



MASTER OF
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PROPORTIONATE COSTS

FIFTEENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

THE LAW SOCIETY

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1. Some four weeks ago, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) received Royal Assent¹. The LASPO provisions which are intended to implement the reforms proposed by Sir Rupert Jackson are expected to come into force in April 2013. The Jackson reforms which require implementation via rules of court, rather than through statute, will be brought into force at the same time. Many of them have already been considered by the Civil Procedure Rule Committee and approved pending the implementation date. Many others have been, and are, subject to ongoing pilot studies to test their efficacy, to bring to light practical problems, and to provide the opportunity for improvements before full implementation.
2. Sir Rupert's vision for the reform of litigation cost is therefore to become a reality in about ten months time, and four and a half years after he embarked on his project. This is a testament to his unstinting hard work and dedication. As you all may know he has

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

had to stop work in order to undergo a serious operation, but he will be back at work by October 2012, well in time to see the final stages of implementation. It is more than fitting then that I pay tribute to him for the truly remarkable achievement of conceiving and progressing the reform process from a standing start in November 2008, through the production of clear, detailed and forcefully argued preliminary and final reports by December 2010, to legislative implementation in April 2013.

3. The focus of this evening's seminar is costs management, which will form a central component of the litigation landscape after April 2013. Proportionality underpins both costs management, and the court's approach to litigation cost generally. In the present context, it is the concept of proportionate costs which I wish to discuss, a concept which represents one of the most important changes, and on which a clear and consistent message is needed.

4. One of the problems which beset the successful implementation of the Woolf reforms was the failure effectively to implement proportionality as a test in respect of cost assessments. As Sir Anthony May PQBD explained, such assessments have so far tended to proceed with '*only a nodding respect only to proportionality.*'² Sir Rupert rightly identified the fault at the heart of this as being the approach articulated, ironically by Lord Woolf himself, as Master of the Rolls, in *Lownds v Home Office* [2002] 1 WLR 2450. That fault was to follow the old approach of allowing costs which were considered to be reasonable and necessary to the litigation, with reasonableness and necessity being considered on a narrow basis, largely without regard to the ultimate value of what was at stake in the proceedings. How best to deal with this fault and ensure that the new costs rule is implemented effectively are still on-going. The precise details of any reform will

² A. May, Speech at Costs Conference (Cardiff, 19 June 2009) at 13 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/pqbd-costs-conference-190609.pdf>>; cited in R. Jackson (December 2009) at 34 - 35.

no doubt have to be worked out, as is evidenced by the Civil Justice Council's recent valuable work on proportionality³.

5. However, the obvious way of introducing proportionality is that suggested by Sir Anthony May and adopted in the Costs Report⁴, namely by effectively reversing the approach taken in *Lownds*. In this way, as Sir Rupert said, disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party. To put the point quite simply: necessity does not render costs proportionate. Reference to necessity can be said to be positively misleading as it suggests necessary to achieve justice on the merits: substantive justice. A fundamental tenet of both Woolf and Jackson, accepts that that aim must be tempered by the need for economy and efficiency, and above all proportionality. On one view, once one has a proportionality requirement, necessity may add nothing; on another view, any test which incorporates necessity is one which will all too easily see necessity trump proportionality. However, it may well be that it is right to retain necessity as a requirement, provided that it is borne firmly in mind that it is one of two hurdles which have to be cleared.

6. The difficulty with retaining necessity is, as I have just noted, the potential to mislead. If necessity were retained, it may equally be potentially misleading to say that proportionality will now take precedence over necessity in the assessment of costs. The better approach seems to be the one which removes reference to necessity and to see the work done by reference to reasonableness, which doesn't carry with it the potential to mislead the parties and the court into thinking that costs incurred in work done which is necessary to secure the right result is capable of trumping proportionality, and then by

³ Civil Justice Council, *CJC Working Group on Technical Aspects of Jackson Implementation: Options for proportionality, Part 36 Offers and Qualified One-way Costs Shifting*, (October 2011) <<http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/working-parties/technical-aspects-of-jackson-implementation-costs.htm#headingAnchor5>>.

⁴ May (2009) at 13; R. Jackson (December (2009) at 35.

reference to proportionality itself. As such it seems likely that, as the courts develop the law, the approach will be as Sir Rupert described it:

‘ . . . 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 49.⁵

7. It is to that end a new CPR rule 44.4(5) is to be introduced. This rule will state as follows,

‘44.4(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.’*

8. This rule reflects, and is intended to introduce into the conduct of civil litigation the fundamental element of both the Woolf reforms and the Jackson reforms. As was explained in Sir Rupert’s Final Costs Report,

‘The policy which underlies the proposed new rule is that cost benefit analysis has a part to play, even in the realm of civil justice. If parties wish to pursue claims or defences at disproportionate cost, they must do so, at least in part, at their own expense.’⁶

The point is simple, and it was made by Lord Devlin in 1970, it was cited by Lord Woolf in 1995⁷ and it underpins the Jackson Report⁸ and its recommendations: it is a fallacy to

⁵ R. Jackson (December 2009) at 37.

⁶ R. Jackson (December 2009) at {38}.

⁷ Woolf (1995) at 19.

think that time and money are no object where the operation of the civil justice system is concerned. Parties and their lawyers must keep firmly in mind that they ought to expend no more than a proportionate amount of money in the pursuit of justice. If they wish to spend more, they must appreciate that such sums will not be recoverable from their opponent. That is proportionality, proportionate costs, as between the parties.

9. That is further emphasised by the fact that, even if the parties wish to pursue claims or defences at disproportionate cost at their own expense, the court may refuse to let them do so. Litigation must be conducted consistently with the need to ensure that all litigants are able to pursue their claims proportionately: dealing with cases justly requires the court, and parties, to focus on more than the individual case in front of them. In that respect parties, their advisers and the courts must always keep in mind the principle articulated at CPR 1.1(2)(e), as explained in Lord Woolf's Access to Justice Reports⁹, and in the House of Lords decision, *Sutradhar v Natural Environment Research Council* [2006] 4 ALL ER 490 at [42]. In that case, Lord Hoffmann said that justice was not 'priceless', and that, in the light of the '*burden [which] a long and complicated trial would impose*' upon the defendant, it would, '*even if its resources were infinite, . . . be wrong to permit this case to proceed to trial*'.
10. Putting to one side that aspect of proportionality, the forthcoming new approach to proportionate costs, as implemented through the new costs rule, will operate before the issue of the claim form, throughout the life of proceedings, and then at the end of proceedings when costs come to be assessed. The focus of discussion of the new

⁸ R. Jackson (December 2009) at 36, '*The essence of proportionality is that the ends do not necessarily justify the means. The law facilitates the pursuit of lawful objectives, but only to the extent that those objectives warrant the burdens thereby imposed upon others.*'

⁹ See for instance, H. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) at 26; H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996), at 24, because active judicial case management is intended to ". . . preserve access to justice for all users of the system it is necessary to ensure that individual users do not use more of the system's resources than their case requires. This means that the court must consider the effect of their choice on other users of the system."

proportionate costs rule has so far been on its operation when costs come to be assessed. However, an equally important, and rather more novel, effect of the new rule will be during the life of proceedings, and even during the pre-trial stage of litigation.

11. Effective management of claims by lawyers and the courts during the pre-trial stage will require consideration of whether certain steps can be achieved at proportionate cost and, if not, whether the client is willing to pay for it knowing that the cost will be irrecoverable. At case management and cost management hearings, the court will have to decide the cost of certain steps, and whether that cost is proportionate. Each such decision will be fact sensitive, but it may well be that parties and the court will be faced with the question at a case or cost management hearing of deciding whether, for instance, a witness statement, an additional expert's report, disclosure of certain items of evidence can be achieved at proportionate cost.
12. If not, it may be that the party will decide to go ahead and obtain the item at the own cost, with a costs order or provisional costs order made at that hearing in respect of that item reflecting that fact. But, before the party decides to obtain an item of evidence on that basis, his advisers should often warn him that the court may decide to allow the item to be adduced. The court, even now, cannot, for instance, be forced to accept that a party can call two expert witnesses when one should suffice, simply because the party is prepared to pay for two.
13. The effective, and consistent, implementation of case and costs management informed by the new costs rule should have a salutary effect on litigation conduct and costs. It should focus the minds of all involved on the need to consider the costs and benefits of each step proposed to be taken in proceedings; not least because parties will need to be made fully aware of the fact that certain steps taken may, or will, be at their own cost, or may be futile.

14. While the change in culture should reduce the scope of costs assessments at the conclusion of proceedings, it will not obviate the need for a robust approach to such assessments. Again the decision as to whether an item was proportionately incurred is case-sensitive, and there may be a period of slight uncertainty as the case law is developed.

15. That is why I have not dealt with what precisely constitutes proportionality and how it is to be assessed. It would be positively dangerous for me to seek to give any sort of specific or detailed guidance in a lecture before the new rule has come into force and been applied. 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.

16. Obviously, the amount of money involved will normally be a very significant factor, but it will not be determinative, and there will be issues such as whether one looks at the sum reasonably claimed or the sum recovered. Difficult questions may arise when one party claims that the point at issue is very important to him or her even though, objectively speaking, it is of little significance. Objective perspectives may well be more important than subjective ones in this area, but that remains to be assessed. And is the approach to proportionality to be the same for defendants' costs as it is for those of claimants? Such issues will have to be worked out, but the working out will involve the Judges exercising that quality which they are pre-eminently expected to have, namely judgement.

17. A consistent approach by the courts to this application of the new costs rule is obviously necessary, as inconsistency always brings the law into disrepute, and, more particularly,

as parties and their advisers must know where they stand in advance of having to make strategic and tactical decisions. A consistent approach by the Court of Appeal is equally important, but so is a strong respect for, and inclination to uphold, first instance decisions on costs issues. When making costs decisions, first instance judges should not be looking over their shoulders, and parties should not be encouraged to appeal costs decisions. In that connection, I have agreed with Sir Rupert that, in due course, two specific members of the Court of Appeal will be asked to sit on all appeals arising out of the Jackson reforms to ensure consistency and efficiency. Judicial education in advance is also important, and I am glad to say that the Ministry of Justice has agreed to fund such education ahead of April next year, and a team has already been set up under the Judicial College, and it is well developed in planning courses for Judges.

18. A new approach to litigation costs based on proportionality should produce a culture which sees litigation conducted at proportionate, more economical and thereby lower, cost. This in turn should help to create a culture where costs assessments at the conclusion of proceedings are, ultimately, reduced in scope, as parties will, through effective proportionate costs management, ensure that proceedings were conducted, and charged to the parties, at proportionate cost. In other words, the application of proportionality at the costs management stage should, in an ideal world, avoid any need for assessments after the substantive hearing. However, not only would one have to be naive to believe that will be the reality, especially in the first few years of the new regime. It is also true that proportionality can only be finally assessed at the end of a case.

19. The Court of Appeal, the Rule Committee and the Civil Justice Council will need to pay more attention to whether there is effective implementation of the new, Jackson, costs reforms than it did in relation to the previous, Woolf, reforms. If, as happened in *Lownds*, the new rules do not seem to be working quite as they should or as intended, then remedial action will need to be taken sooner rather than later. Having said that, I

believe that, provided Sir Rupert's approach is effectively implemented through rules, training and practice, any such remedial action will be unnecessary and costs will be rendered proportionate, or at least more proportionate than they are today.

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