



# PROPORTIONALITY UPDATE - 21/09/17

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# CAN ANYONE SOLVE THE MYSTERY OF PROPORTIONALITY?



# LORD JACKSON – FINAL REPORT ON CIVIL LITIGATION COSTS – DECEMBER 2009

“I recommend that “proportionate costs” be defined in the CPR by reference to sums in issue, value of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance; and that the test of proportionality should be applied on a global basis.”

## 01 APRIL 2013 – THE NEW TEST IS BORN

**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.**

**BUT NO PRACTICE DIRECTION!**



**LORD NEUBERGER:** (Speaking at a Law Society event in 2012)

“Any question relating to proportionality and any question relating to costs is each very case-sensitive, and when the two questions come together, that is all the more true. 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.”

## HERE'S WHAT WE DO KNOW

Proportionality now trumps reasonableness. See 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;

But what does this mean in practice? Would the Courts provide the answers?



## FAST FORWARD 4½ YEARS.....

Various attempts made to clarify proportionality in costs budgeting cases:

- **Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404**
- **Various Claimants v Sir Robert McAlpine [2015] EWHC 3543**
- **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481**

But....proportionality and reasonableness got mixed up



# WOULD DETAILED ASSESSMENTS PROVIDE THE ANSWERS?

Reported decisions on Detailed Assessment:

- **Hobbs v Guys & St Thomas NHS Foundation Trust (2015) EWHC B20 (costs)**
- **BNM v MGN Ltd 2016 EWHC B13 (costs)**
- **May & Onor v Wavell Group PLC & Anor (2016) EWHC B16 (costs)**
- **Rezek-Clarke v Moorfields Eye Hospital NHS Trust (2017) EWHC B5 (costs)**

## THE COMMON THEMES OF THESE DECISIONS

- Proportionality was dealt with at the end of the assessment
- Proportionality trumped reasonableness – significantly
- The Court effectively acknowledged that the costs awarded were not sufficient for the case to be conducted proficiently.
- Master Rowley, in **May -v- Wavell**  
*“ The amount that can be recovered from the paying party is not the minimum sum necessary to bring or defend the case successfully. It is a sum which it is appropriate for the paying party to pay by reference to the five factors in CPR 44.3(5). It is not the amount required to achieve justice in the eyes of the receiving party, but only a contribution to that receiving party's costs in many modest cases”.*

## REMAINING UNCERTAINTIES

- Additional liabilities
- Degrees of regard to conduct, complexity etc
- Appeal in BNM v MGN

Professor Dominic Regan: (writing in the ACL Journal in 2017)

*“Recent decisions such as BMN, May, and Rezek Clarke render the winner the loser. In recent talks, I have described the current position as akin to the wild west. Having arrived at a net standard basis figure, costs judges wield the bluntest of instruments and seemingly pluck a drastically different lower figure from the ether”*

## LORD JACKSON'S SOLUTION TO THE UNCERTAINTY

“The best way to satisfy the requests for clarification is to convert the five identified factors into hard figures: in other words, to create a fixed costs regime... those seeking certainty about how rule 44.3 (5) will apply are seeking something akin to a fixed fee regime for all cases”.

## A GOOD SOLUTION?



## SO, WHAT CAN PRACTITIONERS DO?

- Plan ahead for shortfall on costs recovery
- Warn clients early, and throughout
- Carefully match level of legal team to level of case
- Record decisions taken on costs grounds
- Review position if anticipated quantum drops
- Use Part 36 offers

THE END