difficult in deciding that the premium sought was not. He decided that £2,000 plus IPT was a reasonable and proportionate premium based firstly on the comparative premiums that had been submitted by the Defendants and secondly upon the basis of his own judicial knowledge in dealing with Detailed Assessments in similar cases.

In arriving at his decision, the Master fell back on the very old case of Jefferson v National Freight Carriers Plc [2001] EWCA Civ 2082 and the approval by the Court of Appeal of the judgment of Her Honour Judge Alton in Birmingham County Court when she said:

"*In modern litigation, with the emphasis on proportionality, it is necessary for the parties to make a value of the claim and its importance and complexity at the outset and then to plan in advance the necessary work to be undertaken, the overall time to be spent and the likely overall cost. While it is not unusual for costs to exceed the amount in issue such as in the present case it is one reason for seeking to curb the amount of work done and the costs to achieve proportionality."*

Master Simons indicated that having looked through the Solicitor's file he could find no evidence of any planning in the manner described by the Judge.

We now approach the fourth anniversary of the implementation of the current proportionality test. As can be seen from the decisions above even now there is dissent in the ranks as to how this is to be applied and no doubt there will continue to be so until such time as the Court of Appeal give definitive guidance on the subject.

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