Handout for White Paper Conference Talk

15 May 2019

Various Claimants in Wave 1 of the Mirror Newspapers Hacking Litigation v MGN Limited

(1 June 2018)

Paragraphs 39 and 40

39. I cannot accept the Claimants' submission that the court should consider the proportionality of the individual costs alone. It seems to me that when considering the proportionate base costs of the individual claims one must have regard to the sums agreed for common costs. The costs which are being assessed are the costs of the claims. In relation to any particular Claimant those costs have been divided between a common costs bill and an individual bill but the costs of that Claimant's claim is the aggregate of that Claimant's share of the common costs and that Claimant's individual costs.

40. The common costs have been agreed between the parties as proportionate. In aggregating the appropriate share of the common costs with the agreed reasonable base costs, I have to bear in mind that the part representing common costs has been agreed as proportionate. It is not an irreducible minimum for the overall costs of the claim. It is the reasonable and proportionate figure for the work that was described in the common costs bill.

Paragraphs 74 to 76

74. Rule 44.3(5) does not identify any of the five factors as being more important than the others. Inevitably it is easier to consider whether one sum bears a reasonable relationship to another than whether a sum bears a reasonable relationship to an abstract concept. However I cannot accept the Defendant's submission that the sums in issue and the value of the non-monetary relief are the primary factors.

75. The rule does not prevent the recovery of costs in an amount greater than the sums in issue in the proceedings. Had that been intended it could easily have been stated. Financial value is but one of the five factors and so there will be cases where, by reason of the other four factors, the costs are proportionate even though they exceed the sums in issue.

76. In my judgment this is such a case. The value of the non-monetary relief and the wider factors I have sought to identify justify the conclusion that the costs can be proportionate even though they exceed the damages.

Sarah Jane Reynolds v One Stop Store Ltd (21 September 2018)

Paragraph 106

(106) I come to ground 4 – the general approach. As I have already indicated, DJ Reeves did not err in taking proportionality at the end, and in the round, nor in applying it to the whole of the provisional total, that is, to both incurred and budgeted costs. He did not fail to consider each of the 44.3(5) factors in turn, and he properly then turned to draw the threads together, coming to a decision on proportionality in the round. I also consider that he sufficiently conveyed how those factors interacted and fed into his view on proportionality, when giving his oral decision, building on the earlier discussions during the hearing. In short, it is quite clear that he considered that the costs were disproportionate to the sums in issue (about which he took a properly-reasoned view), and that this was not a case where the complexity of the litigation, additional work generated by the paying party's conduct, nor any other factors in the Rule 44.3(5) list, had a countervailing impact, such as to lead to a different overall conclusion.

Paragraph 59

(59) The fact that the Court, when conducting a detailed costs assessment, may bring proportionality to bear on *all* of the costs, does not, in my view, mean that there is a form of double counting, by the Court as it were *further* cutting down for proportionality, costs which may have already been cut down for proportionality. Rather, the Court is simply applying, and then later reapplying, the same filter at two different stages. At the assessment stage it does so with the benefit of different information, and bringing hindsight to bear, which it is entitled to do.

Paragraph 71

(71) Further, the overriding requirement is that the costs "bear a reasonable relationship" to the Rule 44.3(5) factors. This masterly choice of phrase itself confers a degree of latitude on the assessing Judge in coming to a discretionary value judgment. It is designed, it seems to me, to provide a temper to the rigours of the "trump card" status of proportionality, and its role as a safeguard for payers, so that, without detracting from that, it need not bear oppressively on payees.

Claris Powell (acting in her own capacity & as Co-Administratrix to the estate of Mikey Powell & 7 Ors v Chief Constable of West Midlands (10 July 18)

Paragraphs 28 to 32

28. On behalf of the Claimants, Mr Westgate QC submitted that it would be unfortunate if the court found the costs to be disproportionate by reason of the costs incurred in attending the criminal trial and inquest and then disallowed all or a large part of those costs on the basis that they were not recoverable in these proceedings. The test of necessity

should be applied only to the balance, he submitted, which may not of itself have been disproportionate.

29. However it seems to me that the court has to adopt the two-stage approach identified by Lord Woolf. The first stage is to decide "whether the total sum claimed is or appears to be disproportionate". If the test were to be applied after decisions had been taken to reduce the costs, for whatever reason, the logical conclusion would be that the test should be applied only at the end of the line by line assessment. If, for example, the costs of attending the criminal trial were to be disallowed and not then taken into account in considering proportionality, why should not any other costs disallowed on the basis that they were unreasonable not then be taken into account?

30. The Claimants' solicitors have chosen to include the criminal trial and inquest costs as part of the costs of the civil proceedings and the court cannot, I think, hide or disregard those costs when considering the proportionality of the total. They are part of the total.

31. That said, by the same token it seems to me that when considering the proportionality of the total, one should have regard to the work that made up that total, including attending the Crown Court and the inquest, whether or not those costs end up as being recoverable.

32. The pre-2013 test of proportionality, like its successor, did not have any formula for deciding what figure would be proportionate built into it. The test suggested by Master Hurst1 of whether a client of adequate means would be prepared to pay that level of costs out of his own pocket, may be helpful in some cases. However it is likely to be less helpful in a case which raises issues of public importance, such as the present, where the award of damages may not be the most significant factor driving the litigation. Essentially therefore whether the costs claimed appear to be disproportionate is one of judgment and feel based on the experience of the costs judge deciding the question.2 It probably goes without saying that, in deciding that question, a costs judge in 2018 must put out of mind the more stringent test of proportionality which has been in force for the last 5 years.

JLE (a child by her mother & litigation friend ELH) v Warrington & Halton Hospitals NHS Foundation Trust (20 December 2018)

Paragraphs 40, 41 and 43

40. Taken together in my mind the most significant factors are (1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten.

41. In all the circumstances in my judgment the 'bonus' of 10% in this case would be a clearly disproportionate sum and it would be unjust to award it. That is also the case when one looks at

the overall effect in the round of what would be the cumulative penalties in sub-rules (a)-(c) added to (d).

…

43. To summarise my judgment: consistent with examples cited to me from both appeal courts and courts of coordinate jurisdiction with myself, I hold that the court should apply the test of 'injustice' separately for each part of rule 36.17(4) as well as in the round, as was the approach in *Ayton*, and that where one is considering the 10% 'bonus' under sub-rule (4)(d) it is appropriate to disallow that sum if in all the circumstances the level of bonus is clearly disproportionate relative to the margin by which the offer was beaten, especially where a bill has been significantly reduced on assessment and where the margin by which the offer is beaten is small. There may well of course be other circumstances where one would disapply the sub rule but on the facts of this case I have concluded that this is a case where the award of the 10% figure would be disproportionate.

Maiden London Ltd v Ruddick & Anor [2018 EWHC 3684 (QB)

Paragraph 7

(7) On 21 July 2016, the Secretary of State made a partial award in relation to all three appeals. The Appellant was ordered to pay the Respondents' costs incurred in the first and second appeals, limited to those costs incurred from 2 March 2015 (inclusive) less any expense commonly incurred in all three appeals. The Appellant was also ordered to pay the Respondents' costs incurred in relation to the third appeal, less any expense commonly incurred in all three appeals. Such costs were ordered to be assessed in the Senior Courts Cost Office if not agreed.

Paragraphs 52 to 54

(52) The Appellant contended that the Deputy Master took account of matters that were not relevant to the value of any relief in the proceedings when considering the issue of proportionality and so maintained that the Deputy Master failed to apply the test properly. Presumably, the implication, although not expressly stated, is that the Deputy Master has arrived at an assessment that is too generous to the Respondents.

(53) The Respondent, by contrast, contents that the deputy master failed to give sufficient weight to the complexity and importance of the issues and has reduced the total by 33 per cent without justification. The implication, again not expressly stated, is that her assessment was unduly mean to the Respondents.

(54) I have considerable sympathy for the Deputy Master. As she observed, the conduct of both parties throughout was such as to put them at loggerheads rather than seeking to engage in a collaborative manner consistent with the overriding objective. She noted that she had experienced that conduct over the two days of the hearing. That conduct has continued through the appeal. I note that the parties were unable even to agree the terms of an order reflecting the deputy master's decisions, including her grant of permission to

appeal. I have seen some correspondence about this issue and am decidedly unimpressed with the conduct on both sides and echo what the Deputy Master said.

Paragraph 59

(59) In hope rather than any expectation given the history I would urge the parties to consider whether they might now reach a sensible consensual resolution. I am sure neither party seriously intended matters to become so protracted. Even at this stage it seems to me that litigation risks exist on both sides. I stress that the exercise of the discretion in relation to proportionality is again at large. For my part, without expressing any concluded view at all, I consider that the unfairness identified by Mr Stacey in applying what was probably a bad order, may have some bearing on the exercise of that discretion. I say no more than that.

Stevens v Watts (HHJ Alton) per Lownds v Home Office

"In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality."