



The prospects for consistency & predictability in the application of the 'new' proportionality test

28th March 2017

Roger Mallalieu

The Plan

- The terms of reference – *‘to make recommendations to promote access to justice at proportionate cost’*

- Lownds wasn’t working – see Buxton LJ, *Willis v Nicolson* [2007]

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

- Necessity no longer trumps proportionality – and if that means some claims should not be funded, so be it;

The Rule

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...

(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...

'Simple' Transitional provision in CPR 44.3(7);



The Guidance

The PD – there isn't one;

“Any major civil justice reform is followed by litigation in which parties test the boundaries of the new rule. A few robust Court of Appeal decisions are needed to deal with the points raised. If the rule is supplemented by an elaborate practice direction, opportunities for satellite litigation will increase exponentially, as practitioners explore the relationship between the provisions, possible interstices in the language and so forth.”

“One lesson from the Costs War is that lawyers leave no stone unturned when it comes to arguing about costs.” (Jackson LJ, 31st October 2011)

The Description

“an utter mystery”

“an essentially meaningless concept”

“arbitrary and subjective”

Something that “no one comprehends”

“the current belief that proportionality is a meaningful concept that can be consistently deployed by the courts to enhance access to justice, is [a] delusion”



The Problems (1)

Inherent arbitrariness – fitness for purpose?

Conflation with reasonableness? – see *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404

Practical Application – when and how?

- Where does proportionality bite – and bite hardest?

“[10] ...the forthcoming new approach to proportionate costs...will operate before the issue of the claim form, throughout the life of proceedings, and then at the end of proceedings when costs come to be assessed.”

Lord Neuberger - 15th Implementation Lecture

- What solution to the front loaded, incurred costs dilemma?
- Is proportionality biting at CCMCs?



The Problems (2)

Practical Application – when and how on detailed assessment?

“...the proportionality test must be applied on a global basis.” (Final Report);

The court should first make an assessment of reasonable costs... 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” (Final Report);

“The test of proportionality does not... replace the requirement for the court to consider the bill in detail on an item by item basis. The application of any reduction for proportionality should only take place when each item on the bill has been assessed individually.” (Final Report)

J should not be constrained by a practice direction to approach his task in a particular way. One size does not fit all.” (Jackson LJ, 31st October 2011)

The Problems (3)

Indemnity basis assessments:

Proportionality has no application?

“...the contrast between the descriptions of the standard basis and the indemnity basis in rule 44.4 is so stark, that a direct application of the proportionality principle cannot have been intended [to an assessment on the indemnity basis]. Although the court will bear proportionality in mind when dealing with individual items, it will not cut down the total sum by reference to the principle of proportionality.”

“The sanction for such oppressive conduct will be an order for indemnity costs. Such an order will substantially (although not entirely) free the receiving party from the shackles of the requirement for proportionality”

Does this support the suggestion that Coulson J may have been right about indemnity basis costs orders and budgeting after all?

Elvanite Full Circle Ltd v Amec [2013] EWHC 1643 (TCC)



The Problems (4)

Application to additional liabilities:

“recoverable costs are liable to be disproportionate in every case brought under a CFA. This is because additional sums are added to that which is reasonable and proportionate (viz the base costs) without regard to the proportionality of the total figure.” (Final Report, paragraph 5.23)

- (i) Pre April 2013 claims commenced post April 2013;
 - Does the new test apply to additional liabilities at all?
 - If so, does it apply separately or are they ‘lumped in’ with other costs?
 - How are they to be tested?

- (ii) Post April 2013 claims, but with LASPO exceptions:
 - (i) Media claims;
 - (ii) Mesothelioma;
 - (iii) Insolvency claims;
 - (iv) Clinical negligence recoverable ATE premiums;

The Judicial guidance

Additional liabilities – the SCCO turf war;

- (i) *BNM v MGN Ltd* [2016] EWHC B13 (Costs) – application of new test to both base costs and additional liabilities – though separately – Court of Appeal October 2017;
- (ii) *King v Basildon & Thurrock* [2016] EWHC B32 (Costs) – proportionality does not apply to additional liabilities (under pre April 2013 arrangements);
- (iii) *Murrells v Cambridge University NHS Foundation Trust* (SCCO, 17th January 2017));
 - (i) Does ‘costs’ under CPR 44.3 (still) include additional liabilities;
 - (ii) note in *Murrells & Kings* the additional liabilities were arguably ‘incurred’ pre April 2013
- (iv) *Mather v Doncaster & Bassetlaw Hospitals NHS Trust* (RCJ Besford) (February 2017);
- (v) *Rezel Clarke v Moorfields Eye Hospital* [2017] EWHC B5 – proportionality did apply to additional liabilities. Premium assessed separately (post 4/13 clinical negligence policy);

The Judicial guidance

Other issues on correctness of application to additional liabilities:

Recoverability in principle / breach of Article 10 – the media cases – *Campbell v UK* round two;

- (i) Supreme Court – *Frost v MGN, Miller v Associated Newspapers, Flood v Times Newspaper*;
- (ii) If compatible, possibility of guidance as to how proportionality must be applied to ensure compatibility

Where recoverable in principle, how is the test applied – the clinical negligence claims;

- (i) Court of Appeal *Reynolds v Nottingham University Hospitals NHS Foundation Trust, McMenemy v Peterborough & Stamford Hospitals NHS Trust* – October 2017

Proportionality generally:

BNM, May v Wavell Group PLC [2016] EWHC B16 (Costs) – CA October 2017;



The Solution

“The best way to satisfy the requests for clarification is to convert the five identified factors into hard figures: in other words, to create a fixed costs regime... those seeking certainty about how rule 44.3 (5) will apply are ‘seeking something akin to a fixed fee regime for all cases’”

(Jackson LJ, 23rd May 2016);

Consistency & predictability is not necessarily the aim;

The best advert for:

- (i) Greater use of costs management and expansion to incurred costs;
- (ii) Greater use of fixed costs;

The Advice to clients?

Starting point – knowledge of the rule and transitional provisions;

At the outset:

- Warnings of uncertainty of own costs recovery and adverse costs exposure;
- Compounded by state of flux;
- Only partly mitigated by costs management – see Merrix & Harrison;
- Is the case ‘worth the candle’?

On assessment;

- Proportionality will bite in an appropriate case;
- A more inexact science – your knowledge and experience is the biggest asset;
- Consider discrete offers re base costs / additional liabilities in interim;

Thank You – and Good Luck



NEW SQUARE

4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM

T: +44 20 7822 2000

DX: LDE 1041

E: CLERKS@4NEWSQUARE.COM