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Proportionality - new decisions tighten the vice

Some recent Court decisions provide guidance on what to expect under the new proportionality test.

The new proportionality test has been in place since April 2013 but it has taken quite some time for cases where it applies to filter through. Now all of a sudden there are several reported judgments which begin to paint a picture of how the new test will be applied on detailed assessment.

Although the new test has been criticised for failing to provide a clear measure of what proportionality really means, there is little doubt about the underlying aim; namely that proportionality should trump reasonableness.

Until recently most reported decisions on this topic have arisen from costs budgeting hearings rather than detailed assessments however we now have three important judgments arsing from assessments, two of which were reported just a few weeks ago, which together leave little doubt that the new underlying aim is to be enforced rigorously.

At the lower end of the scale in terms of size, the case of *Hobbs v Guys & St Thomas NHS Foundation Trust (2015) EWHC B20 (costs)* was the first reported decision where costs on detailed assessment were found to be reasonable but nevertheless reduced under the new proportionality test. This was a clinical negligence claim which settled for damages of £3,500. The Claimant sought costs of £32,000. Master O' Hare reduced the Claimant's Bill on the grounds of reasonableness to £11,500. He then decided that the remaining costs were disproportionate but rather than chopping off a further slice of general costs he targeted specific items and reduced those by around £2,000.

The more recent decision in the privacy case of *BNM v MGN Ltd 2016 EWHC B13 (costs)* involved larger sums. The claim settled for damages of £20,000. Costs were sought in the sum of £241,000 and reduced to £167,000 on the grounds of reasonableness, which left base profit costs and Counsel's fees of around £60,000. Senior Costs Judge Master Gordon-Saker declared that the costs remained disproportionate with particular reference to the base costs still

exceeding the damages by around three times and he made a further global reduction of around 50% leaving the Claimant with costs of just £83,000. A particularly controversial part of this decision was to reduce the Claimant's ATE insurance premium by over 50% on the basis of proportionality, a move which is now thought to be the subject of appeal.

Most recently, the private nuisance case of *May & Anor v Wavell Group PLC & Anor 2016 EWHC B16 (costs)* was another matter where costs found to be reasonable were nevertheless reduced heavily on proportionality grounds. Master Rowley assessed the Claimant's Bill down from £208,000 to around £100,000 but found that because the case was worth only £25,000 the costs were still disproportionate and reduced the costs down further to £35,000. He recommended that in cases where costs significantly exceed damages clients should be warned that they will receive "no more than a contribution to those costs if they are successful".

Whilst these cases certainly do not provide that all elusive clear measure of proportionality, and some would argue that *BNM* has opened a big can of worms in also applying the new test to additional liabilities, we now at least have an idea of how rigorously the Courts are likely to apply the underlying aim of the new test, which is clearly a very different and much more lively beast than the old one.

Part 36 displaces provisional assessment costs cap

Under CPR Part 47.15 (5) the costs of provisional assessment proceedings (i.e for those cases where the costs claimed are £75,000 or less) are limited to £1,500 plus VAT and Court fees.

Until very recently the only way to avoid this cap was to obtain a ruling that the matter was not suitable for provisional assessment. However, in *Christine Lowin v W Portsmouth and Company Ltd (QBD)* (yet to be reported) Mrs Justice Laing ruled that the cap is displaced where a party beats its own Part 36 offer. In reaching this decision she concluded that Part 36 applies to Part 47 with full force and effect.

This ruling marks scope for departure from a rule which often bites hard, particularly in cases where costs are reaching towards the top of the £75,000 Provisional Assessment limit. Part 36 already provides significant incentive to make early sensible offers in detailed assessment proceedings not least because of the additional 10% uplift potentially recoverable by Claimants under Rule 36.17 (4) (d). The decision in *Lowin* extends this incentive further, a point not missed by the Judge

who stated that scope for dislodging the cap would encourage parties to accept reasonable costs offers.

The decision is being seen as a further example of Part 36 standing tall above some of the fixed costs provisions and now it seems one of the key Jackson reforms as well.

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