Picking a winner

Dominic Regan on what happens to costs when it is not clear who won the case

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Ping pong. Bingo. A football match. The victor is always obvious. But in civil litigation, as always, things are not so simple. Why this is so profoundly important is because the starting point on costs recovery is that the loser should pay.

One straightforward approach was advanced by the notably direct Ward LJ in *Day v Day* (2006) EWCA Civ 415. He said: 'We must ask ourselves whether the primary rule applies in this case – that is, the general rule that the unsuccessful party will ordinarily be ordered to pay the cost of the successful party unless the court thinks otherwise. The question is which, if any, of these parties did enjoy success in this litigation? We were referred to a judgment of Lightman J in *Bank of Credit and Commerce International SA v Ali* (no.3) [1999], NLJ 1734 Vol. 149, where he said that: "For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense." I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case.'

The cheque test, while no doubt decisive on many a day, can prove to be over simplistic.

LOSER PAYS

In *Kupeli v Kibris Turk Hava Yollari Sirketi (trading as Cyprus Turkish Airlines)* [2018] EWCA Civ 1264, a total legal spend of about £2m was incurred in pursuit of 838 modest claims brought after the first defendant airline lost a licence to operate, and the second defendant did not honour a promise to carry the claimants who had purchased tickets to travel.

At the conclusion of a seven-day trial, Mrs Justice Whipple found for some of the claimants who had, according to their circumstances and transactions, been allocated to one of three categories. Since some claimants had been successful she decided that, to reflect the outcome, the group should recover 33% of whatever the costs would be on the conventional standard basis. The recovery was more than nominal, and since the outcome was that the defendant 'had to write a cheque', it was the loser for costs purposes.

The defendant appealed the costs order. The primary contention was that the judgment meant that 94.5% of claims made had failed. While the defendant had been obliged to write a small cheque in favour of a small cohort of claimants, one had to step back and look at the litigation as a whole. From that standpoint, it was clear that the defendant had blatantly got the better result. A costs decision is only susceptible to a

successful appeal if it was plainly wrong. Was that so here?

Although by CPR rule 44.2(2)(a) it is the general rule that an unsuccessful party will be ordered to pay the costs of the successful party, rule 44.2(2)(b) provides that 'the court may make a different order'.

Hickinbottom LJ succinctly explained that, in his opinion 'where the concept of overall "success" may be a necessarily ambivalent concept (as in a complex group claim trial, in which opposing parties each have considerable success), a search for an overall "winner" may be a largely fruitless exercise. In any event, it is clear from CPR rule 44.2 that, in assessing costs as between parties, the court must first determine whether to make a costs order at all.'

Since honours were broadly even, it was right to overturn the award and direct that no costs be paid. Thus, the cheque test was not determinative.

Should anything less than outright success be regarded as partial failure? Absolutely not, declared the Court of Appeal in *Webb v Liverpool Womens' NHS Foundation Trust* (2016) EWCA Civ 365. This was an all-or-nothing clinical negligence claim. In the event, C won and recovered in full even though she failed on a number of specific allegations (para. 4). The trial judge decided that this should be reflected in a percentage costs award.

Oddly, there was no reference to the judgment of Jackson LJ in the important *Fox v Foundation Piling LTD* (2011) EWCA Civ 790, where the court explained that it was commonplace in an injury claim for some allegations to fail. That should not inevitably lead to denying the winner full costs. Apart from anything else, one could imagine Sir Rupert Jackson shuddering at the thought of having to dissect the case in order to quantify a percentage to disallow. A full award would be much less painful. Obviously, percentage orders do have a role to play, as where a major plank of the claim had collapsed. This was not such a case.

Practitioners might care to note a few other comments from on high. In *HLB Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm), Gloster J, as she then was, said: 'There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at paragraph 35: "The court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues." Likewise in *Travellers' Casualty* [2006] EWHC 2885 (Comm), Clarke J said at paragraph 12: "If the successful claimant has lost out on a number of issues, it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point."'

This appeal decision confirms that a percentage order is permissible, but there were no grounds for one in this case. C ought not to be penalised for making legitimate but unsubstantiated allegations. A similar theme has recently arisen in the context of costs management. The fact that an action settles for less than the amount claimed is not a good reason to cut the budget, held Master Rowley in *Jallow v MOD* (2018) EWHC B7 (Costs). A claim pleaded at £300,000 settled for £90,000. There were a variety of quantum scenarios. Without evidence of wilful exaggeration, the budget remained sound. Further, a reduction in hourly rates for incurred costs was not to be read across so as to disturb the budget.

Deputy Master Campbell took a different approach last year in *RNB v Newham*, but the appeal against his decision has been compromised.

PART 36

An apparent victory can of course be reversed where the loser has made a good Part 36 offer. There has been a flurry of recent decisions on the rule. On 20 June the Court of Appeal heard *Hislop v Perde*, where D accepted, one week before trial, an offer made two years earlier. What costs order was justified? The claimant contended that indemnity costs are justified. The defendant's case was that the claimant should recover all costs accumulated during the currency of the claim, and on the standard basis. My expectation is that the claimant will fail.

In *Optical Express Ltd v Associated Newspapers Ltd* (2017) EWHC 2707 (QB), the High Court abandoned conventional Part 36 principles where C accepted a Part 36 offer out of time, having initially rejected it as derisory. Without a principled explanation for the change of heart, it was inferred that C had belatedly reappraised the offer, something that should have been done at a much earlier date. The conduct of the claimant was held unreasonable. C got costs up to the point when it ought to have taken the offer. Thereafter, it was to pay D and on the indemnity basis. So again, the recipient of cash was not the outright winner.

'There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues'

Warby J observed, relying on *Medway v Marcus* (2011) EWCA Civ 750, that a defendant confronted by a high claim of perceived low value would best be protected by making an offer without prejudice save as to costs. Critically, it is impermissible to put forward a valid Part 36 offer which contradicts the costs regime embedded in the measure. One cannot therefore, for example, make a good offer if it purports to include costs. There is nothing to stop a party making an all in offer by way of a without prejudice save as to costs proposal instead.

A costs term inconsistent with the rule meant that a proposal made by a prestigious legal practice in the case of *James v James And Others* (2018) 1Costs LR 175 was not compliant despite being dressed up as a Part 36 offer. To this day, old hands can come unstuck due to the demanding requirements of the procedural code that is Part 36.

The great HH Michael Cook observed that 'The one rule of costs is that there is no rule of costs'. Discretion and innumerable exceptions mean that certainty is not ever present. Do not prematurely celebrate your win.

Professor Dominic Regan of City Law School is an expert on costs reform

A sense of proportion

David Cooper looks at the latest developments on proportionality

The Holy Grail in the costs world right now is definitive guidance on applying the proportionality test. It is an issue that has come up time and again, yet five years on from its introduction, still we wait.

It is not just practitioners who are struggling with this. In May, in *Various Claimants v MGN Ltd* [2018] EWHC 1244 (Ch), the chief chancery master at a CCMC expressed uncertainty as to how to apply the proportionality test to the budgeted costs in the latest round of phone hacking cases, concluding that if the costs are reasonable, they are proportionate.

The case concerned the 'second wave' of the Mirror Newspapers hacking litigation (MNHL), and the first claims coming through it from former TV presenter John Leslie and former Celebrity Big Brother contestant Chantelle Houghton.

The MNHL uses a novel system of template costs budgeting to avoid having to create one from scratch each time. There are three templates; these cases were 'template C', meaning there was at least one admission of the misuse of private information, and the number of articles complained about exceeded 20. However, it was agreed that these two cases should have bespoke individual budgets for a variety of reasons.

The MNHL is not subject to a group litigation order but has been structured similarly. Chief Master Marsh said: 'There are features in the MNHL litigation that obviously do not fit with the standard costs management regime. Budgeting common costs, creating template budgets for both individual and common costs and permitting bespoke budgets are but a few examples of the bespoke nature of the regime that applies in the MNHL.

> The court was asked to consider the proportionality of costs without itself having first carried out an item-by-item assessment

'It would be wrong, however, to see that regime as operating in a wholly parallel universe. It is better seen as an adaptation of the standard regime. The difficulty this creates, however, is that it is not clear to what extent the standard regime has been adopted and/or adapted when it comes to a detailed review of the rules and the practice direction.

'As I have already indicated, the basis of budgeting as set out in PD3E paragraphs 7.3 and 7.4 has been expressly adopted. As to the remaining provisions of the rules and the practice direction it is, as the parties accepted at the hearing, more a matter of the bespoke costs management regime "looking to" the standard regime rather than being a new set of rules that can be derived from a re-drafting exercise.'

The master said he was finding it hard to apply 'a principled approach to proportionality in relation to these budgets'. He continued: 'It seems to me that the only principled way of applying the test in these cases is to have only very limited regard to the possibility that proportionality may produce a cap that will limit what would otherwise be a reasonable figure. This is what the parties have done in their submissions. To take any other approach in this bespoke litigation risks the court merely applying arbitrary limits because there is no financial reference point for proportionality.

'It seems to me that the wider factors I have summarised, in particular the public importance and test case factors, will have the effect that if the costs are reasonable they are proportionate. That conclusion chimes with the approach the parties have adopted and avoids the court wielding a concept of uncertain application.'

Shortly afterwards, the senior costs judge took this a little further in another part of the MNHL, with an unreported ruling that the proportionality test does not prevent the recovery of costs that are higher than the sums at issue in litigation. Master Gordon-Saker said the value of the non-monetary relief and other factors at play in the case 'justify the conclusion that the costs can be proportionate even though they exceed the damages'.

'In the face of the defendant's denial, the claimants pursued difficult claims to bring the defendant to account for its disgraceful behaviour,' he said. 'These claims were not about claiming compensation for injury. They were about seeking vindication for the claimants' position that they were the victims of appalling breaches of privacy by a national newspaper group motivated only by commercial gain.'

He was ruling on the costs of 10 claimants where the proportionality of their costs remained at issue. The hearing was delayed until the Court of Appeal handed down judgment in *BNM v MGN*, but in the event it did not address the application of the test to base costs.

However, noting that 'anything said about proportionality, at whatever judicial level, is subjected to anxious scrutiny', Master Gordon-Saker stressed that nothing in his judgment should be taken as an attempt to provide guidance.

The group included the likes of footballer Paul Gascoigne (pictured), businesswoman Nicola Horlick, actor Christopher Eccleston, singer Peter Andre and Robert Willis, the PA to film star Jude Law. Only Mr Gascoigne's case and that of BBC executive Alan Yentob went to trial; the rest settled. Mr Gascoigne was awarded the highest damages of the group (£188,250) and Mr Andre the lowest (£15,000) – across the cases, the total damages were £540,750. Mr Gascoigne also claimed the highest amount of costs, £239,543, but had agreed reasonable base costs of £158,614. MGN offered £80,000.

The agreed reasonable base costs for all the cases totalled £508,814, and MGN's offers added up to £225,000. In addition, common costs of £61,976 per claimant had been agreed as proportionate. This was therefore a highly unusual case – where the court was being asked to consider the proportionality of costs without itself having first carried out an item-by-item assessment. Master Gordon-Saker said he would take the agreed elements into account when deciding whether the overall individual costs awards were proportionate.

He then went through the five factors in CPR 44.3(5) against which to assess proportionality. Turning first to the sums at issue, the judge said that 'in the present case it is reasonable to assume that, had the settled claims proceeded to trial, the awards of damages would have been significantly greater than the sums that were agreed'.

The judge found several elements of valuable non-monetary relief, such as undertakings to delete and not republish articles derived from hacking, orders for delivery up of documents, statements in open court and the judgment following trial.

He said his impression was that the claimants 'were not motivated principally by their claims for damages. They were motivated principally by the desire to hold the defendant to account… The value of the non-monetary relief in issue in the proceedings, taken as a whole, was substantial and at least as great as the sums in issue.'

The litigation was complex, he continued, but the conduct of MGN – even though he said this did not have to be misconduct – did not meet the test of generating any additional work. There were also a number of wider factors involved in the proceedings, including their 'significant public importance', the reputations of the claimants and the vindication they had obtained by bringing their cases.

As a result, Master Gordon-Saker concluded that all of the individual costs claimed were proportionate. 'The rule does not prevent the recovery of costs in an amount greater than the sums in issue in the proceedings. Had that been intended, it could easily have been stated. Financial value is but one of the five factors and so there will be cases where, by reason of the other four factors, the costs are proportionate even though they exceed the sums in issue. In my judgment, this is such a case. The value of the non-monetary relief and the wider factors I have sought to identity justify the conclusion that the costs can be proportionate even though they exceed the damages.

'I cannot conclude that the total costs of Mr Gascoigne of £220,590… are disproportionate in a claim which proceeded to a 13-day trial and resulted in an award of damages of £188,250. The costs of the other claimants are lower and I would reach the same conclusion, even though for some the sums in issue were lower.'

Publication proceedings are different from many classes of litigation in that they are often not primarily about the damages, with reputations and other relief like injunctions usually at stake – while this case has also served to shine a light on misconduct at one of the country's leading newspaper groups. This undeniably makes it easier to advance the case that the court should not simply consider the relationship between costs and damages.

The question is whether the corollary to this case also holds true – where it really is all about the damages, can you justify costs being greater than damages? At this stage we cannot know for sure, but the receiving party will undoubtedly want to engage as many of the other rule 44.3(5) factors as it can.

But while Master Gordon-Saker may have said his ruling does not provide guidance – and of course it has no binding precedent value – given his position and the paucity of judgments of this nature, it is sure to be cited by others.

Proportionality issues arise at various stages within proceedings. The judge at each stage will have to make a determination based partly on the representations made by each side; and the nature or tone of those representations will be influenced by numerous factors, not just the amount of damages that may be at stake.

It is therefore extremely important that all parties to litigation do have full regard to the factors set out in CPR 44.3(5) at all stages of the proceedings, so as to ensure that genuine efforts are made to keep the costs of the litigation to a reasonable and proportionate level, and to avoid providing more ammunition for the sceptics who seek to promote the often-held view that the lawyers are only in it for the money.

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