Costs Law Update
7th June 2016

- The Defendant Costs Specialists

BNM v MGN Limited

A mere three years and two months after the new "Jackson" proportionality test was introduced and the first important decision on how this should to applied in detailed assessment proceedings has been handed down in *BNM v MGN Limited* [2016] EWHC B13 (Costs). "Important" because this was a decision by the Senior Costs Judge, Master Gordon-Saker, having heard detailed submissions by specialist costs counsel. But, it is only a first-instance, non-binding decision. Nevertheless, this is likely to be followed (to the extent it can be) by other judges until there is guidance from higher up.

To appreciate the importance of the decision to parties to litigation, the *Law Gazette* led their report on the case with: "The senior costs judge has slashed a claimant's costs bill in a high-profile media case because of the proportionality tests brought in by the Jackson reforms – despite deeming it to be 'reasonable and necessary'".

The successful claimant submitted a bill of costs totalling £241,817.

The Master undertook, in the first instance, a detailed assessment applying ordinary principles of what amounts were reasonable. This led to a reduction of the bill to £167,389.45. This was made up as follows:

Base profit costs	£46,321
Base Counsel's fees	£14,687.50
Court fees	£1,310
Base costs of drawing the bill	£4,530
Atkins Thomson's success fee	£16,780.83
Counsel's success fee	£4,846.88
ATE premium	£61,480
VAT	£17,433.24
Total costs	**£167,389.45**

However, he then stood back and concluded that this amount was disproportionate to the issues and amounts at stake and reduced the bill by approximately 50% to £83,964.80 made up of the following:

Base profit costs	£24,000
Base Counsel's fees	£7,300
Court fees	£1,310
Base costs of drawing the bill	£2,250
Atkins Thomson's success fee	£7,920
Counsel's success fee	£2,409
ATE premium	£30,000
VAT	£8,775.80
Total costs	**£83,964.80**

The claim itself concerned a primary school teacher who had a relationship with a Premier League footballer. She lost her mobile phone, which ended up in the hands of a national newspaper. The claimant brought proceedings seeking an injunction to restrain the newspaper from using or publishing confidential information taken from her phone, damages and an order for delivery up of any confidential information. The newspaper made substantial admissions in the defence and the claim was concluded by a consent order at an early stage in the proceedings, under the terms of which it undertook not to use or disclose the confidential information, and agreed to pay damages of £20,000 plus costs.

The Master set out the following key principles:

1. The correct way to apply the new test of proportionality was for the court to 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 the CPR. 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. This is the approach previously advocated by Lord Justice Jackson and by Lord Neuberger, then Master of the Rolls, but not expressly set out in the CPR. (It is to be noted that this approach differs to that given by Master O'Hare in the recent case of *Hobbs v Guy's and St Thomas' NHS Foundation Trust* [2015] EWHC B20 (Costs), which itself received some publicity.)

2. The new proportionality test applies to both base costs and any recoverable additional liability. The court is to look at the additional liabilities and base costs together when determining what amount would be proportionate overall. This is potentially a very important decision for those cases where there are recoverable additional liabilities and the new proportionality test applies to some or all of the costs claimed.

3. There will be some cases where the costs are proportionate notwithstanding that the costs exceed the amounts in issue.

Is it, perhaps, unfortunate that this particular case was the vehicle for this issue to be explored. It would have been preferable if this had been a routine claim (eg personal injury) for damages only. It might then have been easier to seek to apply the decision as to the size of reduction appropriate to achieve proportionality to a wider category of claims. It is possible to read too much or too little into the particular facts of the case. On the one hand, the Master recognised "the value of the non-monetary relief claimed is not easy to quantify" and a "privacy case is more complex than the run of the mill". These references imply that a higher final figure was allowed than might have been the case if these elements were not present, and certainly explain why the total costs allowed exceeded the damages. On the other hand, the Master also commented that the value of the non-monetary relief "was not substantial", "but for the claim for damages, it is unlikely that a claim would have been pursued" and "nor was it a particularly complex case". These suggest the Master was trying to play down the less usual elements of the claim and was perhaps more focused on the value of the damages.

The final decision throws up almost as many questions as it answers:

- If a 50% reduction to the "reasonable" costs was appropriate given the facts of this case, what size reduction would have been appropriate for a more routine damages only claim?

- The claim settled at a relatively early stage in the proceedings before the first CMC, before disclosure of documents or exchange of witness statements. A conveniently neat 50% figure was applied to the "reasonable" figure. If the "reasonable" figure in this case, given the early settlement, was £167,389.45 it is not difficult to see that a "reasonable" figure to take this to trial might have been £400,000. If the matter had proceeded to trial, would the same 50% reduction have been appropriate, producing a final figure of £200,000 against damages of £20,000 (plus non-monetary value)? If so, on what planet would this be viewed as being proportionate? If not, what figure would be proportionate? Why should it make any difference as to what work was done as to whether the final figure is proportionate? Is this not to confuse what work was reasonable/necessary with what is proportionate, which is precisely what the new test seeks to avoid? The CPR expressly provides for the court to take into account a number of factors beyond the sums in issue when considering proportionality. However, as a matter of common sense, it is difficult to see why the answer to the issue of what is a proportionate level of costs to recover, say, £20,000 should normally vary from case to case. Issues such as complexity may well mean additional work is reasonable and necessary, but proportionality is now meant to trump those two factors.

- Many of the headlines in the legal press on this case have been about how a "reasonable bill" was "slashed by 50%". However, could the headlines not have equally been: "Senior Costs Judge rules costs of more than four times

damages are still proportionate"? It is very difficult to see that the final figure allowed was actually "proportionate" to the damages. One disproportionate figure has been replaced by another, somewhat less, disproportionate figure.

- Why 50%? This is not a criticism of the Master's interpretation of the rules but the inherent problem caused by the new proportionality test. As Kerry Underwood has commented: "This decision shows how random and arbitrary the whole new concept of proportionality is. What the Master has done here is merely to chop the costs in half but with no real explanation as to why he has done that, rather than, say, reducing the costs by a quarter or three quarters or whatever. The problem for lawyers and their clients is that as they go through the case they will have no idea what the court will allow as proportionate whereas any experienced lawyer has a fairly clear idea as to what will be allowed as reasonable and necessary." It would certainly make life much simpler if parties knew that where the total allowed on the basis of reasonableness alone was deemed disproportionate, that figure would be reduced by a further 50% in all cases. However, the Master here was clearly not purporting to establish such a standard approach. Inevitably, all litigation is case sensitive but the vast majority of cases are money only claims with no particular issues of complexity. Why should a standard % reduction not be applied?

The new proportionality test was intended to help provide a degree of predictability as to what costs would be payable if a case was lost for those claims not subject to fixed fees. Parties would know that the total would not be more than was proportionate to the claim. Does this case bring us any closer to such certainty? We know a bit more about the correct method to adopt but are we any closer to being able to predict the final figure? Is the starting point for a damages claim with some non-monetary relief that the total of the "reasonable" costs should be reduced by 50% if the initial total is deemed disproportionate? Is the starting point for a damages claim with some non-monetary relief that costs are proportionate if they are four times the level of damages recovered?

Are we really any closer to discovering what "proportionality" means?

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> "The Legal Costs Blog is usually three steps ahead of what is reported in the legal press: it almost defines what is happening in the world of costs" – Mark Friston, Kings Chambers.
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> "The Legal Costs Blog is absolutely essential reading for those who want to be in the know about the latest developments in the fast-moving field of costs. It is an excellent source of up to date news in the field, as well as providing challenging and perceptive analysis and comment on all significant developments". – Alexander Hutton QC, Hailsham Chambers

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Costs Budgeting Training

GWS are currently arranging a limited number of in-house costs training sessions for defendant panel solicitors and insurers for the second half of 2016. These are designed to provide practitioners with a practical insight into this area of the law and to deliver tactical tips on staying one step ahead of the opposition.

Please contact Simon Gibbs if you would like to find out more.

Contact

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