T23261E

"The application of 'proportionality' has not reduced costs." Discuss.

Proportionality is a key principle in costs law. It reflects the policy that litigation should be conducted in a proportionate manner, and at a proportionate cost. Proportionality is first mentioned in the Civil Procedure Rules at 1.1, thus it is linked to the "*overriding objective"* ideal. The CPR states that cases should be dealt with *"in ways which are proportionate*"[1].

The starting point for any consideration of proportionality should be at Civil Procedure Rule 44.4 (2) (b), where the courts will *"only allow costs which are proportionate to the matters in issue"*[2], when costs are to be assessed on the standard basis. Further, the *"court will not…allow costs which have been unreasonably incurred or are unreasonable in amount"*[3]. The factors which the court may take into account when assessing proportionality are set out in CPR 44.5.3, and are known as the 'seven pillars of wisdom'. These include such factors as the conduct of the parties, the value of the claim, the importance of the matter to all parties, the complexity of the matter, the skill or knowledge involved, the time spent on the case and the place where the work was done.

With regards to costs on the indemnity basis, any doubt as to the proportionality of the costs will be resolved in the receiving party's favour[4].

Proportionality is stated in CPR 44.5 as an important factor for the court when costs are to be assessed. Proportionality has not been defined itself in any further case law. In *Home Office v Lownds*, it was suggested that there should be a two stage test for assessing whether costs are proportionate. It was first suggested that a global view should be taken, where costs are assessed alongside the value of damages. If the costs are not deemed to be globally disproportionate, then all that is normally required is that each item should have been reasonably incurred. If the global costs do seem disproportionate, then an item by item test should be used, where each item will be judged as to it whether it is necessary and, if necessary, then is reasonable in cost. The global view should centre on the factors listed in 44.5 (3).

The first test is conducted by assessing whether the costs claimed are globally disproportionate. The judge will commonly use the seven pillars of wisdom, and their own experiences. However, CPD 11.1 states that "*the relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide."*[5] This highlights the importance of assessing each individual matter on its own means, and not using a broad brush approach based purely on a global, financial test. It is further stated that *"there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case"*[6]*.* This supports matters which are modest in value, where the costs may be equal, or greater than, the damages received. On the standard basis therefore, any doubt as to whether the costs are proportionate should benefit the paying party.

[1] Civil Procedure Rules 1.1 (2)(c)
[2] Civil Procedure Rules 44.4 (2) (b)
[3] Civil Procedure Rules 44.4 (1) (b)
[4] Civil Procedure Rules 44.4 (3)
[5] Costs Practice Direction 11.1
[6] Costs Practice Direction 11.2

When the court is assessing whether the costs are proportionate or not, it will be the base costs which are assessed, excluding VAT[7] and additional liabilities[8]. Additional liabilities are only assessed as to their proportionality if specifically challenged. Further in CPD 11.9, it is stated that an additional liability *"will not be reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate."* This is important, as in a matter in which base costs are deemed disproportionate, an additional liability can still be up to 100%, and may not be disproportionate. Base costs and additional liabilities should be assessed separately.

It was held in *Lownds* that where proportionality is likely to be an issue, a *"preliminary judgment as to the proportionality of the costs as a whole must be made at the outset."*[9] Once this is done the judge will then be in a position to consider each item.

It was held in *Giambrone v JMC Holidays*[10] that just because the costs are judged to be disproportionate, this does not mean that the receiving party should be penalised. It only follows that the receiving party is required to demonstrate that the costs were necessary[11].

The second test for proportionality is the test of necessity and reasonableness on an item by item basis. It was held in Lownds[12], that the standard of necessity is not fixed, and again it should be judged on a case by case basis. The test of necessity is arguably a higher standard to show whether an individual item is proportionate. The receiving party must therefore show that the costs claimed are completely necessary in order for the litigation to be conducted. A factor which can be used to judge necessity is the conduct of the paying party. This can cause the receiving party to incur additional costs which could have been avoided, and these would generally be allowed by the court. Further factors affecting the necessity for costs to be incurred could be travelling to a client who was deaf to take a witness statement, or using the services of an interpreter to help a client communicate. These could look disproportionate at first glance, but would pass the necessity test to ascertain the proportionality of the same.

There are arguments which show that this method of assessing proportionality is flawed, and has no weight in reducing costs. It is difficult to see where costs which are deemed as 'unnecessary' can then be seen to be 'reasonable'. An example of this could be in a matter which has damages which would just creep into the multi-track. The receiving party used grade A fee earners. This may not be 'unreasonable', but it may be difficult to show that that it was 'necessary' for this grade of fee earner to have conduct, and that a grade B or C fee earner could not have had conduct.

The current test therefore allows costs even where a claim for costs is ruled at the outset to be wholly disproportionate. At the end of the assessment the amount may still be allowed in full. If each individual item has been 'reasonably' incurred and is 'necessary', then the judge could be bound to allow the costs claimed, as he would have no reason to disallow the costs. Therefore currently the proportionality tests used commonly from *Lownds,* are not completely useful and often

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[7] Giambrone v JMC Holidays Ltd [2003] 2 Costs LR 189 at [43]
[8] Costs Practice Direction 11.5
[9] Lownds v Home Office [2002] EWCA Civ 365 at [36]
[10] Giambrone v JMC Holidays Ltd [2003] 2 Costs LR 189 at [32]-[33]
[11] Ross v Stonewood Securities Ltd [2004] EWHC 2235 (Ch) at [26]
[12] Lownds v Home Office [2002] EWCA Civ 365 at [37]

do not conclude in a definitive answer as to whether costs are proportionate, and should be reduced.

Conversely there is the argument that proportionality has reduced costs. If the principle of proportionality was not considered at all, then it could possibly give the receiving party the license to act completely unreasonably, and incur unnecessary costs with no fear that these would be reduced by the Court. Without any thought as to proportionality the overriding objective would be useless and ignored by receiving party practitioners. An idea for proportionality could be to introduce costs capping for certain matters. This would reduce costs as receiving parties would be under pressure to act more efficiently to make the work economical. Costs estimates in allocation questionnaires and listing questionnaires could also be made to have a greater weight and could be enforced more stringently by the courts.

There are many other ways of testing proportionality, which could be implemented in the future. Each item could be assessed as to its reasonableness at the outset, and only at the end should an overall impression of proportionality used. Further, both reasonableness and proportionality could be considered at the same time.

In conclusion, it can be seen that there is no definitive way of determining the proportionality of costs claimed. The test used from *Lownds* is a useful tool, however, it does have its weaknesses. The second stage of the test is only applied if the global costs seem disproportionate. Conversely, if the costs seem disproportionate on a global basis, but on an item by item basis the individual items are deemed to be reasonable and necessary, then there is the situation where globally the costs may far exceed the damages, but the work done is reasonably incurred. However, introducing any kind of costs capping would surely not help the problem, but would merely sidestep it. If practitioners were to be penalised by not recovering their costs in matters where financial damages were small, this would have a negative impact. Examples of these include clinical negligence matters, where some damages can be small, but the litigation is extremely Claimant-loaded. This would also affect civil matters such as property disputes where the financial damages are minimal. Overall I believe that a test where proportionality and reasonableness are assessed side by side, and on each individual item, would be the most useful and accurate test, as the current idea of proportionality does not have sufficient weight to significantly reduce costs.

Bibliography

Civil Procedure Rules 1.1 (2)(c)
Civil Procedure Rules 44.4 (2) (b)
Civil Procedure Rules 44.4 (1) (b)
Civil Procedure Rules 44.4 (3)

Costs Practice Direction 11.1
Costs Practice Direction 11.5
Costs Practice Direction 11.2

Giambrone v JMC Holidays Ltd [2003] 2 Costs LR 189
Lownds v Home Office [2002] EWCA Civ 365
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