

## COSTS: Keep it in proportion

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### **Gwendoline Davies and Claire Acklam make sense of the rules and recent case law on proportionality of costs**

Proportionality. Since the introduction of Jackson LJ's sweeping reforms to civil litigation procedure in England and Wales in 2013, this word has had a fundamental impact on the level of legal costs a successful party can recover from its opponent at the conclusion of a case, and consequently on a party's decision whether to litigate at all. No party wishes to incur unreasonable and disproportionate costs, but there is often a disconnect between costs reasonably and necessarily incurred in the context of the litigation, and costs which the court may consider to be proportionate. While the Civil Procedure Rules (CPR) provide rules and guidance which go so far, there is currently no prescriptive method for ascertaining proportionality of costs and the approach taken by the judiciary varies on a case-by-case basis. In this article we shall examine the key case law on proportionality of costs and ask whether any key themes can be identified to assist those involved in, or considering, litigation.

### **Proportionality of costs: a necessary but nebulous concept**

Jackson LJ added the words 'and at proportionate cost' to the overriding objective (CPR 1.1(1)), such that the concept of proportionality is now central to the CPR and lies at the very heart of civil litigation reform. Parties and their advisers are now expected to have the issue of proportionality 'at the forefront of their minds at all times': *Gotch v Enelco Ltd* [2015]. In relation to both the costs budgeting process and the assessment of recoverable costs at the end of a case, the court will consider whether a party's budgeted costs fall within a range of reasonable and proportionate costs. Even if costs are reasonable this does not mean that they will necessarily be proportionate. The court must identify which of the factors listed in CPR 44.3 (5) are relevant to the case and relate them to a costs figure. These factors include the sums in issue in the proceedings and the complexity



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of the litigation.

## Proportionality

While the factors to be considered by the judge in determining proportionality are clearly specified within the CPR, judges have a wide discretion.

In *BNM v MGN Ltd* [2016] damages were agreed at £20,000 and *reasonable costs* were assessed at £167,389. Subsequently the judge considered *proportionality* and reduced the overall recoverable costs by 50% (save for court fees). As well as taking into account the value of the claim, the judge considered the conduct of the defendant, the stage at which the claim was settled, the complexity of the legal and factual issues, and whether the proceedings were of any wider public importance. The judge concluded that the costs, while reasonable, were not proportionate.

The case of *Bloomberg LP v Sandberg* [2016] provides a useful summary of a number of points made in various previous decisions. In relation to proportionately of costs, the court commented the following:

- The court will take incurred costs into account when considering the reasonableness and proportionality of all subsequent costs.
- The only way to take into account excessive costs already incurred in determining the reasonableness and proportionality of subsequent costs is to limit the approved subsequent costs at figures below what they might otherwise have been approved at but for the excessive sums already expended.
- Complexity was more important than value in calculating proportionality.
- The court should consider not only fee-earners' hourly rates and the number of hours worked, but the level of fee-earner involved.
- A case may have to be exceptional to render a costs budget of £824,000 proportionate for the recovery of £805,000 plus interest.
- The court should have regard to the other party's cost budget because it may provide a useful indicator about necessary resourcing of the litigation.

The judge in *Group Seven Ltd v Nasir* [2016] decided that, rather than set revised budget figures himself and go into the details of individual items (which he could have done), if the parties revised their budgets as to future expenditure in accordance with his judgment, he would then be able to make a final assessment as to whether the revised budgets fell within the range of reasonable and proportionate costs. This approach coincides with the idea that the proportionality of costs is looked at both at the costs management stage and with the benefit of hindsight on assessment at the conclusion of the case.

## Hourly rates

While the judge in *Group Seven* said it would 'obviously be inappropriate' to prescribe in the CPR any particular mathematical relationship between the budgeted costs and the claim values in issue, he considered costs of just over £5m to be disproportionate in a claim for just over £7m. The case was not particularly complex. He drew attention to CPR 44.4(3) which refers to a number of considerations when assessing the reasonableness and proportionality of costs, including the skill, effort, specialised knowledge and responsibility involved. Most of these would be reflected in the amount of time expected to be spent by various fee-earners and by the level of the relevant fee-earner. It was not reasonable and proportionate for the claimants to use two different leading counsel.

The judge's focus was on solicitors' hourly rates and counsels' fees. As to hourly rates, this was not a case where it was necessary for a party to instruct solicitors in the City of London. The judge said he would approve budgets containing maximum hourly rates which he set out for each party. As to three of the parties' counsels' fees, he considered them to be excessive and tried to build up for himself the ingredients of what would be reasonable fees for trial preparation and trial. Importantly, he said that even if the fees contended for by those parties were reasonable, the sums being claimed were a major reason why those parties' budgeted costs gave rise to sums which were disproportionate. Even if the fees claimed for counsel were reasonable, they should not be included in the budget at that level when they contributed to the overall result of budgeted sums being disproportionately high.

*May v Wavell Group plc* [2016] was settled for just £25,000. This was in accordance with the defendant's first Part 36 offer of settlement, which was accepted without any counteroffer. While the claimant had incurred costs in excess of £208,000, the senior costs judge considered the sum of £35,000 plus VAT was proportionate and reasonable in accordance with CPR 44.3(5). In this case the judge adopted a two-stage test for CPR 44.3(5):

- an assessment of the costs which are reasonable on an item-by-item basis and a calculation of the aggregate of those reasonable sums made: in this case that figure was £99,655.74; and
- consideration as to whether the reasonable sum allowed is also proportionate: it was on the issue of proportionality that the judge substantially reduced the costs.

## Costs budget

In *Marks and Spencer v Asda Stores Ltd* [2016] the judge suggested that whether the costs budget exceeds half the value of the claim was a rebuttable indication of lack of proportionality, to be treated as a starting point when considering proportionality of costs. In this case, which was not considered to be complex, the claimant's costs, which far exceeded the defendant's estimated costs, were not found to be proportionate. The disparity between the two costs estimates was one factor taken into account, along with the lack

of explanation and/or good reasons to explain any difference in the estimates. Practically, however, this proposed 'broad-brush' approach may cause particular difficulty in mid-value claims, where the costs of pursuing the case to trial may be close to the amount in dispute.

In *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] the Court of Appeal stated that proportionality should be applied on a global basis on assessment (as well as on costs management) and so, at the conclusion of a matter, a further reduction may be applied. This approach reflects the method in *BNM* where the global figure of costs was taken into consideration by the judge when determining proportionality of costs.

These cases indicate that some judges are leaning more towards a strict approach to proportionality, often finding costs to be disproportionate to the claim (particularly when comparing the costs to the value) and thereby justifying a reduction to those costs.

However, it is not all bad news. In the recent case of *JSC Mezhdunarodniy Promyshlennyi Bank v Pugachev* [2017], the judge took a very different approach and approved an *increase* to the defendants' costs budget (in the sum of £84,000), stating that it was 'a lot of money, but, in proportionate terms, not as much as it might have appeared' (as the costs were in the context of a total budget to trial of £1.8m). He considered that the hourly rates being charged, and the daily rates by counsel and the solicitors, were reasonable and proportionate for the purposes of approving a budget. He conceded that the increase was 'somewhat generous' (as it was prepared assuming the increase in trial length was two days whereas it was actually one and a half), however, in the overall scheme of things, he did not regard it as a significant difference and so allowed the increase.

## Comment

What the cases do tell us is that the judges are exercising their wide discretion when considering proportionality, which is in itself a flexible term designed to cater for a wide variety of circumstances. Whether costs are reasonable and proportionate will vary case by case and we therefore remain some way off any neat definition or certain approach to the determination of that essential but imprecise concept: proportionality of costs.

However, there are some practical points that we can take away from the key cases:

- Legal advisers must compare the likely legal costs of pursuing/defending a claim against the amount in dispute and advise their client on the issue of proportionality, asking will the costs justify the proposed action/approach?
- Remember the suggestion in *Marks and Spencer* that there is a rebuttable presumption that costs should not exceed 50% of the amount in dispute. A client may have other reasons, not purely financial, for

pursuing/defending a claim which to the client justify incurring what a court may consider to be disproportionate costs, but in accordance with *May* this does not mean that the paying party should pay such sums at the end of the day.

- Legal advisers should consider the hourly rates and level of seniority of the fee-earners undertaking the work and, again, should advise clients whether the costs could be disproportionate.
- Proportionality of costs should be considered both at the costs management stage (and may be considered on a line-by-line basis or as a global figure) and at the conclusion of the case, comparing the overall costs (which can include success fees and ATE insurance premiums) with the value of the claim. Legal advisers should keep this in mind throughout, and should keep a close eye on escalating costs, particularly in mid-value disputes.
- There may be benefit in keeping a record of the other side's actions throughout the case, and in particular taking note of any unreasonable conduct or behaviour which increases costs.
- Remember, wherever costs can be recovered on the indemnity basis, so much the better for the receiving party, as proportionality does not apply.
- Proportionality can also work both ways! Remember the *JSC* case in which the judge approved a generous *increase* in the costs budget.
- There is no 'hard and fast' rule pursuant to which a judge is required to conclude costs are proportionate or not. In each case the judge will make an assessment. The court will conclude in each case what it considers to be proportionate costs in the particular circumstances.

The case law to date merely provides useful indicators as to what may persuade a judge one way or the other. It therefore (somewhat ironically) leaves fertile ground for future costs disputes (and the costs that they themselves inevitably entail).

### **CASE(S) REFERENCED:**

*BNM v MGN Ltd* [2016] EWHC B13 (Costs)

*Bloomberg LP v Sandberg & ors* [2016] EWHC 488 (TCC)

*Gotch & anor v Enelco Ltd* [2015] EWHC 1802 (TCC)

*Group Seven Ltd & anor v Nasir & ors* [2016] EWHC 620 (Ch)

*Harrison v University Hospitals Coventry and Warwickshire NHS Trust*  
[2017] EWCA Civ 792

*JSC Mezhdunarodniy Promyshlenniy Bank & anor v Pugachev & ors*  
[2017] EWHC 1853 (Ch)

*Marks and Spencer plc v Asda Stores Ltd* [2016] EWHC 2081 (Pat)

*May v Wavell Group plc* [2016] EWHC B16 (Costs)

