

Is the Approach to Proportionality too harsh?

**White Paper Costs Conference
1 March 2018**

*Alexander Hutton QC,
Hailsham Chambers*

Proportionality

- **Previous approach:** Lord Woolf LCJ in *Lownds v Home Office (2002)*:
- (1) A global approach at the outset: do the costs appear proportionate? if so, assess on the basis of reasonableness;
- (2) If disproportionate, assess on the stricter test of necessity. If it was necessary, and the amount is reasonable, those costs are allowed.

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Lownds

- The end result was often a figure for costs allowed by the court which could be vastly greater than any damages – fair?
- Why should uneconomic claims be brought at all?

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Lownds

- CA (Woolf LCJ, Dyson and Laws LJ) rejected approach of assessing costs first and then standing back, taking a view and reducing to a figure which looks proportionate –
- this was “*double jeopardy*” – para 30
- Jackson LJ disagreed.

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The Jackson Report

- In his ***Review of Civil Litigation Costs: Final Report*** (Chapter 3), Sir Rupert Jackson was critical of the Lownds approach, “*disproportionate costs do not become proportionate because they were necessary*” (para 5.10) and continued (para 5.13):

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Jackson's Prescription

- “... I propose that in an assessment of costs on the standard basis proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). 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.”

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Proportionality

- New Rule 44.3(5):
- “Costs 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”.

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- CPR 44.3(2):
- *“Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.”*

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- Lord Neuberger MR (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 while the courts work out the law, but we should be ready for that, and I hope it will involve relatively few cases.”*

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Practice Direction?

- Jackson LJ thinks the position so simple there was no need for guidance from a Practice Direction.
- The Practice Direction adds nothing at all.
- Thanks a lot...

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The Solution?

- Need a new step so that if the item by item assessment applying reasonableness and/or proportionality process produces a figure which seems too high at the end, you simply reduce it to a figure which isn't.
- Simple, eh?

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Problems with Jackson?

- (1) What is a “reasonable relationship”? A set percentage of damages? If not, why not?
- (2) Even if you can compare costs with damages, how do you compare them with complexity or importance?

Problems with Jackson?

(3) How are you supposed to advise your client at the outset?

(4) Why as a matter of principle if costs are necessarily incurred to achieve justice for a wronged person shouldn't the wrongdoer pay them? A charter for the tortfeasor/wrongdoer?

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Problems with Jackson?

(5) It's arbitrary: almost totally in the eye of the assessor.
How can you appeal without any science to apply?

(6) An approach of the Judge arbitrarily fixing a tariff without looking at the detail of the costs was not allowed under the old rule as arbitrary as not being a genuine assessment of the actual costs:

- see a succession of cases following *1-800 Flowers Inc v Phonenames* [2001] EWCA Civ 721
- Do you not even bother with the reasonableness test if you know what your “Stand Back” figure is?

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Problems with Jackson?

- And uncertainty is the enemy of costs saving.
- And encourages satellite litigation...

Decisions on Proportionality

- The transitional provisions are such that its impact has been limited to cases which “*commenced*” (presumably issued) after 1.4.13:
- CPR 44.3(7) states that “*[the new rule] does not apply in relation to (a) cases commenced before 1st April 2013; or (b) costs incurred in respect of work done before 1st April 2013*”.

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Proportionality

- Meaning?
- (1) Cases issued before 1.4.13 – *Lownds* (and not the new rule) applies throughout even for costs incurred after 1.4.13
- (2) Cases where costs were started to be incurred prior to 1.4.13 but issued after 1.4.13 – hybrid – *Lownds* for pre-1.4.13, new rule for costs incurred after 1.4.13
- (3) Cases where work begun on or after 1.4.13 – new rule applies throughout

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Decisions

- Precious few authoritative decisions thus far.
- *Vitol Bahrain v Nasdec General Trading Co and others* (5/11/13 Males J, Commercial Court)
- As an urgent new case the Rule applied: unusual.
- 1 day inter partes hearing on whether anti-suit injunction granted without notice should continue

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Vitol Bahrain

- Underlying claim worth US\$119 million
- Claimants sought £242,000 costs (inc without notice application costs),
Defendants £165,000 (excluding those costs).
- Defendant won.

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Vitol v Nasdec

- “*A typical one day Commercial Court application such as might be encountered on any Friday.*”
- “*I consider these figures on both sides represent charging on an epic scale*” re a limited issue of whether the case should proceed in England or the UAE where neither party contended justice could not be done in the UAE court.

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Proportionality

- *“It is important that the message should go out loud and clear that the Commercial Court will not assess costs summarily in such disproportionate amounts merely because the figures on both sides are broadly comparable...”*
- Defendants allowed broad brush figure of £75,000 without any apparent line by line consideration of the figures
- Why £75,000? Why not £50,000? Or £100,000?

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Kazakhstan Kagazy v  hailshamchambers
Zhunus [2015] EWHC 404

- Another large commercial case, many millions at stake, £945,000 costs claimed for a 2 day hearing. Leggatt J had to decide on an appropriate payment on account:

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Kazakhstan Kagazy

- *[13] In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings.*
- *It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context 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..*

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Kazakhstan Kagazy

- *This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests.*
- *There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants.*

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BNM v MGN Ltd [2017] EWCA Civ 1767

- Billed as the “*New Lownds*” that would tell us all the answers
- Privacy case where woman who had relationship with Premier League footballer lost her phone and it was returned to her family by the People newspaper, nothing published
- Settled for £20K damages, costs claimed £242K

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BNM – Senior Costs Judge

- Senior Costs Judge Gordon-Saker:
- (1) While it was entirely a post-March 2013 case, it was a privacy case so a “*pre-commencement funding arrangement*”
- (2) The new proportionality rule applies to such cases, both in relation to base costs and additional liabilities;
- (3) Costs were assessed on a reasonableness basis at £167K, and then on applying the “stand back” proportionality test, effectively halved each of the global items for profit costs, counsel and the ATE premium and allowed £86K

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BNM in Court of Appeal

- Held:
- (1) SCJ was wrong to find that the new rules apply to pre-commencement funding arrangement additional liabilities:
- the effect of the transitional provisions was that the old *Lownds* approach applied to the additional liabilities, but the new test applied to the base costs and necessarily those two tests are applied separately and not globally;

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BNM on the new test?

- (2) They ducked the Claimant's appeal on the application of the new proportionality test on the base costs (which had been part of the appeal), and remitted it all back to the Senior Costs Judge
- They didn't have to duck it...

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BNM

- **Not** the “*New Lownds*”...
- We are still waiting for one.

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May and May v Wavell Group

- HHJ Dight (Central London CC) January 2018, on appeal from Master Rowley
- First world problems:
- Basement noise dispute in Holland Park.
- BVI registered company owned property
- Settled for £25,000, costs claimed £208K
- Directly instructed counsel conducted the case

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May – Master Rowley’s Approach

- 2 stage approach, first reasonableness: assessed at **£100,000**
- Then proportionality: going through the factors in CPR 44.3(5) – nothing exceptional – undoubtedly disproportionate
- Not stepping back item by item globally
- Bear in mind expert was necessary but settled early: proportionate figure **£35K plus VAT**
- **“Broadsword”** and **“Blunt Instrument”**

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May Appeal – HHJ Dight and Master Whalan

- Not challenged reasonableness assessment
- Agreed that “double jeopardy” is inherent part of the new rules
- Held (1) that the Master was wrong to take it as a £25K damages claim but should have determined the value on the basis of an “objectively realistic figure” (as claimed) at £50K-£100K

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May – HHJ Dight

- (2) Master wrong to find it was not complex – it was relatively complex for its value;
- (3) Master was wrong to reduce the overall figure further on the basis that it settled early
- So he misapplied the proportionality test
- Appeal allowed: £75,000 plus VAT a fair figure (cf to £100K on reasonableness assessment which was not challenged)
- Permission to appeal to the Court of Appeal now sought

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Are Additional Liabilities subject to the new proportionality rule?

- (1) *BNM* applies for LASPO-exempted - Privacy/libel/publication claims where there is a “*Pre-commencement funding arrangement*” but the proceedings are started post-March 2013: new proportionality test on the base costs, old proportionality costs on the additional liabilities;
- (2) Non-LASPO pre-April 2013 claims – old rule applies to base costs (if issued pre-April 2013, if issued post then new rule) and the old rule applies additional liabilities, per *BNM*

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Lowds or New Rule?

- (3) Clinical Negligence premiums recoverable post-LASPO (2013 No.2 Regs): Lownds or new rule?
- *McMenemy v Peterborough & Stamford Hospitals NHS Trust* [2017] 6 Costs LR 973 (CA). Held:

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Court of Appeal's Conclusions

- (1) Argument that they were not subject to assessment at all rejected and the CPR applies;
- (2) New test of proportionality applies to them, not *Lownds*;
- (3) *Callery v Gray* re reasonableness of taking it out at the outset still applies;

CA on Clin Neg Premiums

- (4) *Rogers v Merthyr Tydfil* [117] still applies – the court should not second guess the insurance market
- (5) Questions of amount did not arise and we will have to wait for a decision in further cases this summer.

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Proportionality and Costs Budgeting

- *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792:
- Decided that costs management does not just operate as a “cap” i.e. maximum amount, but a fixed figure which will only go up or down if there is a “good reason”
- The costs managing judge will consider whether the costs fall within the range of reasonable and proportionate costs in PD 3E
- But also para 52:
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Harrison on Proportionality

- But also at [52] per Davis LJ:
- *“I add that where, as here, a costs judge on detailed assessment 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.”* **More uncertainty?**

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The Alternative to Proportionality

- “*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, 23.5.2016)
- Be careful what you wish for...