



temple garden
chambers

ARGUING PROPORTIONALITY AT ASSESSMENT

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A lesson from history?

LESSON 1

CAN'T WAIT UNTIL
ASSESSMENT TO
CONSIDER
PROPORTIONALITY



1. CONSIDER FROM THE OUTSET

GOTCH

v

ENCELO LTD

EDWARDS-STUART J

“(44) IT IS THEREFORE TIME TO SAY, IN THE CLEAREST TERMS, THAT PARTIES AND THEIR SOLICITORS CAN NO LONGER CONDUCT LITIGATION IN A MANNER WHICH DOES NOT KEEP THE PROPORTIONALITY OF THE COSTS BEING INCURRED AT THE FOREFRONT OF THEIR MINDS AT ALL TIMES.”



2. AT THE COST BUDGET STAGE

GSK v QPR HOLDINGS LTD

STUART-SMITH J

- £800K building dispute
- Costs claimed at £824k
- Agreed 4 day trial required
- C's budget savaged
- Allowed £425k (51%)
- “Astonishing” times on SOCS
- “Absurd” times on W/Stmts

3. REQUESTING PAYMENT ON ACCOUNTS

RALLISON

v

**NORTH WEST
LONDON
HOSPITALS NHS
TRUST**

GARNHAM J

- Clin Neg claim (pre 1/4/13)
- Valued at £3 - £4m
- Liability / causation disputed
- Settled for £450k
- Costs claimed at £1.1m (incl S/Fees)
- IP sought of £574k
- Judge only allowed £307k (incl ATE premium of £100k)
- “Fairly typical” clin neg case.
- Costs did not appear proportionate

WHAT CAN WE EXPECT IT TO BRING?

FRIENDS RE-UNITED?

WORDS OF WISDOM?

THE JACKSON REPORT

“The policy which underlies the proposed new rule is that cost benefit analysis has a part to play even in the realm of civil justice. If parties wish to pursue claims or defences at disproportionate cost, they must do so, at least in part, at their own expense.”

IPA LECTURE FIXED COSTS – THE TIME HAS COME

“Remuneration on a time basis rewards inefficiency.”

“Unrestrained costs shifting drives parties to leave no stone unturned”

KAZAKHSTAN KAGAZY v ZHUNUS

- 2 day application to amend POCS in high value fraud claim before Leggatt J
- Application for payment on account
- Costs claimed at £945k
- Judge held that £325k was a “more proportionate sum”
- Payment ordered of just £220k

“(13) **The touchstone 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..... Expenditure over and above this level should be for a party’s own account”.**

LESSON 2

- In an adversarial system is it safe to leave stones unturned?
- Be clear with your client from the outset re unrecovered costs
- Record / agree any decisions taken in the litigation on purely costs grounds
- CFA Lite: an acute issue?
- See Dunhill v Brook (negligent to send trainee solicitor to attend trial?)

THE RULES

- **CPR 44.3(2):** costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.
- Practice Direction: silence is golden?
- Lord Neuberger's 15th implementation lecture: "the law on proportionate costs will have to be developed on a case by case basis. This may mean a degree of satellite litigation."
- Jackson's proposed table of fees (£30k for claims in which damages of £50k - £100k recovered after 5 day trial anyone)?

NO FLOOD WARNINGS NECESSARY



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BP v CARDIFF & VALE UNIVERSITY **LOCAL HEALTH BOARD**

- Clin neg claim for £440k
- Settled shortly before trial for £205k
- Costs claimed £586k incl SF
- Cost pre and post 1/4/13
- Base costs post 1/4/13 = £138k
- Costs claimed were within approved budget figures.
- Satisfied on proportionality so no reductions made.

3 Valuable Lessons

- **Confirmation of the Neuberger (two-stage) approach.**
- **Can Additional Liabilities be taken into account when considering post 1/4/13 proportionality? (old CPD 11.5 gone).**
- **Format of Bill: should be divided pre and post 1/4/13.**



HOBBS v GUY'S & ST THOMAS'

- Clin Neg claim, elderly Claimant
 - Sent to wrong clinic, few weeks delay in treatment
 - Claim settled for £3,500
 - Costs claimed at £32,000
 - Provisional Assessment
 - £11,000 reasonable costs
 - £9,900 proportionate costs
- A. Zhunus not followed – didn't go far enough in low value cases!**
 - B. Targeted individual items rather than global % reduction**
 - C. Explicitly used hindsight**
 - D. Excluded cost of drawing / checking Bill from consideration**

BUDGETING v DAH

CPR 44.3(5)

Reasonable relationship to

- **Sums in issue**
- **Value of non-monetary relief**
- **Complexity**
- **Conduct**
- **Wider factors**

- Hourly rates, incurred costs.
- Are the costs claimed within budget (for each phase?)
- Has the value of the claim changed since the budget set?
- What did the real issues turn out to be? (Hindsight
- Conduct – crucial for RPs

AND FINALLY

PREVENTION IS BETTER THAN CURE

- BROADHURST v TAN (indemnity costs even trump fixed costs)
- Effective (& early) Part 36 offers