CHALLENGING REASONABLENESS & PROPORTIONALITY

JUDITH AYLING KC

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Reasonableness & Proportionality

- Question: in light of recent cases, how can you effectively challenge the reasonableness and proportionality of claimants' costs and secure a successful outcome for your clients?

- Answer is against the background of the (not very new) proportionality test and of costs management

- Civil Justice Council Costs Review: Final Report (2023): usefulness of costs management re-affirmed. MR endorses recommendations in Nov 2023 and CPRC is taking forward pilot schemes.

The basics

- Proportionality is part of the overriding objective, so it applies at every stage; all case management decisions must be made against the obligation of the court to deal with cases at proportionate cost
- Dynamic not static. What if the value of a claim drops during its course, e.g. a C has to discontinue one head of loss. Proportionality may alter. Significant development and revised budgets CPR 3.15A.
- If it's going to cost £6M I don't want it.
- No case is too big to costs budget?

The basics

- But in pure costs terms the key provisions are
  - CPR 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; and (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
  - CPR 44.3(5) Costs incurred are proportionate if they bear a reasonable relationship to (a)-(f)

The basics

- CPR 44.4(1) The court will have regard to all the circs in deciding whether costs were … proportionately and reasonably incurred or proportionate and reasonable in amount
- CPR 44.4(3) The court will have regard to (a)-(g) 44.4.(3)

Pan-Nox Emissions Litigation

- [2024] EWHC 1728 (KB); Constable J and Senior Costs Judge Gordon-Saker
- 3-day hearing, 1,071 costed phases across C/D budgets, by conclusion of tranche 2 case will be 33% done, costs submitted are "eye-watering sums" - Cs' incurred and estimated = £342M; Ds = £306M
- Parties agree that the Court can substitute an approved phase in place of an agreed phase (para 22ff, "fully justified in the particular circs")
- Court accepts Ds' invitation to comment on incurred costs, to be taken into account in any later DA (CPR 3.15(4)).
- Court reminds itself spend/recovery (enough to put the sums "well within the foothills of disproportionality") is not the only measure of proportionality

Pan-Nox Emissions Litigation

- Para 33 “Moreover, proportionality is, of course, not the sole benchmark against which recoverability is measured: costs have also to be *reasonable* . The costs claimed have to bear some resemblance to the work reasonably required to properly, but efficiently, advance these claims. As explored more fully below, there appears to be little effort – nor, it seems, incentive – to run this litigation in a manner so as to minimise, as far as is reasonably possible, the number of lawyers and the hours they suggest they need to work in order sensibly to progress this litigation.”
- Para 35 “it does take two to tango: over-lengthy, unnecessarily argumentative or wasteful correspondence may still have to be read (ideally once), but it can be appropriately responded to politely and briefly. It does not necessitate reciprocity. As indicated during submissions, the Court will not sanction this outdated approach to litigation in the 21st century through Costs-recovery”

Pan-Nox Emissions Litigation

- Para 36 “Whatever the reason, the staggering costs both incurred and estimated are in numerous individual respects and in the aggregate frankly absurd and – whether or not the Claimants still intend to incur and charge for work on such a basis – this Court will not sanction this wholly unreasonable expenditure of costs”
- Para 39 Ds’ costs are too high, even where agreed, and if Cs have agreed them and used aggregate of agreed sums as springboard to justify own exorbitant costs – no thanks.
- Para 74 “in general costs have been reduced because the extent of time (and in relation to Counsel overall time/cost) underlying the figures claimed is excessive.”

Pan-Nox Emissions Litigation

- The nature and extent of the work required to litigate the claim was the key factor, rather than the value of the claims.
- Reduce Cs' estimated costs from £207 million to £51.8 million
- Reduce Ds' estimated costs from D £211.7 million to £113.9 million

PXT v Atere-Roberts

- [2024] EWHC 1372 (KB)
  - Master Brown decides to budget a child's claim
  - *Considers CIP v Galliford* and *CXS v Maidstone and Tunbridge Wells NHS Trust* [2023] EWHC 14 (KB) Master Cook where D's application had been rejected – timescales are different
  - Said to be worth more than £10M (2nd reason why auto costs budgeting does not apply) but D successful on application to budget by reason of very serious concerns that without budgeting the costs would be become excessive and unreasonable; costs appeared to be escalating between hearings and likely to exceed £1M by time of next CMC; "clear and compelling reason" to budget

KB warning

- Senior Master Guidance 26 Sept 2024 *The parties are reminded that the provisions set out in CPR 44.2 apply, see Reid v Wye Valley NHS Trust [2023] EWHC 2843 (KB). Parties who (1) pursue unreasonable or unrealistic claim for costs, or (2) fail to take reasonable steps to agree budgets or make reasonable offers in respect of the costs, may be the subject of adverse costs awards (whether or not Calderbank or other admissible offers have been made or beaten).*

Reid v Wye Valley NHS Trust

- [2023] EWHC 2842 (KB)
  - Master Brown makes substantial reductions to C's clin neg budget (case man Master Stevens, value c£1M)
  - D says "no reasonable endeavours were made by the C" to negotiate in advance so that no order for costs should be made
  - Elements of budget unrealistically high, inc as pursued and maintained at hearing "outside bracket of realistic contention" and concern about Cs or solicitors advancing budgets "without any real constraint or consideration as to whether the claim was reasonable".
  - Costs in the case but should the C recover them, 25% reduction (cautions re too high a sanction in case deters Ds from making realistic offers; it may be that that sort of % reduction encourages reasonable steps to negotiate budgets and achieve settlement

Worcester v Hopley

- [2024] EWHC 2181 (KB) Master Thornett
  - Again, case man before costs man. "A short interim period is designed during which the budgets can be adjusted to reflect the directions by then given."
  - Estimated costs sought a total figure of £342,263 approved at £159,675; costs budget reduced by 53.35%
  - Court expectation that the intervening period provided should prompt the parties to reconsider their positions … a party that resolutely proceeds to a separately listed costs management hearing with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties engaged without any potential consequence in costs.
  - No order for costs hearing on 15 May; C to pay D's costs hearing on 16 July; C's costs management costs reduced by 15%

Jenkins v Thurrock Council

- [2024] EWHC 2248 (KB) Master Thornett
  - Again, case man and then costs man. At case man hearing court had made prelim observations about apparent disproportionality of C's budget;
  - C's budget unrealistic and inappropriately ambitious despite opportunity to modify
  - Hearing could have been avoided if more sensible approach had been taken to costs claimed
  - C to pay D's costs of the costs man hearing and subject to a 35% reduction in their own costs of budgets

GS Woodland Court GP 1 Ltd & anor v RGCM Ltd

- [2025] EWHC 285 (TCC) (Constable J)
- In a multi-party construction dispute, Cs ordered to pay four Ds' costs of the CMH (limited to the costs of attendance of counsel and one solicitor) and ruled that Cs would bear their own costs in any event.
- According to *Worcester*, "a party that resolutely proceeds to a separately listed [CMH] with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties engaged without any potential consequence in costs".

GS Woodland Court

- Constable J fully endorsed Master Thornett's approach. He also agreed that, in considering whether a party had "succeeded" in this context, it was not determinative that the sum allowed exceeded the amount offered, or that a reduction had been achieved. The word "resolutely" was important.
- The court had to step back, examine the numbers and determine whether the case was on the wrong side of the line. It clearly was. C had sought £8.74 million. The highest offer received was £3.539 million. C recovered £4.212 million. Given the scale of the reduction, C's Precedent H was obviously unrealistic as to reasonableness and proportionality. Furthermore, Constable J had made various observations about the hours on a phase-specific basis (including describing them as "implausible"). *Samsung Electronics Co Ltd v LG Display Co Ltd (Costs)* [2022] EWCA Civ 466 indicated that there would (given the absence of meaningful justification) be a significant reduction from the rates claimed, making it "pretty obvious" what the court's approach would be to C's rates.

Lessons

- Make your own budget sensible
- Poss to get an adverse costs order in costs management or a reduction
- Be sensible about it
- Make a sensible offer

Questions?