The new proportionality test

In the absence of case-law on how the new proportionality test is working in practice, how should you argue proportionality at assessment (with examples of successes and failures, difficulties experienced and overcome and unexpected issues or arguments deployed)?

1. Back in early December, White Paper got in touch with me to ask me to speak on the subject of the new proportionality test. It’s a very important topic so I was happy to agree. I thought that the subhead was perhaps a little ambitious, but there were four months to go before the talk, and I hoped that the case law would develop usefully over that time. I did what barristers always do in these circumstances, and buckled down to the urgent cases on my desk, whilst hoping that decided cases would conveniently turn up in the meantime to allow me to live up the my billing.

2. In the event I am going to have to be a little less definitive than the subheading suggests. There is not yet the level of guidance from the senior courts that would allow me to tell you which arguments are going to succeed. The effect of the transitional provisions in CPR 44.3(7) is that assessment of costs under the new regime is not yet taking place in a sufficient body of significant cases to yield the sort of authoritative guidance that you would all like in order to assist you to advise your clients and shape your arguments.

3. Rather I am going to look at the rules, the guidance so far, and to seek to guide you as to the arguments and approaches that seem most likely to be productive.

How important is proportionality under the new rules?

4. Put shortly, it’s central to the scheme of the new rules. The significance is best demonstrated by the new formulation of the overriding objective at CPR 1.1. The old formulation, engraved on litigators’ hearts, was

   1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

But the new formulation is significantly different:

   1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

This is self-evidently a fundamental change. Proportionality is now elevated to equal billing with justice.
5. This is why the principle in Lownds v Home Office [2002] EWCA Civ 365 has been pushed aside. The effect of that judgment was that, in practice, necessity trumped proportionality – if a step in the proceedings was necessary in order for the litigant to achieve justice, then the costs were recoverable, even if that meant that the total costs of the action became disproportionate. That principle no longer applies.

What do the rules say about proportionality?

5. CPR 1.1 now carries on as follows:

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-
   (i) to the amount of money involved;
   (ii) to the importance of the case;
   (iii) to the complexity of the issues; and
   (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

6. It will be noted that saving expense is right up at the top of the list of aims, and that the first focus of the proportionality test is on the amount of money involved.

7. The reversal of Lownds is effected by 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.

8. The other rules defining proportionality are in CPR 44.3(5):

Costs incurred 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.

Guidance as to what these rules mean

9. Litigators, and indeed litigants, might be forgiven for throwing down the White Book in exasperation and asking “but what is a reasonable relationship?” If the claim is for money, does this mean that the costs should not exceed the damages or should not exceed a percentage of the damages, or should not amount to more than twice the damages? And how does that relationship alter if the litigation is complex?

10. But if those issue appears intractable, pity the litigant and litigator not making a money claim but seeking a declaration or judicial review of a government decision. In that event the costs must bear a reasonable relationship to the value of a remedy that may not really be about money at all.

11. The new senior Costs Judge has, however, expressed the opinion, in a speech to the Commercial Litigation Association in October 2014, that no further guidance is required.

   It is said that we will need guidance on how to apply the new test. I disagree. The guidance is already there. It is likely that somebody will in some case or another seek to appeal the approach that has been taken. But I would suggest that there is no reason to suppose that the court hearing the appeal will do other than restate the guidance that has already been given by Jackson LJ in his final report:

   “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. There is already a precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see R v Supreme Court Taxing Office ex p John Singh and Co [1997] 1 Costs LR 49.”

12. That guidance therefore suggests that proportionality is now to be determined at the end of the assessment, not at the outset, and that the approach is to be that in ex parte John Singh. That was an appeal from an application for judicial review of a decision of a Taxing Master on appeal from a determining officer. The Court of Appeal concluded that there was no jurisdiction for judicial review in these circumstances, but treated the application as an
application under the Court’s inherent jurisdiction to control the exercise of the authority of the court as delegated to the Taxing Master where there would otherwise be a real injustice. One specific criticism of the determining officer and the Taxing Master was that having assessed the individual items then considered whether the aggregate of the individual items reached a level such that the overall time claimed was unreasonable. The Court of Appeal upheld the judge’s view that this consideration of the aggregate effect was one of the necessary functions of the determining officer.

13. Lord Neuberger in the 15th implementation lecture declined to give general guidance and said that the law would have to be developed on a case by case basis.

Decided cases so far

14. Some, albeit limited, assistance can be found in a handful of decisions.

Vitol Bahrain v Nasdec Commercial Court 5/11/13, Lawtel AC0139109

This was the summary assessment of the costs of a Commercial Court injunction. The successful party sought some £165,000. Notwithstanding that its opponent had spent some £242,000, and that the underlying action was worth some $119 million, Males J described the costs claimed as eye watering, concluded they were disproportionate and reduced the sum allowed to £75,000. This case indicates that there is not necessarily safety in numbers – spending at a lower rate than your opponent will not protect you. Nor is the underlying value of the claim enough to justify high costs on an application.

Savoye v Spicers Limited [2015] EWHC 33 (TCC)

This was the decision on the summary assessment of the costs of an action to secure the enforcement of the decision of an adjudicator. The sums claimed and recovered was some £889,000, but there was only a single issue in the proceedings. The costs claimed were some £210,000. Akenhead J concluded that the extent of the work undertaken was unreasonable and disproportionate and that the sum claimed was disproportionate. He allowed £96,465. His approach was based on identifying the sums for various elements of the costs claim that it was reasonable and proportionate for the unsuccessful party to pay.

Yeo v Times Newspapers [2015] EWHC 209 QB

In this case Warby J gave guidance as to costs budgeting, but specifically considered the correct approach to the issue of proportionality in this context. It was argued that the approach to proportionality should be impressionistic. The judge disagreed, and held that, at least on the facts of the case that it was
necessary to have regard when deciding the issue of proportionality to the hours of work proposed and the hourly rates claimed.

_Kazakhstan Kagasy PLC v Zhunus_ [2015] EWHC 404 (Comm)

Leggatt J considered proportionality and reasonableness in the context of very hard fought commercial litigation, and drew a distinction between the amount which it was subjectively reasonable for a client to wish to spend, and the amount which was reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party.

_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._

15. Anecdotally I am aware that practice where issue of proportionality arise varies greatly from court to court. For example in the Technology and Construction Court, it is sometimes suggested that if the parties’ combined costs exceed the damages that the costs are disproportionate. In more modest cases certain district judges have been making swingeing reductions to budgets to the point where solicitors are said to be wary about issuing claims where the damages are only modestly higher than the small claims limit.

How to deal with proportionality if you represent the Receiving Party

16. The first hint, and probably the crucial message to take away from this talk, is to do all you can to avoid the argument entirely. If it is possible to secure an indemnity costs order, you will avoid the entire problem. So think about arguments in favour of an indemnity costs order. Think about making a Part 36 offer at a realistic level, so that if the offer is not accepted, this will ground an application for indemnity costs. If the case is an all or nothing one, think about making a without prejudice save as to costs offer to accept, say 75% of your costs. If you then succeed, you can rely on the refusal of that offer as the basis for an award of indemnity costs.

17. If you are stuck with standard basis costs and the proportionality test, then consider the following

- Consider whether there are good arguments based on the importance of the case
- Consider whether there are good arguments based on the complexity of the case.
  But note that specialist tribunals will expect that argument to be to the effect that the case is complex by the standards of the TCC or Commercial Court or whatever, not that it is complex compared to a personal injury claim.
• Set out to the judge or Costs Judge why it is that the case was complex or difficult and analyse the difficult hurdles that the receiving party had to cross in order to succeed.
• Look carefully at the conduct of the dispute both at the pre-action stage and during the proceedings. Can you argue that there has been conduct on the part of your opponent such that it generated additional work.
• Consider whether there are aspects of the case that can be characterised as wider factors for the purposes of CPR 44.3(5)(e).
• Consider why the tasks involved in the litigation may have been more difficult for your client than for the opponent, thereby undermining any comparison with the other side’s level of expenditure.

18. It may be helpful to set out a narrative of the progress of the proceedings, so that judge can understand, for example, how a case that may have ended up turning on a narrow factual or legal point in fact required the lawyers to address a much wider range of issues.

How to deal with proportionality if you represent the Paying Party

19. For the paying party, it will often be most effective to focus on

(a) the amount of damages in fact involved; it is easier to apply a direct relationship to a value;
(b) the case as it was finally constituted; if the case turned out to be all about a single issue, then it is hard to justify a high level of costs, even if the damages were large: see the Vitol case;
(c) the extent to which this is standard as opposed to exceptional litigation so that you can oppose any allowance for the complexity of the litigation;
(d) the level of your own costs;
(e) if the opponent’s solicitors charge a high hourly rate or the fee earner was senior, you can argue that this should mean that such expert lawyers should have been able to do the work quicker;
(f) it will often be helpful to tot up hours involved and translate them into day or weeks of work: 40 hours work on disclosure sounds worse if presented as a week’s worth of 8 hour days

20. Remember the analogy in the Jackson report between litigation and project management. Can you contend that the reasons why costs are as high as they are because of a failure to exercise proper control and devise a proportionate litigation strategy?
21. Remember that ultimately proportionality is about the judge’s feel for the case. If the case feels to the judge like an exceptionally difficult and important piece of litigation, a high costs bill may well be reasonable. But if the case feels like a standard piece of litigation of which the party has made heavy weather, the bill will be slashed.

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