

# What costs might be recoverable in publication cases?

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# Introduction

- ▶ Proportionality
- ▶ Additional liabilities (CFA success fees and ATE insurance premiums)
- ▶ Costs budgeting
- ▶ Fixed costs

# Proportionality

- ▶ Post 1 April 2013 – the Jackson test
  - ▶ Court will assess what costs are reasonable
  - ▶ Then “take a step back” to consider whether those costs are proportionate
  - ▶ Disproportionate costs are then disallowed even if they were reasonably or necessarily incurred
  - ▶ Any doubt should be resolved in favour of the paying party
- ▶ CPR 44.3(2) – costs to be assessed on the standard basis

- ▶ Factors that may influence the decision, 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.**”

- ▶ Little guidance on what court should do if costs are found to be disproportionate. No Court of Appeal guidance (yet)
- ▶ Proportionality trumps reasonableness and necessity
- ▶ The bare minimum? “*The correct standard is the lowest amount of costs that a party could reasonably have been expected to spend to ensure its case was conducted and presented proficiently*” (Leggatt J, *Kazakhstan Kagazy plc v Zhunus & Ors* [2015] EWHC 404 (Comm))
- ▶ Use of hindsight & target particular items of work rather than a global reduction (as Sir Rupert Jackson recommended)? (Master O’Hare, *Hobbs v Guy’s & St Thomas’ NHS Foundation Trust* [2015] EWHC B20 (Costs))

- ▶ *BNM v MGN* [2016] EWHC B13 (Costs)
  - ▶ Claim for injunction, delivery up and damages
  - ▶ Settled at early stage – undertakings, damages of £20k plus costs
  - ▶ Costs claimed: £241k, including sol's success fee (of 60%), Counsel's success fee (of 75%) and ATE insurance premium of £61k (incl tax)
  - ▶ Detailed assessment: additional liabilities not a violation of Article 10, (subject to proportionality) success fees were allowed at 33% and insurance premium was allowed. Following line by line assessment, the parties agreed the figure of £167k
  - ▶ Hearing, April 2016: court concluded the reasonable costs of £167k were disproportionate and reduced all items (save for the court fee) by 50%

- ▶ Sum in issue: base costs of 3 x agreed damages must be disproportionate, covering work which fell far short of trial
- ▶ Value of non-monetary relief: not substantial on the facts (C took no action for 2 years after her phone was returned, no information had been published in those 2 years and no application for an interim injunction)
- ▶ Complexity: case was neither factually nor legally complex
- ▶ Conduct: little additional work generated by Ds conduct
- ▶ Wider factors: not of wider public importance, no threat of publication and C not seeking in any real way to protect her reputation

- ▶ Additional liabilities
  - ▶ Accepted that the ATE premium was not unreasonable and was necessary for C to purchase it. However, it was disproportionate.
  - ▶ *“It would be absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee...excluding additional liabilities from the new test of proportionality would be a significant hindrance on the court’s ability to comply with its obligations under CPR 44.3(2)(a) to allow only those costs which are proportionate” (Master Gordon-Saker at [31], BNM v MGN)*

- ▶ Why 50% reduction?
  - ▶ No reasons given
- ▶ Lessons from *BNM* (as things currently stand):
  - ▶ Warn clients of risk of low(er) recovery of costs from losing side (“*no more than a contribution*” (Master Rowley, *May v Wavell Group* [2016] EWHC B16 (Costs))
  - ▶ Be prepared to argue proportionality e.g. keep a record of opponent’s conduct
  - ▶ Consider if there are ways of avoiding the proportionality test, e.g. indemnity costs, settlement for specific costs amount, or approved (base) costs incurred at budget stage
  - ▶ Reputation one of the specific factors to be taken into account

## CFAs and ATE insurance (additional liabilities)

- ▶ LASPO : ss44 and 46 (CFA success fees and ATE insurance premiums not recoverable) will not come into force in relation to defamation and privacy claims until Leveson recommendations implemented
- ▶ Government has announced it will review the LASPO reforms towards the end of the period between April 2016 and April 2018
- ▶ Article 10 and additional liabilities:
  - ▶ *Campbell v MGN* [2004] UKHL 22
  - ▶ *MGN v United Kingdom* [2011] ECHR 66

- ▶ *Miller v Associated Newspapers* [2016] EWHC 397 (QB) – success fee and ATE
- ▶ *8 Representative Claimants & Ors v MGN* [2016] EWHC 855 (Ch) – success fee and ATE
- ▶ Court’s approach to ATE recoverability (applying Article 10(2)):
  - ▶ “*Technically different*” to success fees but difficult to see how they should be treated differently
  - ▶ Prescribed by law
  - ▶ Served a legitimate social purpose and necessary that such a scheme should exist
  - ▶ Burden of ATE on defendant publishers not so large as to amount to a disproportionate interference with their right to freedom of expression

# Costs budgeting

- ▶ Proportionality
  - ▶ Consider proportionality of incurred costs at CMC?
  - ▶ Briggs LJ Final Report: CPRC should urgently consider implications – is it the time and place to consider costs incurred as that will lengthen CMCs
  - ▶ Paragraph 7.3 and 7.4 of Practice Direction 3E: court may record comments on reasonableness and proportionality of incurred costs
- ▶ Additional liabilities
  - ▶ *8 Representative Claimants v MGN*: should not be included in the budget
    - ▶ Note inconsistency with *BNM* which held that additional liabilities should not be treated separately to base costs

## Other cases of note

- ▶ *Burrell v Clifford* [2016] EWHC 578 (Ch) – approach to costs in low value privacy cases
- ▶ *Stocker v Stocker* [2015] EWHC 1634 (QB) – Ds costs “*out of proportion*” to issues in stake and were reduced (ensuring a “*reasonably level playing field*”)
- ▶ *Yeo v Times Newspapers Ltd* [2015] EWHC 2132 (QB) – revised budget

## The future: fixed costs?

- ▶ “Fixed costs – the time has come” Jackson LJ speech, 28 January 2016
  - ▶ Recommends fixed costs for all claims with a value of up to £250k
  - ▶ Claims worth £175k - £250k: £70k fixed costs
  - ▶ There could be a % uplift for complex cases such as defamation (presumably not greater than 100%!)
- ▶ Review and consultation announced on 11 November 2016
  - ▶ Initial written responses invited by 23 January 2017: [fixed.costs@judiciary.gsi.gov.uk](mailto:fixed.costs@judiciary.gsi.gov.uk)
- ▶ A cautionary tale:
  - ▶ *Niche Products Limited v MacDermid Offshore Solutions LLC* [2013] EWHC 3540 (IPEC) – Libel claim in a fixed costs regime

▶ Questions?

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