



Proportionality

The “appropriate approach” following West v Stockport



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Proportionality – the origins

- Introduced into the CPR April 1999;
- The perceived problem – that ‘*reasonableness*’ institutionalised the market rate dictated by the profession;
 - “*The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when professional services were rendered.*” (Woolf MR, Lownds [2002])
- The answer? A new test - intended to infect both case management and costs.
- But what did it mean?

Proportionality – the first meaning

- CPR 44.4 – costs had to be *‘proportionate to the matters in issue’*;
- CPR 44.5 – Court had to have regard to *‘all the circumstances...’*
- *Lownds v Home Office* [2002] EWCA Civ 365 – Lord Woolf;
 - If something is necessary, it is proportionate;
 - But a *‘sensible standard’* of necessity;
- So – why not just say *‘necessarily incurred’*?

Proportionality wasn't working

- The perceived problem;

“Proportionality played no part in the taxation of costs under the RSC. The only test was that of reasonableness. The problem ... was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession... If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable...”

The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work.”

(Buxton LJ – Willis v Nicolson [2007] EWCA Civ 1999)

Proportionality wasn't working

- Lownds wasn't working:

“Assessments which have to concentrate retrospectively on what the winning party has spent will always risk producing a disproportionate result.” (Sir Anthony May, PQBD, Cardiff, June 2009)

“to put the point quite simply: necessity does not render costs proportionate” (Lord Neuberger MR, lecture, May 2012)

- Were these criticisms of the proportionality test? Or of a perceived lack of rigour in detailed assessment?



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"I'm sorry, this isn't working. Can't you just teach me some more *old* tricks?"



New, improved Proportionality #2

- Jackson LJ – Final Report;
 - Proportionality cannot simply be judged by comparing the costs to the sum in issue, even in purely ‘money’ claims;
 - There is, therefore, no ‘golden ratio’ in costs;
- A multifactorial test, which must take into account the sum in issue, complexity, conduct and (limited) wider factors;
- Little different to the list of factors relevant to reasonableness;
- Above all, the fact the costs are necessary is not sufficient.



Proportionality #2 – the rule

- New test under CPR 44.3(2) – necessary costs are no longer ‘necessarily’ proportionate;
- But costs are proportionate if they bear a reasonable relationship to
 - the sums in issue in the proceedings;
 - the value of any non-monetary relief in issue in the proceedings;
 - the complexity of the litigation;
 - any additional work generated by the conduct of the paying party; and
 - any wider factors involved in the proceedings, such as reputation or public importance.

What does it mean?

- Fundamental to the revised CPR;
 - In particular, intended to bite prospectively through costs management;
 - No guidance in PD – intention is for judicial guidance as needed
- Court of Appeal in *BNM v MGN* [2017] EWCA Civ 1767;
 - The case where guidance was expected;
 - Of limited utility, save re transitional provisions for additional liabilities;

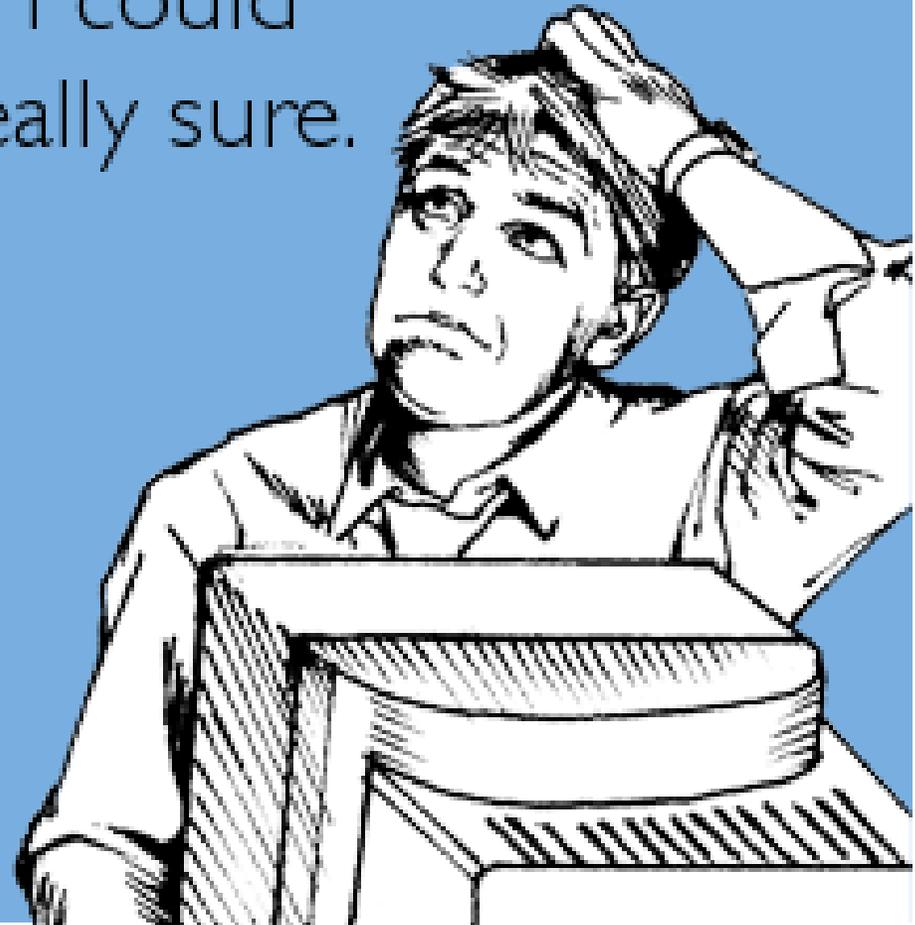
What does it mean?

- Kazakhstan Kagazy v Zhunus [2015] EWHC 404 (Leggatt J)

“The touchstone [of proportionality] is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.”

- Proportionality used synonymously with reasonableness - repeatedly.

I'm so confused. Well, maybe I'm not. I suppose I could be. But, I'm not really sure.





What we do know...

- It applies to costs management;
 - Approved estimated costs must be “*within the range of reasonable and proportionate costs*”;
 - CPR 3 PD 3E paragraph 7.3
- It applies on assessments of all kinds – CPR 44.3 & CPR 44.4;
- It probably should be applied after applying the reasonableness test, but no rule actually says this;
- It does not apply to indemnity basis costs – CPR 44.3(2).

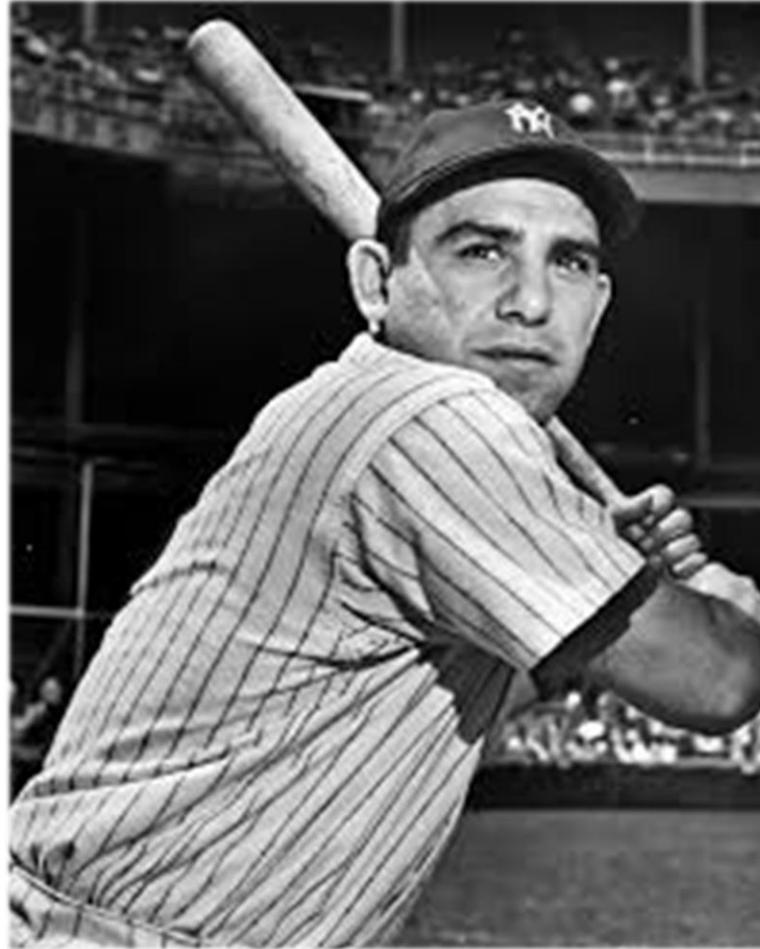
What we do know...

It bites even on budgeted costs – Harrison v UH Coventry [2017] EWCA Civ 792

“a costs judge ... will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of “good reason”) the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party.”

But what does it mean?

- *West v Stockport NHS Trust* [2019] EWCA Civ 1220 - the unexpected occasion for guidance on proportionality;
- Three key points;
 - CPR 44.3(5) is not exclusive. All the circumstances must be considered through CPR 44.1;
 - Costs which are 'inevitable' or 'unavoidable' are proportionate (if reasonable);
 - There is no 'global backstop';
 - Assess the costs for reasonableness. If prima facie disproportionate, revisit 'categories' or 'specific periods' of costs. If these are proportionate, the total is.



“It’s like déjà vu – all over again”

Yogi Berra

Proportionality – in practice?

- On an assessment, a judge will go through a bill line by line by reference to reasonableness – and then decide if the total is proportionate;
- If not, the judge should revisit categories / periods of costs by reference to both CPR 44.3(5) and 44.4(1);
- There should be no global ‘step back’ (query Harrison);
- Impact on budgeting hearings;
 - Focus on categories / importance of comments;
 - Identification of ‘inevitable’ costs.

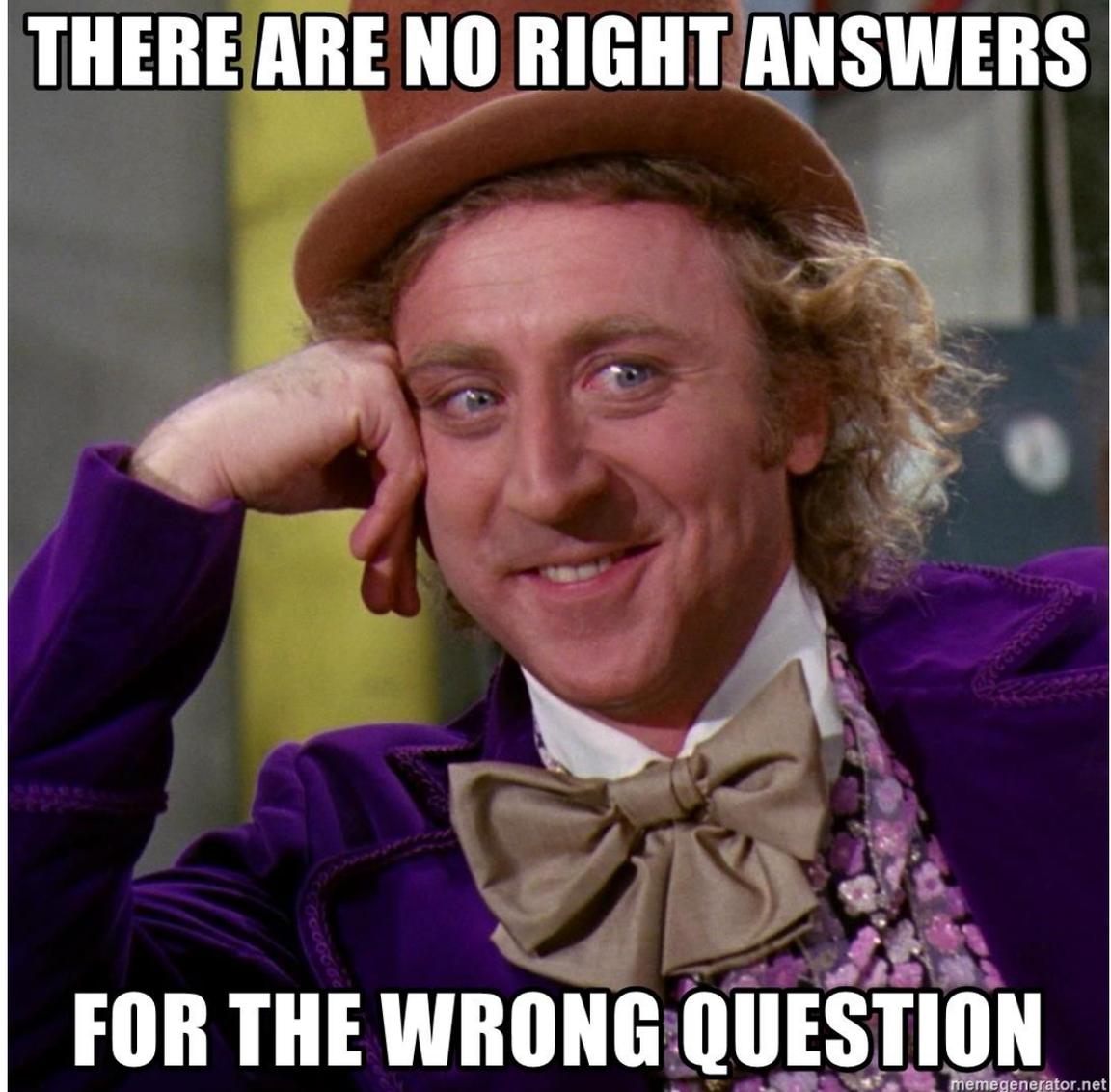
Proportionality – what does it all mean?

- The Jackson concept – of a judge having a broadly discretionary and very robust power to limit costs by a global test – has gone;
- The new approach appears to be a variant on Lownds;
 - Inevitability / unavoidable, not necessity;
 - Looking at all the circumstances, not the limited list proposed by Jackson LJ;
 - More closely tied to the detail rather than the overall picture;
- Its potency on costs management is diluted by approval now being expressly by reference to phases. May still be more potent here than on assessment.



Final thoughts

- Can proportionality of costs ever be achieved in a costs shifting system which is dominated by time based charging?
- Does any attempt to do so not risk injustice?
- Are DBAs and contingency fees the answer?
- Or fixed costs?
- Is proportionality the right question?
- If so, why has it taken 20 years to try and work out what it means?



Thank You



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