

Arguing proportionality at detailed assessment

- With occasional musical diversions

P.J Kirby QC

26 April 2016

It's too late? – Carole King

- ▶ If you're considering proportionality for the first time at the detailed assessment that's much too late

Who'd be a solicitor? Who'd be a client?

- ▶ 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* [2016] EWHC 165 (QB) (negligent to send trainee solicitor to attend trial?)

Let's start at the very beginning – Sound of Music

- ▶ Edwards-Stuart J in *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC)
- ▶ *“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.”*

The winner takes it all - Abba

- ▶ Wrong
- ▶ CPR 44.4 – if assessing costs on the standard basis
 - Proportionately and reasonably incurred
 - Proportionate and reasonable in amount

The winner takes it all - Abba

- ▶ Possibly
- ▶ Indemnity costs
- ▶ Even trump fixed costs – *Broadhurst v Tan* [2016] EWCA Civ 94
- ▶ Importance of well judged Part 36 offers
- ▶ Proportionality not a factor save where overlaps with unreasonableness
 - Unreasonably incurred
 - Unreasonable in amount

Money on my mind – Sam Smith

- ▶ At the cost budget stage
- ▶ *GSK v QPR Holdings Ltd* – Stuart Smith J
 - £800k building dispute
 - Costs claimed £824k
 - 4 day trial
 - Allowed £425k (51%)
 - “Astonishing”
 - “Quite simply absurd”

Cost budgeting – Help – the Beatles

- ▶ Not a detailed assessment of costs in advance but
- ▶ Approved budgets “will be a strong guide as to the likely costs order to be made after trial” *Sarpd Oil v Addax Energy* [2016] EWCA Civ 120

Group Seven Ltd v Ali Nasir & others [2016] EWHC 620 Ch

- ▶ Consideration of proportionality at costs budgeting stage
- ▶ Proportionality is central concept in the CPR – can result in non-recovery of costs even if reasonable and necessary
- ▶ £5m costs disproportionate re claim for £7m. Combined costs disproportionate
- ▶ Not complex. Not sophisticated. Factual dispute

Money that's what I want – Barrett Strong

- ▶ **Payments on account**
- ▶ *Rallison v North West London Hospitals Trust* Garnham J
- ▶ £3-4m clin neg claim settled for £450k – costs £1.1.m
- ▶ Lownds test re proportionality
- ▶ *“..a claim for £1.12 million of costs for the period up to the start of a trial of this sort is extraordinary and disproportionate. ...if the total claim appears disproportionate and there are grounds for concern about the necessity of some of the items claimed then I should limit the interim award to a figure that reflects those concerns.”*

Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404

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

Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404

- ▶ Leggatt J – payment on account application
- ▶ *“What is reasonable and proportionate ... must be judged objectively. 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**, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party.”*

At last – Etta James

- ▶ Perhaps not the romantic yearnings of the song but starting to get decisions

BP v Cardiff & Vale Uni Local Health Board

- ▶ Master Gordon-Saker – SCCO – 17.8.15
- ▶ Complex clin neg – settled £205k, bill £586k, base costs £295k
- ▶ Claim commenced after 1.4.13 but pre 1.4.13 CFA
- ▶ Pre 1.4.13 costs “did not appear to be disproportionate”
- ▶ Post 1.4.13 costs “were not disproportionate”
- ▶ Standing back not disproportionate – complex clin neg claim – costs allowed likely to be within the budget approved by the court

Hobbs v Guy's & St Thomas' NHS

- ▶ SCCO 2.11.15 Master O'Hare
- ▶ *“ the primary purpose of this reserved judgment is to state and explain my decision as to proportionality.”*
- ▶ Clinical negligence – delay – operation 1 hour longer?
- ▶ Settled £3,500 plus costs
- ▶ 2 proportionality tests applied
- ▶ Jackson Report – assess what's reasonable and if not then proportionate make appropriate reduction

Hobbs v Guy's & St Thomas' NHS (cont'd)

- ▶ Leggatt J in *Kazakhstan Kagazy* may not apply where reasonable costs will inevitably exceed value of claim
- ▶ Decided to "target particular items of work which it was disproportionate to do in the particular circumstances of the case"
- ▶ Reasonable to incur these costs but unfair to expect D to pay
- ▶ Rule against the use of hindsight in costs assessment (*Francis v Francis and Dickerson [1955] 3 All ER 836*) is a rule based upon reasonableness, which, today, is trumped by proportionality

Hobbs v Guy's & St Thomas' NHS (cont'd)

▶ Lessons?

- Zhunus not followed – didn't go far enough in low value cases!
- Targeted individual items rather than global % reduction
- Explicitly used hindsight
- Excluded cost of drawing / checking Bill from consideration
- Result?
 - Reasonable costs - £11,000
 - Proportionate costs - £9,900

Tips?

- ▶ Make sure that proportionality is raised in the Points of Dispute
- ▶ Try to avoid a generic point of principle on proportionality and relate to the actual case in issue!
- ▶ Which approach to proportionality are you going to ask the judge to take?

Tips?

- ▶ The factors in CPR 44.4(3) are relevant to reasonableness and proportionality
 - Conduct – attempts to resolve dispute
 - Amount involved
 - Importance of matter to parties
 - Complexity of matter

Tips?

- ▶ CPR 44.4(3)(h) – “the receiving party’s last approved or agreed budget”
- ▶ Budget was prospective but at DA can take a retrospective look at the costs when considering proportionality

Tips?

- ▶ Mere assertions are not enough
- ▶ Why was it a particularly complex matter?
- ▶ Why was it particularly important to the client?
- ▶ How and why were costs increased as a result of the paying party's conduct?

I wasn't expecting that – Jamie Lawson

- ▶ Over researching topics
- ▶ Squeezy @squeezyapp .
- ▶ If you are doing your pelvic floor exercises but bladder/bowel symptoms unresolved, ask to see a pelvic physio for **detailed assessment**
- ▶ Spotify – Proportionality by Crocodile Pills

All clear?

.....thank you