CHAPTER 2

THE CIVIL LITIGATION COSTS REVIEW AND PROPOSALS FOR REFORM

1. THE REVIEW OF CIVIL LITIGATION COSTS

Establishment of the Review of Civil Litigation Costs. On 3 November 2008, the Master of the Rolls, Sir Anthony Clarke, established the Costs Review with the support of the Ministry of Justice. **2–001**

Terms of reference. The terms of reference for the costs review were: **2–002**

"To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

Terms of reference:
In conducting the review Lord Justice Jackson will:

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements – 'No win, No fee', following the scoping study.
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.
- Compare the costs regime for England and Wales with those operating in other jurisdictions.
- Prepare a report setting out recommendations with supporting evidence by 31 December 2009."

Assessors. The assessors were Mr Justice Cranston, Professor Paul Fenn, Senior Costs Judge Peter Hurst, Jeremy Morgan QC, Michael Napier CBE QC, Andrew Parker and Colin Stutt. The assessors met regularly throughout the **2–003**

Review. They gave invaluable advice and assistance. Inevitably, they disagreed with one another on many issues. They are not responsible for the contents of the Preliminary or Final Reports.

2–004 **Judicial assistants and clerk.** The judicial assistants were Pete Given (Allen & Overy LLP) from January to February, Ilona Groark (Herbert Smith Freehills LLP) from March to July, and Hannah Piper (Hogan Lovells International LLP) from September to December 2009. Julian Bailey of CMS Cameron McKenna LLP gave intermittent assistance throughout the year, in particular with analysis of the overseas material. The accountant judicial assistants (both from Deloitte LLP) were Lucy Harrison from 27 July to early October, and Chris Tune from October to December 2009. All the judicial assistants worked long hours and made a real contribution to the project.

2–005 **Phase One of the Costs Review.** Phase One of the review ran from January to April 2009. It involved fact finding, a study of academic research, a tour of overseas jurisdictions, preliminary consultation with stakeholder groups, collection of evidence and available statistics/costs data. The work product of Phase One was the Preliminary Report.

2–006 **Judicial survey.** During the four-week period 19 January to 13 February 2009, every first instance judge was asked to provide details of every case in which they made a summary assessment of costs, a detailed assessment of costs, or an order for interim payment on account of costs. The results of the survey were published in the Preliminary Report. They were the subject of much analysis by the accountant judicial assistant and also by many stakeholders who sent in submissions.

2–007 **Overseas visits.** The overseas jurisdictions visited were France, Germany, Hong Kong, Australia (New South Wales, Victoria and Western Australia), New Zealand, USA and Canada. The Preliminary Report includes an account of those jurisdictions and also other jurisdictions based on desk study and phone calls.

2–008 **Preliminary Report ("PR").** The Preliminary Report comprised 64 chapters and 30 appendices on a CD. The report (excluding appendices) was 663 pages long. It provided details of the costs of different categories of litigation gathered from a variety of sources. It summarised:

- relevant academic research;
- the positions of major stakeholder groups on the principal issues;
- the current means of funding civil litigation and options for reform;
- the issues surrounding fixed costs;
- the rules for summary and detailed assessments;
- case management procedures and options for reform, including costs management;
- the costs and procedural regimes of nine overseas jurisdictions.

The report reviewed 11 specialist areas of litigation. It examined the effects of (a) cost shifting and (b) regimes where there was no costs shifting, such as employment tribunals. The Preliminary Report identified issues for consideration during Phase Two.

Appendices to the Preliminary Report. Appendices 1–8 set out the results of the judicial survey. Appendices 9–30 set out in digestible form a vast mass of data provided by stakeholder groups. These included the Association of Personal Injury Lawyers ("APIL"), various insurers, the Commercial Court Users Committee, individual firms of solicitors, the Media Lawyers Association ("MLA"), the National Health Service Litigation Authority ("NHSLA"), the Medical Protection Society and others. The appendices were on a CD, but if printed out would run to about 300 pages. 2–009

Data from the Legal Services Commission. PR Ch. 6 sets out data from the Legal Services Commission. This gave a clear picture of costs in 14 identified areas. These areas were welfare, public law, consumer claims, debt claims, education, employment, actions against the police, community care, personal injury, mental health, clinical negligence, immigration, housing and "miscellaneous". These costs were broken down by reference to the stages at which cases settled. 2–010

Total volume of material in the Preliminary Report. The total volume of material in the Preliminary Report and its appendices was vast. Only a brief description is offered here. 2–011

Phase Two of the Costs Review. Phase Two was the consultation period, running from May to July 2009. Stakeholder groups, practitioners, court users and others sent in several thousand pages of written material. Numerous firms of solicitors and other organisations hosted meetings at which issues of concern to themselves and their clients were debated. Legal commentators pitched into the fray with gusto. 2–012

Working groups. During Phase Two, working groups considered the following areas and reported back: 2–013

- personal injury damages;
- fixed costs in insolvency proceedings;
- costs management of insolvency proceedings;
- disclosure;
- libel;
- costs management generally.

2–014 **Seminars.** There were:

- four major seminars (organised by the Master of the Rolls' office) at Cardiff, Manchester, Birmingham and London; and
- eight "informal" seminars, each devoted to a specific topic: CFAs, CLAF/SLAS/DBAs, fixed costs, chancery litigation, judicial review, SMEs' business disputes, case + costs management, assessment of costs.

2–015 **Pilots and working groups during Phase Two.** Two costs management pilots were established during Phase Two. The first was in the Birmingham specialist courts. The second was a pilot of costs management for defamation proceedings in London. Seven working groups were established to consider specified topics and report back.

2–016 **Phase Three of the Costs Review.** Phase Three ran from mid-August to December 2009. The first month was spent reading and analysing the accumulated the material. Thereafter, the Final Report was written at the rate of five chapters per week (i.e. one chapter per day). By late November, the whole of the Final Report was in first draft. That allowed a month for revising and polishing. The Final Report was complete by Christmas 2009.

2–017 **Visits during Phase Three.** The principal task was report writing at this stage, so visits were kept to a minimum. Nevertheless, Phase Three included a trip to Scotland for a conference marking the launch of Lord Gill's report. It also included visits to three solicitors' offices: Irwin Mitchell LLP in Sheffield, Beachcroft LLP in Birmingham and Olswang LLP in London. The purpose of these visits was to study work in progress and gain an insight into preparations for detailed assessment, costs negotiations and budgeting.

2. PROPOSALS FOR REFORM

2–018 **Final Report ("FR").** The Final Report was 558 pages long. It comprised 46 chapters and 10 annexes. It set out additional statistical material which was not available at the time of the Preliminary Report, including details of 1,000 cases closed or settled by the NHSLA in the period 1 April 2008 to 1 March 2009.

2–019 **Structure of chapters of the Final Report.** Each chapter set out a summary of the relevant evidence, a summary of the written submissions received and the competing arguments deployed during Phase two. It then set out conclusions and supporting reasons.

2–020 **Recommendations.** The Final Report made 109 recommendations. Most of the proposals required amendments to the CPR. Some required primary legislation. Some of the proposals related to the state of the common law and were a matter for judicial consideration in future cases. Some of the recommendations were directed to particular bodies, such as providers of professional training or the Judicial College (then known as the Judicial Studies Board).

2–021 **What reforms did the Final Report propose?** Rather a lot, actually. Anyone seeking the full answer should read the report or at least have a look at the list of recommendations on pp. 463–471. The following chapters of this book set out and discuss the principal recommendations and some of the others.

2–022 **Interrelationship between the recommendations.** The reforms were designed as an interlocking package. The links between them include the following:

- The new rules about proportionality govern case management, costs management, funding reforms, summary assessment and detailed assessment.
- The abolition of recoverable success fees and recoverable after-the-event insurance ("ATE") premiums. This is necessary to prevent (a) recoverable costs being grossly disproportionate and (b) distortion of incentives on both sides, which further drives up litigation costs.
- The introduction of qualified one-way costs shifting ("QOCS") is necessary to compensate for the abolition of recoverable ATE premiums.
- The 10% increase in damages is part of a package of measures to compensate personal injury ("PI") claimants for the loss of their former right to recover against defendants the success fees payable to their own lawyers.

  Other elements of that package are (a) the cap on the amount of the success fee which a lawyer can charge his or her own client in a PI case, and (b) the enhanced reward for effective claimant offers under CPR Pt 36.
- The introduction of damages-based agreements ("DBAs"), the promotion of before-the-event insurance ("BTE") and the proposal for a contingent legal aid fund ("CLAF") are part of a policy to establish new means of funding litigation (which do not drive up costs) in a world where success fees and ATE premiums are no longer recoverable.
- The case management reforms are intended to go hand in hand with costs management. The general idea is that courts will manage cases in accordance with approved (and proportionate) budgets.
- The costs management rules, together with the abolition of recoverable success fees and recoverable ATE premiums, are intended to facilitate alternative dispute resolution ("ADR") (as well as reduce the costs of litigation).
- The proposals concerning court IT are designed to facilitate effective case management and costs management.
- Increased docketing is necessary in order to facilitate more effective case management and costs management.
- The new measures to control the scope of witness statements and expert reports enable the court to limit written evidence to that which is proportionate, having regard to the approved budgets.
- The reforms to the disclosure rules should enable the court to limit disclosure` to that which is proportionate, having regard to the approved budgets.

- Referral fees drive up the costs of personal injury litigation, because competition inures to the benefit of the referrers rather than the claimants; that is a driver of disproportionate costs and must stop.
- Fixed costs across the fast track are the best way to achieve certainty and to ensure that costs are proportionate. Once referral fees are banned, it becomes possible to fix the costs of fast track personal injury cases at a proportionate level.
- The proposals for future fixing of costs in the lower reaches of the multi-track are a logical extension of costs management and fast track fixed costs. Experience gained from those exercises will feed into any future grid of fixed costs.
- The proposal for a new form bill of costs fits with (a) the proposal to make effective use of modern IT and (b) the existence of approved costs budgets.

2–023 **Appendix A.** Appendix A at the end of this book illustrates graphically some of the links between reform proposals in the Final Report.

2–024 **Launch of the Final Report.** The text of the Final Report was delivered to the Lord Chancellor and the Master of the Rolls in late December 2009. The report was printed in early January 2010 and published on 14 January 2010.

CHAPTER 3

THE ORGANISING PRINCIPLE – PROPORTIONALITY

1. WHAT IS PROPORTIONALITY?

Aristotle's long shadow. As noted in Ch. 1, above, Aristotle's twin conceptions of justice embody proportionality. Izhak Englard, in his essay on corrective and distributive justice,[1] has demonstrated how the Scholastic movement picked up and developed these ideas. Aquinas, in *Summa theologica*, appreciated that corrective justice was not a simple equal measure, but a proportionate measure adapted to the particular circumstances.[2] Through the Scholastic movement, Aristotle's ideas came to infuse modern European jurisprudence. 3–001

Professor Zuckerman's analysis. Professor Zuckerman classifies proportionality as a civilian principle. He describes it as a tool of administrative law 3–002

> "for assessing the use of authority by state organs, such as the police, so as to determine whether their use of power was excessive or unnecessary in relation to the particular intended objective".[3]

Whilst accepting that summary, it is right to say that similar principles are embedded in the common law.

Blackstone on the limits of law. In his distillation of English law during the eighteenth century, Sir William Blackstone described the limits of the law as follows: 3–003

> "Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick [*sic*]."[4]

---

[1] Izhak Englard, *Corrective and distributive justice: from Aristotle to modern times*.
[2] See Englard's analysis of *Summa Theologica* at p.20 of *Corrective and distributive justice: from Aristotle to modern times*.
[3] Adrian Zuckerman, *Zuckerman on Civil Procedure*, Ch 1, para. 1.35.
[4] Sir William Blackstone, *Commentaries on the Laws of England*, 1st edn (1765), Ch. 1, p.121.

Interestingly, Blackstone cites Justinian's *Institutes* as authority for this proposition, even though the Institutes omit the crucial restriction on the ambit of law.[5]

3–004 **Proportionality as a restraining principle.** It is, therefore, a long established feature of both civil and common law jurisdictions that there are limits upon the extent to which the law can intrude upon private rights. The proportionality principle is one way of expressing those limits.

3–005 **Lord Reed's analysis.** Lord Reed traced the emergence of proportionality as a principle of both common law and civil law in *Bank Mellatt v HM Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700 at [68]–[76]. Although Lord Reed did not specifically cite Englard, *Summa Theologica*, Justinian or Zuckerman, his analysis is along the same lines as set out in the preceding paragraphs.

3–006 **What does proportionality actually mean?** Proportionality means that there is a proper relationship between subject and object. If applied to the action of an administrative body, it means that there is a proper relationship between the administrative action and the objective to be achieved. If applied to a judicial decision, it means that there is a proper relationship between (a) the subject matter of the litigation and (b) any remedy ordered and/or any steps taken to achieve that remedy. Proportionality is the antithesis of "zero tolerance".

3–007 **A European concept.** The principle of proportionality has underpinned the European Community (now the EU) since it was established in 1957. The fourth paragraph of Article 5 of the Treaty on the European Union provides:

> "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

This is widely accepted as enshrining the proportionality principle. In *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* (C–331/88) [1990] ECR I-4023, the European Court of Justice stated at [13]:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The most recent analysis of proportionality in EU law is to be found in *R. (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2015] 1 WLR 121.

[5] Justinian, *Institutes*, at 1.3.1:
"Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius, quod cuique facere libet, nisi si quid aut vi aut jure prohibetur."

3–008 **Proportionality as a principle of English law.** In *SS (Nigeria) v SSHD* [2013] EWCA Civ 550; [2014] 1 WLR 998, the Court of Appeal was considering whether the deportation of a foreign criminal would be disproportionate. Laws LJ (with whom Black LJ and Mann J agreed) neatly distilled the proportionality principle at [38] as follows:

> "But the true innovation effected by proportionality is not, in my judgment, to be defined in terms of judicial intrusion or activism. Rather it consists in the introduction into judicial review and like forms of process of a principle which might be a child of the common law itself: it may be (and often has been) called the principle of minimal interference. It is that every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers."

3–009 A month later, the Supreme Court reviewed the role of proportionality in a very different context. In *Bank Mellatt v HM Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700, the Bank of England in the exercise of its powers under s.62 of the Counter-Terrorism Act 2008 issued a direction which had the effect of shutting the claimant (an Iranian Bank) out of the UK financial sector. The purpose was to hinder the pursuit by Iran of its nuclear weapons programme. The claimant applied under s.63 of the 2008 Act to set aside the direction. The High Court judge dismissed the application, as did the Court of Appeal. The Supreme Court reversed that decision, holding that the measure taken by the Bank of England was disproportionate. Lord Sumption gave the leading judgment for the majority. At [21], he noted that the principles of rationality and proportionality overlapped. After identifying a line of authorities on these two principles, he concluded with a pithy summary:

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

2. PROPORTIONALITY IN ADJECTIVAL LAW

3–010 **Adjectival law.** Adjectival law is a collective term for the rules of procedure and practice which enable persons to (a) enforce the rights and remedies conferred by substantive law, or to (b) resist baseless claims. Some of these rules embody fundamental principles, for example *audi alteram partem* – listen to both sides before deciding. Even so, the rules of adjectival law are not ends in themselves. They are subordinate to the principles of substantive law. You don't listen to both sides just for the fun of it. You do so in order to decide the relevant issue in accordance with substantive law. As Sir Jack Jacob observed in the Eighth Upjohn Lecture, 1979:

"Procedure is not the master but the servant of justice, and its function is ever to study and conform to the needs of the times."[6]

3–011 **The procedural rules must not licence a free-for-all in which every point is pursued without limit.** As Bentham noted two hundred years ago,[7] it is not possible to deliver perfect justice in every case without regard to costs or delay. Such an approach would be a denial of justice because most litigants could not afford to participate in the process. The question therefore arises as to what restrictions should be placed upon the obtaining and presentation of evidence. This question becomes all the more acute in the digital age. In many cases, the potentially relevant electronic documents are unlimited. Parties can produce with ease pleadings, witness statements, expert reports and written submissions of inordinate length. The more the written material expands, the more there is to talk about at oral hearings.

3–012 **How should litigation be regulated in the digital age?** The answer is that the principle of proportionality, which has now emerged in substantive law, should also be the guiding principle of adjectival law. Sorabji describes this approach as "the revolutionary change that the Woolf and Jackson reforms brought about".[8]

3–013 **How should the proportionality principle be formulated for this purpose?** The proportionality principle in the context of adjectival law may be formulated as follows: Procedural requirements should be proportionate to the subject matter of the litigation. This proposition is subject to qualifications, for example in the event of misconduct by parties.

3–014 **Can you give examples to illustrate 'proportionate' and 'disproportionate' in adjectival law?** Here are two illustrations:

Illustration (i). Absent special circumstances (e.g. the litigation is a test case), it would be disproportionate to require the parties to spend £1 million on disclosure, if the sum in dispute is only £200,000. The rules must be sufficiently flexible to enable the court to make proportionate disclosure orders in every case.

Illustration (ii). The purpose of sanctions is to secure that (a) litigation proceeds efficiently and at proportionate cost towards resolution in accordance with the substantive law, and that (b) there is a general culture of compliance with rules, practice directions and orders. (In the absence of such a culture, litigants (a) will be inhibited from enforcing their rights and remedies or from resisting baseless claims, alternatively (b) they will only do so at increased cost and inconvenience.[9]) Therefore any sanctions imposed by the rules or by the court must be proportionate to that purpose. This inevitably involves a balancing exercise. That balancing exercise is neatly illustrated by recent experience.

---

[6] Jacob, *The reform of civil procedural law*, p.2.
[7] See section 1 of Ch. 1, above.
[8] John Sorabji, *English civil justice after the Woolf and Jackson reforms*, pp.2–3.
[9] An award of costs thrown away by an adjournment or an amendment seldom refects the true loss suffered by the opposing party. See e.g. *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3926 at [89].

- Under the pre-2013 CPR, the courts made insufficient use of sanctions. The consequence was that litigation was so lax that parties generally were less likely to achieve resolution at proportionate cost or in accordance with the substantive law. The Law Society's submissions quoted in section 2 of chapter 11 below graphically described that state of affairs.
- As a result of the decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795 (or at least that decision as generally interpreted), for several months the courts went to other extreme and imposed or maintained sanctions which were unduly tough, for example disallowing costs because a party had been 45 minutes late in filing its budget.

3–015 What is required is a proportionate approach to sanctions, which lies somewhere between those two extremes. Chapter 39 of the Review of Civil Litigation Costs Final Report ("FR"), para. 6.5 advocated such a proportionate approach. The amendments made by the Rule Committee to CPR r.3.9 struck the right balance and thereby achieved a proportionate approach. It appears that—after some initial mishaps—the courts are now applying this rule correctly.

3–016 **Amendments made to the overriding objective with effect from 1 April 2013.** The Rule Committee made two amendments to the overriding objective with effect from 1 April 2013. The purpose of the first amendment was to promote proportionality. The purpose of the second amendment is less clear.

3–017 **The first amendment to the overriding objective.** The first amendment was the insertion of "and at proportionate cost" into CPR r.1.1(1) and (2). As explained in section 5 of this chapter, I accept some responsibility for this amendment, having proposed it to the Rule Committee. It was part of a package of linked amendments, designed to make costs proportionate.

3–018 **The second amendment to the overriding objective.** The second amendment to the overriding objective was to add at the end of r.1.1(2) a new sub-paragraph as follows: "(f) enforcing compliance with rules, practice directions and orders".

3–019 **Comment.** The second amendment to the overriding objective was not one of my recommendations. It is, of course, none the worse on that account. The second amendment will be beneficial if it is understood as promoting the purpose stated in illustration (ii) above. That purpose is to secure that (a) litigation proceeds efficiently and at proportionate cost towards resolution in accordance with the substantive law, and (b) there is a general culture of compliance with rules, practice directions and orders. On the other hand, the provision will be disproportionate if it is understood as introducing formalism or making strict compliance in every case an end in itself, rather than the means to an end. The correct construction of the provision is, of course, a matter for the courts, not for this book.

3–020 **Conclusion.** A major objective of the Woolf reforms was to introduce a regime of proportionate case management. The creation of separate rules for different tracks played a significant part in achieving that objective. The purpose of the

various procedural reforms proposed in the Final Report was to achieve that same objective. Chapters 8–14 below discuss reforms to the management of litigation and the facilitation of ADR. All those reforms have the objective of promoting the resolution of disputes not only in accordance with the substantive law, but also proportionately.

3. PROPORTIONATE COSTS – THE GOAL OF THE 2009 COSTS REVIEW

3–021 **Terms of reference for the 2009 Costs Review.** The terms of reference for the Costs Review required the reviewer "to make recommendations in order to promote access to justice at proportionate cost". This required (a) consideration of what "proportionality" meant in the context of litigation costs and (b) the formulation of specific proposals to achieve proportionality (as defined in answer to the first question), so far as that was possible. Neither of those tasks was particularly easy.

3–022 **The case law.** The existing case law offered only limited assistance to anyone tackling those two questions.[10] Indeed this was one of the reasons why the Master of the Rolls set up the Costs Review.

3–023 ***Lownds v Home Office.*** *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 posed a particular problem. The guidance given by the Court of Appeal in that case was that the assessment of costs should proceed in three stages: (a) assessing "reasonable" costs; (b) determining whether the total of those reasonable costs is proportionate; if not, (c) disallowing any items of costs which were unnecessary (a test to be applied without setting too high a standard). The effect of *Lownds* was that the court could, and in many cases did, make awards of costs which were disproportionately high. This decision has come in for some criticism from several quarters. Sorabji describes it as "disastrous".[11]

3–024 **The effect of recoverable success fees and recoverable ATE premiums.** To make matters worse, when the courts were considering whether or not the costs claimed were proportionate, the then current rules required judges to disregard the amount of any recoverable success fee or ATE premium: see s.11 of the Costs Practice Direction as it stood in 2009.

3–025 **An inescapable consequence.** It was an inescapable consequence of the terms of reference that the Costs Review would have to tackle the problems posed by *Lownds* and by the regime of recoverable success fees/recoverable ATE premiums, as well as the problems of definition discussed above.

[10] See e.g. *Willis v Nicolson* [2007] EWCA Civ 199 at [18]–[19].
[11] John Sorabji, *English civil justice after the Woolf and Jackson reforms*, p.242.

4. RECOMMENDATIONS CONCERNING PROPORTIONATE COSTS IN THE FINAL REPORT OF JANUARY 2010

3–026 **The principal recommendation.** The principal recommendation in the Final Report was that successful parties should only recover proportionate costs.[12] In truth this recommendation was inevitable, given the terms of reference. It was nonetheless highly controversial.

3–027 **Defining "proportionate" costs.** This turned out to be one of the most challenging tasks in the whole of the Costs Review. Chapter 3 of the Final Report (entitled "Proportionate Costs") underwent radical revision more than once as discussions with the assessors proceeded during the autumn of 2009. Paragraphs 5.1 to 5.13 of that chapter set out some important conclusions reached after hearing the valuable (but differing) views[13] of the experienced assessors:

"5.1 **The two relevant principles.** To what extent should the winning party in litigation recover the costs which it has incurred against the losing party? Two principles are relevant to the debate which this question has generated. They are compensation and proportionality.[14]

5.2 **Compensation.** The principle of compensation is embedded both in common law and in equity. The essence of compensation is that a wrongdoer should restore the innocent party to the position in which he would have been, if the wrong had not occurred. The principle of compensation underlies the law of contract, the law of tort, the law of damages and the remedies of equity.

5.3 **Proportionality.** As explained in section 3 of this chapter, proportionality is a more recent arrival on the scene. Proportionality is an open-textured concept. It now pervades many areas of the law, both substantive and adjectival. 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 being imposed upon others.

5.4 **Interaction of the two principles.** The principle of compensation requires that a party whose claim or defence is vindicated should be made whole. In other words, that party's costs should be paid by the other side. However, the principle of proportionality requires that the costs burden cast upon the other party should not be greater than the subject matter of the litigation warrants. The focus of this chapter is upon the extent to which the second principle limits the operation of the first principle.

5.5 **Proportionality of costs.** Proportionality of costs is not simply a matter of comparing the sum in issue with the amount of costs incurred, important though that comparison is. It is also necessary to evaluate any non-monetary remedies sought and any rights which are in issue, in order to compare the overall value of what is at stake in the action with the costs of resolution.

[12] On an assessment of costs on the standard basis.
[13] The function of the assessors was to advise, not to achieve unanimity. They brought to bear a vast wealth of experience, but seldom were in agreement with each other.
[14] See e.g. *Erlanger v New Sombrero Phosphate Company* (1878) 3 App Cas 1218 at 1278–1279; *Newbigging v Adam* (1886) 34 Ch D 582 at 595; *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39. This principle is sometimes referred to as *restitutio in integrum*.

5.6 The comparison exercise set out in the previous paragraph produces a strong indication of whether the costs of a party are proportionate. Before coming to a final conclusion, however, it is also necessary to look at the complexity of the litigation. There can be complex low value claims where the costs of litigation (if conducted properly) are bound to exceed the sum at stake. Equally, there can be high value, but straightforward, commercial claims where the costs are excessive, despite representing only a small proportion of the damages. It is also relevant to consider conduct and any wider factors, such as reputational issues or public importance.

5.7 It is therefore necessary to consider proportionality of costs by reference to (a) the sums at stake, (b) the value of any non-monetary remedies claimed and any rights in issue, (c) the complexity of the litigation, (d) conduct and (e) any wider factors, such as reputational issues or public importance.

5.8 Professor Zuckerman pithily summarises proportionality as follows: 'The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and importance on the other hand.'[15]

5.9 In borderline cases it will be a matter of subjective opinion whether the costs in any particular case are disproportionate. Nevertheless, despite the difficulty of determining in borderline cases whether or not costs are proportionate, there are many cases where it is readily apparent that costs are or are not proportionate, having regard to all the circumstances of the case.

5.10 **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. It will be recalled from chapter 12 of the Preliminary Report that the Legal Services Commission applies a cost / benefit test when deciding whether to support a case with public funds. Any self-funding litigant would do the same. The fact that it was necessary to incur certain costs in order to prove or disprove a head of claim is obviously relevant, but it is not decisive of the question whether such costs were proportionate.

5.11 At the time when *Lownds* was decided, it seemed to myself and others that this decision was a neat way of applying the proportionality test, which would bring costs under proper control. Experience, however, has taught otherwise. In my view, the time has now come to say that the guidance given by the Court of Appeal in *Lownds* is not satisfactory, essentially for the reasons given by the President of the QBD at the Cardiff seminar. The effect of *Lownds* was to insert the Victorian test of necessity into the modern concept of proportionality.

5.12 **Disproportionate costs should be disallowed in an assessment of costs on the standard basis.** If a judge assessing costs concludes that the total figure, alternatively some element within that total figure, was disproportionate, the judge should say so. It then follows from the provisions of CPR rule 44.4(3) that the disproportionate element of costs should be disallowed in any assessment on the standard basis. In my view, that disproportionate element of the costs cannot be saved, even if the individual items within it were both reasonable and necessary.

5.13 In other words, 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

[15] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (2006), para.26.88.

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 exp John Singh and Co* [1997] 1 Costs LR 49."

And what conclusion did all that lead to? Chapter 3 of the Final Report reached two conclusions. The first was that "proportionality" should be redefined to include the matters discussed above. The second conclusion was that on a standard basis assessment the successful party should not recover more than proportionate costs. In other words, proportionality should trump reasonableness. 3–028

New definition of proportionate costs. Paragraph 5.15 of FR Ch. 3 proposed the following definition of proportionate costs[16]: 3–029

"Costs are proportionate if, and only if, the costs incurred 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."

Reversal of *Lownds* by rule change. Paragraph 5.16 of FR Ch. 3 recommended that the Rule Committee should reverse the effect of *Lownds* by rule change. 3–030

Well that's fine, but how could the *actual* costs of litigation be brought down to proportionate levels? Fair question. Merely saying that the winner will only recover proportionate costs is a good first step. It will encourage economy by all parties, but that alone is not enough. You cannot make litigation affordable simply by amending the costs rules. The body of the Final Report, therefore, proposed a series of procedural reforms to make case management more proportionate, as summarised in section 2 above. 3–031

5. IMPLEMENTATION

Amendments to CPR Pt 44. The Rule Committee implemented the recommendations in FR Ch. 3 by amending CPR Pt 44 to include the following provisions: 3–032

"44.3 (2) Where the amount of costs is to be assessed on the standard basis, the court will –

[16] *Zuckerman on Civil Procedure* in the latter part of Ch.27 expresses reservations about this formulation, because it is multi-dimensional. On the other hand, if proportionality is *only* defined as an arithmetic concept, this leads to all sorts of nonsenses. This became apparent in 2009 when a variety of different formulations were tested against imaginary cases.

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(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."

3–033 **Self-evident consequence of the amendments to r.44.3.** At the risk of stating the obvious, any court assessing recoverable costs under the new r.44.3 will sometimes find itself constrained to cut down substantially the costs which the receiving party reasonably incurred in order to "win" the case.[17] The court will have regard to the subject matter of the litigation, as well as the other factors set out in r.44.3(2), and will only award such sum as is proportionate.

3–034 **Amendment to the overriding objective.** The Rule Committee amended the overriding objective by inserting the words "and at proportionate cost" into CPR r.1.1(1) and (2).[18] So CPR r.1.l(1) now reads:

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost."

3–035 **Cumulative effect of the above amendments.** The cumulative effect of the amendments to rr.1.1 and 44.3 is to put the concept of proportionate costs, as now defined, at the heart of civil procedure. Both the court and the parties are under a duty to manage litigation at every stage to ensure, so far as possible, that the *actual* costs are no more than proportionate. The second sentence of r.44.3(2)(a) recognises that this goal cannot be achieved in every case.

3–036 **Proportionate costs rules.** For convenience, the final words of r.1.1(1) ["and at proportionate cost"], r.44.3(2) [reversing *Lownds*] and r.44.3(5) [the definition of proportionate costs] will be referred to collectively as "the proportionality rules".

3–037 **Should there be supplementary guidance about the meaning of proportionality in a practice direction?** During 2011 and 2012, there was much debate about whether a practice direction ("PD") should supplement the definition of proportionate costs. Many practitioners argued that there should be supplementary guidance. The third implementation lecture stated the case against that approach, including the following warning:

[17] As happened in *BNM v MGN Ltd* [2016] EWHC B13 (Costs).
[18] I proposed this draft amendment to the Rule Committee at its meeting on 9 March 2012.

> "If the rule is supplemented by an elaborate practice direction, opportunities for satellite litigation will increase exponentially, as practitioners explore the relationship between the provisions, possible interstices in the language and so forth. One lesson from the Costs War is that lawyers leave no stone unturned when it comes to arguing about costs."

3–038 **Fifteenth Implementation lecture.** In the fifteenth implementation lecture, Lord Neuberger MR stated the case against providing supplementary guidance more fully:

> "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."

3–039 **Outcome.** In the end, the view that there should be no PD giving supplementary guidance prevailed. Some commentators and practitioners are concerned about this.[19] Others accept that this is for the best.

3–040 **Why are we better off with no supplementary practice direction?** Rule 44.3(5) states all of the general principles to be applied in determining whether costs are proportionate. The application of those principles in any given case is fact-specific and involves the exercise of discretion. If a PD were to give more detailed guidance, it would inevitably be lengthy. The PD would be helpful in some cases and confusing in others. No legislator can foresee all the vagaries of litigation. Any detailed PD would generate satellite litigation about the relationship between the rule and the practice direction. Then we would have r.44.3(5) + a lengthy PD + an encrustation of case law, followed up inevitably by much learned commentary from the academic community. Surely we are better off without all that?

3–041 **Guidance on the application of r.44.3(5).** For a helpful commentary on the application of r.44.3(5), readers should consult *Questions & Answers*,[20] Ch. 3 "Proportionality". There is also helpful judicial guidance on the proportionality test to be found in *Hobbs v Guy's and St Thomas' Foundation NHS Trust* [2015] EWHC B20 (Costs).

[19] See e.g. *Costs Law: An Expert Guide*, Ch 7 entitled "Proportionality – a brief plotted history from Woolf to Hobbs (via Jackson)".
[20] Hurst, Middleton and Mallalieu, *Questions & Answers*, 2nd edn (2016).

13–032 **Conclusion.** It is hoped that the use of concurrent evidence will increase as the benefits become more widely appreciated. Perhaps younger practitioners (for whose benefit this book is principally written) may persuade judges to make use of the procedure more often. As legal systems go, England and Wales are not that different from Australia.

13–033 **Linkage with other FR reforms.** The reforms concerning expert and factual evidence link in with the various case management reforms discussed in Chs 11 and 12, above. Additionally, and self-evidently, there is a link between the new r.35.4 (limitation of future expert costs, when granting permission for expert evidence) and costs management.

CHAPTER 14

COSTS MANAGEMENT

1. BACKGROUND

Development of case management. As discussed in Ch. 11, above, Lord Woolf's reforms gave the court a central role in the management of civil litigation. The concept was that the court should get a grip on the case at an early stage. The court should focus the parties on the real issues and give directions leading up to trial or settlement. This was unquestionably a positive development. 14–001

The logical consequence. One logical consequence of the Woolf reforms (once they had bedded in) was this. If the court, rather than the parties, was managing the litigation, then the court should do so with an eye on the costs involved. If the court is going to direct three expert witnesses on each side and extensive disclosure of documents, the court needs to know what those directions will cost the parties. The court must also be satisfied that it is reasonable and proportionate for the parties to expend that level of costs on procedural steps. In a claim for £200,000, for example, it would be absurd to direct the parties to take procedural steps which will cost each side £1 million. 14–002

The position in 2009. The position in 2009 was that, save in exceptional cases, the court did not attempt to control costs in advance. The exceptional cases were those where the courts made "costs capping" orders. That regime was problematic. It was seldom invoked in practice and even then only in group actions. In the general run of cases, the solicitors on both sides charged their clients on an hourly rate basis. They added up the costs at the end. The winning party then recovered as much as it could on detailed assessment. By the time of detailed assessment, the money had been spent and it was too late to say: "this or that piece of work did not need to be done". Of course the costs judge can disallow items, but it is unsatisfactory after the event to tell someone what costs they should not have incurred. It is also unsatisfactory for the losing party to learn—after the event—what work someone else was doing at his expense. 14–003

Horror stories. In the course of the Costs Review, there were many horror stories about cases where costs had mushroomed out of control. One typical 14–004

example was the small boundary dispute. In such a case, the losing party could end up selling their home in order to pay both sides' costs.

2. DEBATE DURING THE COSTS REVIEW

14–005 **Chapter 48 of the Preliminary Report.** PR Ch. 48 raised the question of whether the court should manage costs in conjunction with managing the litigation. The chapter explained how this would fit within the general scheme of the CPR. The chapter reviewed earlier proposals for costs budgeting, which had been advanced by Professors Zuckerman and Peysner. Lord Woolf had considered those proposals but not pursued them because of the general outcry from the profession. Since then, however, the courts have gained experience dealing with summary assessments as well as costs capping and costs estimates in accordance with the provisions of the Costs Practice Direction. Chapter 48 concluded with six questions for consultation, the most important being: "(i) Should costs management become a feature of or adjunct to case management?"

14–006 **Consultation period.** The issues surrounding costs management were the subject of much debate during Phase Two of the Costs Review. Two firms of solicitors (Pinsent Masons LLP and Olswang LLP) demonstrated their budgeting software to the Costs Review team. On 26 May 2009, I attended a meeting of the Users' Committee of the Birmingham specialist courts. After a debate about the topic, they voted by a majority to participate in a voluntary pilot of costs management. That pilot duly started on 1 June. A separate pilot of costs management in defamation cases commenced in London on 1 October 2009. This was a mandatory pilot governed by a practice direction.

14–007 **Submissions during Phase Two.** The submissions on this issue (as on much else) were sharply divided. The Association of HM District Judges broadly supported the proposals for costs management. The Council of HM Circuit Judges opposed the proposal. The Bar Council also opposed the notion of the court managing costs. The Law Society, however, supported the idea.

14–008 **Law Society submission.** The Law Society dealt with the issues thoughtfully and in a balanced way. In the course of its paper, the Law Society stated:

> "The Law Society's Civil Justice Committee supports Professor Peysner's approach to the project management of litigation and some of its members have worked with him in developing those ideas. Support was also shown for the concept at the Law Society's Multi Track event in February 2009 which Jackson LJ attended.
> In commercial litigation a database of hours per task is more elusive as the cases vary so much. However, this does not mean an allocation of time cannot be made. The database reposes within the collective experience of practitioners who apply their professional experience.
> The Law Society agrees with the points made about a possible approach in Chapter 48 paragraphs 3.15–3.20 inclusive of the preliminary report. However, such project management will come at a price as budgets/estimates take time to prepare and authorise which will add to the costs of a case. . ."

The Law Society went on to conclude that the costs generated by costs budgeting were "likely to be offset by real savings if the budgeting regime is applied effectively". The Law Society also emphasised the importance of proper judicial training in costs management.

3. RECOMMENDATIONS IN THE FINAL REPORT OF JANUARY 2010

Chapter 40 of the Final Report. FR Ch. 40 described the costs management pilot which had been established at the Birmingham specialist courts, and summarised the initial results of that pilot. The chapter contained an extensive review of the arguments which had been deployed during Phase Two, both at meetings and in written submissions. The chapter also summarised the conclusions of a costs management working group. The group was supportive of the new discipline. 14–009

Overall conclusion. Chapter 40 of the Final Report reached the overall conclusion that costs management should be pursued, but cautiously and after proper training. Paragraph 7.17 of FR Ch. 40 stated: 14–010

> "*A gradualist approach.* In my view, the correct way forward is to adopt a gradualist approach. First there needs to be an effective training programme, as discussed above. At the same time rules should be drafted, setting out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties. At least in the early stages, I think it would be wrong to make costs management a compulsory procedure.
>
> *What is costs management?* The essence of costs management is as follows:
> (i) At the start of the case each party files a costs budget for the action.
> (ii) The parties exchange budgets, endeavour to agree them and lodge them with the court.
> (iii) The court then decides whether to make a costs management order.
> (iv) If the court makes a costs management order:
>
> (a) The court will examine the parties' budgets (in so far as they are not agreed), make any necessary amendments and then approve them.
> (b) Thereafter the court will manage the litigation in accordance with the approved budgets, but with a power to amend the budgets if there is good reason to do so.
> (c) At the end of the case the successful party will recover costs in accordance with its approved budget, unless there is some good reason to disregard that budget.
>
> (v) If the court does not make a costs management order, then the 'old rules' governing costs estimates apply. The court does not approve the budgets. Nevertheless, at the end of the case the successful party will have to provide justification for any bill of costs which exceeds their budget by more than 20%."[1]

Recommendations. Chapter 40 of the Final Report ended with four recommendations: 14–011

[1] See now PD 44, subsection 3.

"(i) The linked disciplines of costs budgeting and costs management should be included in CPD training for those solicitors and barristers who undertake civil litigation.
(ii) Costs budgeting and costs management should be included in the training offered by the JSB[2] to judges who sit in the civil courts.
(iii) Rules should set out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.
(iv) Primary legislation should enable the Rule Committee to make rules for pre-issue costs management."

As will be seen from the following pages, recommendation (iv) in that list has never been implemented. It may be implemented in the future. Alternatively, the view may be taken that pre-issue costs management does not require primary legislation.

4. IMPLEMENTATION

14–012 **Pilots.** Following the publication of the Final Report, successive pilots were established to try out the proposed rules. Chapter 4 of this book summarises the pilots. They generated much useful information, which fed into the rule drafting process.

14–013 **Rule drafting.** In late 2011 and early 2012, I put before the Rule Committee successive drafts of costs management rules which accorded with the description of costs management set out above. The Rule Committee approved the proposed rules in March 2012. In particular, the draft rules made costs management a discretionary process and exempted the Commercial Court.

14–014 **Subsequent decision.** Subsequently, a decision was taken to make costs management (in effect) a mandatory process for all cases within certain financial limits. Thereafter, there was debate about what the financial limits should be and whether the Commercial Court should be exempt. Since the Commercial Court, the TCC and the Chancery Division had a substantial overlap in their fields of work, it was not practicable for them to have different rules in respect of costs management. Accordingly, an exemption for the Commercial Court could not be maintained. The upper financial limit for mandatory costs management was in due costs set at £10 million.

14–015 **Comment on the decision to make costs management mandatory.** Although that decision was contrary to my recommendation, it was a decision which the Rule Committee reached with the best of intentions. The thinking was that, if costs management was a good thing, all litigants should have the benefit of it.

[2] The Judicial Studies Board ("JSB") has now become the Judicial College.

14–016 **The costs management rules.** These are contained in CPR Pt 3 at rr. 3.12 to 3.18, and in PD 3E. These provisions have undergone a number of amendments as experience accumulated.

14–017 **Evaluation of costs management.** Since costs management is a new discipline which at the time of writing has been in place for three years, it may be appropriate to carry out an evaluation. This is best done by identifying the benefits and drawbacks of the procedure in practice.

5. BENEFITS OF COSTS MANAGEMENT

14–018 **Conclusion from the first three years of costs management.** The first and most important conclusion to be drawn from the experience of the last three years is the same as that which was drawn from the pilots. Costs management works. When an experienced judge or master costs manages litigation with competent practitioners on both sides, the costs of the litigation are controlled from an early stage. Although some practitioners and judges regard the process as tiresome, it brings substantial benefits to court users.

14–019 **First benefit of costs management: knowledge of the financial position.** Both sides know where they stand financially. They have clarity as to (a) what they will recover if they win (difference between own actual and recoverable costs), and (b) what they will pay if they lose (own actual costs + other parties' recoverable costs). In many cases, the litigation costs form a substantial part of what the parties are arguing about. This information is of obvious benefit for those making decisions about the future conduct of litigation. Practitioners say the information is extremely helpful in the context of mediation. Insurers (who in practice end up footing many litigation bills) also find costs budgets valuable for the purpose of setting reserves.

14–020 **Views of third-party funders about this benefit.** Third-party funders, who play an increasing role in facilitating access to justice, attach particular importance to the first benefit. They require budgets for their own costs in every case and, wherever possible, seek costs management orders. Their contracts often link funding to the court-approved budgets. An experienced QC, who does much work in this field, states that he does not know of a single funder which dislikes costs management.

14–021 **Comments of others on this benefit.** Most solicitors, including many who are otherwise hostile to costs management, accept that the knowledge gained is helpful for their clients. The Chief Chancery Master has commented that this knowledge justifies the requirement to exchange budgets, regardless of whether or not it reduces costs.

14–022 **Comments of the Senior Costs Judge.** Senior Costs Judge Gordon-Saker stated in his lecture to the Commercial Litigation Association on 1 October 2014:

"Litigation is like a train journey. You cannot get off the train, without injury, unless everybody else agrees that the train can stop before its destination. Yet if you stay on the

train to the end of the journey, you will only know the cost of the journey after you get off. So we need costs budgeting as a matter of fairness to litigants. . . [He then discussed the lack of court resources and the need for more judicial training.] That said, I am told that – although different judges are taking different approaches to costs budgeting – people are generally happy with the overall results."

14–023 **Second benefit of costs management: it encourages early settlement.** One intractable problem of civil litigation has been that cases which are destined to settle often drag on for far too long before the parties come to terms. Chapter 4 of the Final Report identified this as one of the 14 causes of excessive litigation costs. The new costs management regime makes a contribution to tackling this problem, in that it encourages early settlement. Once all parties can see (a) the total costs of the litigation and (b) the extent of their own exposure, they are inclined to "see sense" or bite the bullet early. Numerous practitioners have confirmed this.

14–024 **Third benefit of costs management: controlling costs.** When costs management is done properly, it controls costs from an early stage. This is for two reasons:

(i) In some cases,[3] the very act of preparing a budget, which will be subject to critical scrutiny, tempers behaviour. Any party who puts forward an over-elaborate case plan or an excessive budget (a) invites criticism and (b) encourages similar extravagance by the other party/parties.

(ii) Effective costs management by the court generally reduces the costs payable by the losing party. It also brings down the actual costs of the litigation for both parties, despite the additional costs involved in the costs management process.

14–025 **Interface with the new rules on proportionate costs.** Chapter 40, section 7 of the Final Report discusses how the new proportionality rules interrelate with costs management. Rule 44.3(5) contains a new definition of proportionate costs. Rule 44.3(2) provides that when costs are assessed on the standard basis, no more than proportionate costs will be recoverable. Therefore, the judge at the costs management stage applies the proportionality test and limits the budgets accordingly.[4] It is by no means unusual for a judge to say that (regardless of hourly rates or numbers of hours) no more than £x is proportionate for a particular phase, or that no more than £y is proportionate for the case as a whole. Absent an order for indemnity costs, no losing party should be ordered to pay more than proportionate costs to its adversary.

14–026 **Is it a problem that the winner may recover less costs than in the past?** No. There is extensive academic literature and research to demonstrate that the costs shifting rule tends to drive up costs: see PR Ch. 9. If the 2013 civil justice reforms make a modest inroad into that rule, it is no bad thing. Once people know that they

[3] Except QOCS cases, where claimants generally feel no such inhibitions.
[4] Professor Zuckerman argues that the success or failure of costs management will turn upon how the courts apply the proportionality test: *Zuckerman on Civil Procedure*, pp. 1458–1462.

will only recover proportionate costs if they win, they have a greater incentive to be economical.

14–027 **Fourth benefit of costs management: it focuses attention on costs at the outset of litigation.** A number of solicitors and judges have drawn attention to this benefit. In the majority of cases, costs are a major factor. A failure by the victor to recover sufficient costs may render the whole litigation futile.[5] The costs burden on the loser may be crushing, quite regardless of the damages which he may have to pay or the property rights which he may forfeit. It is therefore necessary that all concerned should be forced to focus on the costs involved at the outset.

14–028 **Fifth benefit of costs management: an old chestnut is conquered.** The "summons for directions" under the pre-1999 RSC was intended to be an occasion when the court would get a grip on the issues and give effective directions. The habitual complaint was that in practice this never happened. Summonses for directions were formulaic and ineffectual. The new style "case management conference" introduced by Lord Woolf was intended to overcome all that and be a real occasion for effective case management. The evidence gathered during the 2009 Costs Review suggested that, outside the specialist courts, this still was not happening. CMCs were simply becoming formulaic occasions. Chapters 37–39 of the Final Report put forward a series of proposals to convert CMCs into effective occasions when the judge

> "takes a grip on the case, identifies the issues and gives directions which are focused upon the early resolution of those issues".[6]

As discussed in Ch. 11, above, one consequence of costs management is that this is now happening. Price tags attached to the work focus attention on the question of whether certain items of work really need to be done at all.

14–029 **Sixth benefit of costs management: elementary fairness.** It is elementary fairness to give the opposition notice of what you are claiming. The rules require litigants to set out with precision the damages which they seek. Why treat costs differently? From the point of view of the client, costs are often just as important as damages.

14–030 **Seventh benefit of costs management: it prevents legal catastrophes.** A regional costs judge in Bristol makes the following point about costs management:

> "It protects losing parties (particularly the 'real' people, as opposed to insurance companies in PI claims) from being destroyed by costs when they lose."

14–031 **Practitioners are now coping with the new regime.** The introduction of the new regime came as an unwelcome shock for many in the profession.

[5] This was the effect of the first instance decision in *Begum v Birmingham CC* [2015] EWCA Civ 386.
[6] FR Ch. 39, para. 5.5.

Nevertheless, a number of practitioners say that their initial fears have not been borne out. A clinical negligence practitioner in Leeds stated that the process has been a learning curve, but in general terms she is now getting reasonable budgets approved. A small firm in Newcastle stated that "costs management is now running fairly smoothly". The Treasury Solicitor's office has generally positive experience of costs budgeting, with one representative stating that he "much prefers" the new regime. AB, the head of the costs department of a major national firm doing claimant clinical negligence work, considers costs management "generally OK" and "a good thing", but he raised a number of specific points which require attention.[7]

14–032 **The proof of the pudding.** In a number of cases where costs management does not apply, one or other party asks the court to manage costs.[8] For example, the *Kenya Litigation* began before April 2013 and so is outside the new rules. There are numerous claimants and that litigation is highly complex. Both parties asked the assigned judge, Mr Justice Stewart, to undertake costs management and he agreed to do so. The *Iraqi Civilian Litigation* began long before April 2013. Nevertheless, as recorded in the Senior Master's judgment of 25 February 2016, both parties agreed that there should be some costs management. The parties differed as to the extent of the budgets which should be lodged for approval, given the advanced stage which the litigation had reached.[9]

6. DRAWBACKS OF COSTS MANAGEMENT

14–033 **Causes of complaint.** The following have emerged as causes of complaint:

(i) Differing approaches adopted by individual judges and courts.

(ii) Delays in listing costs and case management conferences ("CCMCs") as a result of the time spent on costs management, leading to a backlog of work.

(iii) No effective mechanism for controlling costs incurred before the first CCMC.

(iv) Difficulties at detailed assessment if costs budgets and bills of costs are in different formats.

(v) The process of costs management is expensive.

It may be helpful to deal with each of these matters separately.

[7] See Harbour Lecture on 13 May 2015. Readers are referred to this lecture, which is available on the Judiciary website, for a fuller analysis of all the issues surrounding costs management.

[8] *Sharp v Blank* [2015] EWHC 2685 Ch was a shareholders' claim for over £200 million. The claimants applied to the court to undertake costs management. Nugee J ordered the parties to exchange budgets. He left open whether he would make a costs management order, since this case was far above the £10 million threshold.

[9] Difficulties arose in the *Iraqi Civilian Litigation*, because the process of costs management had become separated from case management.

14–034 **(i) Judicial inconsistency**. One major city firm, while acknowledging the benefits of costs management, wrote in 2015:

> "The inconsistent approach being taken by the judiciary, in terms of the detail in which costs budgets are examined and the processes involved, is also unhelpful. [Examples given.] In general it is unclear whether budgets will be addressed in any detail at the CMC, and the approach the court will take if there is to be a detailed consideration budgets."

Many practitioners in both London and the regions echoed those concerns.

14–035 **The solution.** The solution to this problem lies in effective judicial training. The costs management training provided to all civil judges in early 2013 was necessarily brief, because there were many other aspects of the 2013 civil justice reforms to be covered. Now, however, there is a full-day module on costs management available on judicial refresher courses. It is hoped that as many judges as possible are taking advantage of this. There is also an excellent chapter on costs management in the Practical Law Handbook, *Costs and Funding following the Civil Justice Reforms: Questions & Answers*, which is published annually by Sweet & Maxwell. Training material on costs management (prepared by District Judges Matharu and Middleton) is made available to judges in the civil e-library. It is hoped that all these materials will promote uniformity of approach by case managing judges.

14–036 **(ii) Delays and backlog.** As a result of rules making the procedure mandatory, courts have been making costs management orders in virtually every case. At some court centres, that causes no problem. At others, it has caused delays as backlogs of cases awaiting CCMCs build up. This problem became most acute in clinical negligence cases in London. Such delays did not promote access to justice at proportionate cost. On the contrary, they inhibited access to justice and tended to drive up costs.

14–037 **The short-term solution.** In May 2015, I proposed that there should be moratorium for clinical negligence cases in London.[10] In other words, the Queen's Bench masters should suspend costs management of clinical negligence cases until they had caught up with the accumulated backlog. The Senior Master accepted that recommendation and imposed a moratorium during the summer of 2015, which enabled her colleagues to clear the backlog.

14–038 **The long-term solution.** It is suggested that the rules making costs management mandatory should be modified. In place of the current provisions, PD 3E might set out criteria to guide the courts in deciding whether or not to make a costs management order. The formulation of the criteria must be a matter for the Rule Committee. But the committee should perhaps bear in mind the following principles:

(i) In most contested Pt 7 cases and in most cases of the type identified in PD 3E para. 2, costs management by a competent judge or master promotes

[10] In the Harbour Lecture on 13 May 2015, section 5.

financial certainty and reduces the costs expended on the litigation to proportionate levels.

(ii) However, the court should not manage costs in any case if (a) it lacks the resources to do so, or (b) the costs management process would cause significant delay and disruption to that or other cases.

14–039 **Parties must still file budgets even if there is no costs management order.** If PD 3E is amended as suggested in the previous paragraph, the parties must still prepare budgets in all relevant cases. They will file their budgets before the court decides whether to make a costs management order. This is an important discipline for each party. It provides valuable information for opposing parties and the court. The filed budgets (even if not agreed or approved) will still exert some restraining effect on recoverable costs, as set out in section 3 of PD 44.

14–040 **(iii) No effective mechanism for dealing with costs already incurred**. There is a concern that in some cases substantial costs have already been incurred before the costs management conference. That is true. On the other hand, the court has a power to "comment" on incurred costs and such comment will carry weight at the detailed assessment. A sensible improvement would be to enable the court in appropriate cases (and when time allows) to make provisional or binding rulings about specific items of past costs. In the longer term, consideration must be given to some form of pre-action costs budgeting, as proposed in FR Ch. 40.

14–041 **General comment about incurred costs.** Even if the costs budgeting regime is ineffective for regulating past costs, it is still a highly worthwhile exercise. The mere fact that money has been wasted in the past is no reason to abandon cost control in the future. At the time of the first case management conference, there is still much to play for, including the future costs of disclosure, witness statements, expert reports, ADR and trial.

14–042 **(iv) Difficulties at detailed assessment.** Except in personal injury/clinical negligence litigation, it is relatively rare for cases which have been subject to costs management to proceed to detailed assessment. This is because the parties are usually able to reach agreement on the basis of the approved budgets. In respect of those cases which do go to detailed assessment, a number of practitioners and judges expressed concern that it was difficult to marry up the approved budget with the final bill of costs. The Rule Committee introduced a temporary solution to the problem in October 2015 in the form of Precedent Q. This enables the costs claimed in the bill to be represented in a form which matches up with the earlier budget.

14–043 **Long-term solution.** The long-term solution to this problem is to adopt the new form bill of costs, as described in Ch. 20, below. At the time of writing, this new form is currently being piloted and is therefore optional. It is hoped that in the future it will become mandatory. The new form bill of costs marries up precisely with Precedent H. It should be possible to complete the new form bill of costs, either using "J codes" or any other software which the solicitors find convenient.

14–044 **(v) The expense of costs management.** Undoubtedly, the costs management process does itself have a cost. In precisely the same way, quantity surveyors and others who control the costs of building projects are themselves a costs centre. Nevertheless, if people carry out costs control procedures properly, there is an overall financial benefit. This is what the Law Society predicted during Phase Two of the Costs Review, when it was responding to the Preliminary Report.

14–045 **Views of legal practitioners.** Many legal practitioners, for perfectly understandable reasons, dislike the new discipline of costs management. They are inclined to say that the process should be scrapped because it drives up costs. But there is no empirical evidence to support this. The annual surveys conducted by the LSLA show that a majority of their members make that complaint. But even that majority is starting to diminish. In 2015, some 91% of members made that complaint. In 2016, the figure was 80%.[11]

7. OVERALL ASSESSMENT

14–046 **Teething problems.** There have undoubtedly been problems with the introduction of a new discipline, which was unfamiliar to both judges and practitioners. On the other hand, the system is now settling down. As observed by Sir William Blair, in his lecture on 21 January 2016 entitled "Contemporary trends in the resolution of international financial and commercial disputes":

> "The recently introduced costs budgeting rules introduced following Lord Justice Jackson's report require the court to approve the parties' budgets at an early stage in the proceedings, and are mandatory where the amount of the claim is below £10 million. Despite some teething problems, this seems to be settling down in Commercial Court practice."

14–047 **Why then do quite a few lawyers dislike cost management?** Because it means more work and requires people to develop new skills.

14–048 **Are the views of lawyers the litmus test?** No, they are not. The civil justice system exists to deliver civil justice to the public at proportionate cost, not to promote the contentment or convenience of lawyers.

14–049 **Changing attitude of the judiciary.** Many judges did not welcome the new regime, when it came in. Despite that, there has been a softening of judicial opposition over the last three years, as judges have become more comfortable with the process and more skilful at it. Of course, certain judges still dislike the process and feel no inhibitions about saying so. To some extent this is a generational issue. Traditionally, the Bar, from which many judges are drawn, took no interest in costs. However, attitudes are changing. Younger judges have had experience arguing summary assessments when they were in practice. Some may even have practised at the Costs Bar, a sector which developed in the early years of the 21st

[11] See the LSLA's Litigation Trends Survey of June 2016.

century. An increasing number of judges were solicitors and have good background knowledge of costs. Those civil judges appointed since April 2013 must all have demonstrated ability and willingness to costs manage. Otherwise they would not have been suitable for appointment.

14–050 **Changing attitude of the profession.** Many practitioners dislike the process for a variety of reasons. This is especially true of (a) those practitioners who have only done costs management in a few cases, and (b) those who practise in courts where the process has caused delay or where the judges are less enthusiastic. All this is gradually changing. The extent of professional opposition is steadily declining. Many practitioners have spotted that clients like to know what their litigation is going to cost. To some extent, again, this is a generational issue. Younger practitioners are growing up under the new rules and have no difficulty with them.

14–051 **Law Society Gazette article.** On 4 April 2016, the Law Society Gazette published an article entitled "Jackson reforms: counting the cost". The article identified the problems discussed above. It quoted the Chair of the Association of Costs Lawyers ("ACL"):

> "As Master Cook recently pointed out, it seems that costs budgeting is starting to work [in some areas] where it is done properly. It needs to be given more time. You can't just introduce something as radical as predicting costs and expect that to filter through into savings so fast."

The point which the ACL Chair makes about costs management needing to bed down before it delivers benefits is a fair one. Therefore, it is important not to undermine costs management just at the time when the benefits are increasingly being felt.

14–052 **A balanced appraisal.** The same article quoted the President of the Forum of Insurance Lawyers ("FOIL"):

> "Overall budgeting has been a positive change. The courts are getting to grips with it and so are practitioners. The courts are not afraid to cut the budgets – sometimes quite dramatically – and so budgeting is working in that there is starting to be proper control of the costs. But there is still little or no control over incurred costs and there is a trend towards claimants doing a lot more work before they issue proceedings."

The FOIL President makes a fair point about lack of control over pre-issue costs. More judicial control is needed in this area.[12] Nevertheless, there is a great deal of work left to do after the first CMC. The FOIL President is right to say that costs management is an effective procedure for controlling the costs of all that work.

14–053 **What needs to be done now?** The rules governing when courts should undertake costs management require amendment, as discussed in section 6, above.

[12] Ideally, recommendation (iv) at the end of FR Ch. 40 should be implemented.

14–054 **Pre-action costs management.** Ultimately, the best way to control costs incurred before the first CMC will be to (a) extend fixed recoverable costs, and (b) introduce pre-action costs management for cases outside the fixed recoverable costs regime. The Final Report proposed that there should be a pilot of pre-action costs management: see FR Ch. 23, section 6. This would have required the appointment of an additional Queen's Bench master. In the event, no additional master was appointed and the pilot did not proceed.

14–055 **Conclusion.** There are three main conclusions to be drawn from this chapter:

- Costs management may not be popular, but it is slowly bedding down. As it does so, the benefits of the process are becoming more apparent.
- It is quite likely that there will be fixed recoverable costs for cases in the lower reaches of the multi-track. When that happens, the volume of cases requiring costs management will diminish.
- Once the next round of reforms is complete, it will be appropriate to look again at pre-action costs management.