What's reasonable?

Simon Gibbs puts Jackson LJ's proportionality agenda under the spotlight

Initial responses to Jackson LJ's Final Report focused on the headline grabbing proposals such as an end to the recovery of success fees and insurance premiums, one-way costs shifting and a ban on referral fees. However, one of the most significant proposals is the recommendation that "proportionality" be redefined.

The current rules are that on a standard basis assessment the court will "only allow costs which are proportionate to the matters in issue" (CPR 44.4(2)(a)). When the Court of Appeal was asked to interpret what "proportionality" meant in *Lownds v Home Office* [2002] EWCA Civ 365 it held: "what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Pt 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

Jackson LJ has found this approach unsatisfactory. As he says: "Disproportionate costs do not become proportionate because they were necessary. If the level of costs incurred is out of proportion to the circumstances of the case, they cannot become proportionate simply because they were 'necessary' in order to bring or defend the claim."

New approach

He therefore puts forward a new approach: "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."

It is impossible to over emphasise just how radical this proposal is. It is currently common place for costs to be several times the amount of the damages in dispute. This proposal would, in theory, bring an end to that.

The new rule he proposes is: "Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:
(i) the sums in issue in the proceedings;
(ii) the value of any non-monetary relief in issue in the proceedings;
(iii) the complexity of the litigation;
(iv) any additional work generated by the conduct of the paying party; and
(v) any wider factors involved in the proceedings, such as reputation or public importance."

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These various factors bring their own problems. How does one place a financial value on, for example, complexities relating to causation in a mesothelioma claim? What does "conduct" refer to in terms of generating additional work? Is this meant to refer to "misconduct" or will any step that a defendant takes defending a claim, such as denying liability or seeking their own medical evidence, qualify?

Guidance

More significantly, what does proportionality mean if there are no other relevant factors to consider? Are costs of £25,000 proportionate where the damages are £25,000 or still too high? Interestingly, Jackson LJ proposes a cap of £12,000 for pre-trial work in non-personal injury fast-track claims, ie claims with a value of up to £25,000, to achieve proportionality. Is a figure of less than half the level of damages proportionate?

Without further guidance it is inevitable that there will be enormous inconsistency between judges, forum shopping by claimant lawyers and satellite litigation on the issue.

Eventually the issue will return to the Court of Appeal for guidance. But what will that guidance be? It cannot simply say that the court should look at the specific nature of the work that the claim required and allow the reasonable costs for what was required. That would be to no more that reintroduce the test of "necessary" and take us straight back to *Lownds*.

The only meaningful guidance would be to introduce some kind of percentage based test. Costs would be limited to a certain ratio of the damages recovered. However, this would be a far more radical change than anything Jackson LJ has proposed. He could easily have achieved his goal of proportionality in civil costs by introducing a simple cap on the level of costs that could be recovered that was calculated with reference to the damages recovered. This would have made most of the other radical and difficult proposals he has put forward entirely unnecessary. However, he presumably considered and rejected that approach. Will the Court of Appeal, when it is inevitably asked to give guidance on this issue, take a step that Jackson LJ considered a step too far? Writing from a defendant perspective, this is a wonderful proposal but one that regrettably looks suspiciously unworkable. NLJ

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