CHAPTER 14

PROSPECTIVE COSTS CONTROL – PROPORTIONALITY

INTRODUCTION TO PROSPECTIVE COSTS CONTROL – PROPORTIONALITY

[14.1]

The concept of proportionality permeates throughout the CPR, from the overriding objective, through case and costs management, to costs assessment at the conclusion of a claim. In theory, this is nothing new. Prior to April 2013, CPR 1.1(2)(c) included in its definition of 'dealing with a case justly', the requirement to deal 'with the case in ways which are proportionate'. Case managers, with an eye to the overriding objective, ought to have been giving directions that were proportionate. In addition, the case of *Lownds v Home Office* [2002] EWCA Civ 365, introduced the test of proportionality to the assessments of costs – if the global costs claimed by the receiving party were disproportionate then individual items would only be recoverable if *necessarily* incurred and reasonable in amount. The need to keep control over costs, linked to proportionality, was reinforced in *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766, and subsequently codified in Section 6 of the Costs Practice Direction. So why has proportionality taken on such importance following April 2013 and why has it attracted so much comment over the last 13 years.

THE CASE FOR THE 2013 REFORM

[14.2]

While Lord Woolf went on to qualify his definition of proportionality in *Lownds*, his earlier comments in that case set out the purists' position:

> 'If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner.'

However, it became accepted wisdom that applying the two-fold test of *Lownds* did not necessarily achieve this desired outcome. Even after preliminary findings that the global costs of cases were not proportionate in amount, there was a perception that assessments could, and frequently did, still lead to assessed costs, on an item by item basis, that remained disproportionate (See for example the comments of May LJ set out at Chapter 3, para 4.7 of the '*Review of Civil Litigation Costs: Final Report*').

This was a theme picked up Sir Rupert Jackson in his Final Report. His remit was, as he described, 'to promote access to justice at proportionate cost'. He devoted an entire chapter to consideration of proportionality and returned to what he saw as the causes of disproportionate costs at various points in his analysis and conclusions. His clear verdict was that:

> 'Access to justice is only practicable if the costs of litigation are proportionate.'

It was with this desire to preserve access to justice in mind that Sir Rupert Jackson set out the proposals that have become enshrined in the Civil Procedure Rules from 1 April 2013. The Civil Justice Council Costs Review consultation paper of June 2022 and its Final Report May 2023 make clear that both access to justice and proportionality of dispute resolution remain centre stage with the former 'recognising that access to justice for all plays a vital part of the rule of law in a democratic society and that affordability is fundamental to such access' and the Final Report expressing a clear outcome from the consultation in these terms:

> 'Since costs budgeting was adopted, there is now evidence of real and sustained progress in the discipline and understanding around costs and this has consequently improved case management and the proportionality of costs.' (para 1.9)

THE REFORM

The proportionality test

[14.3]

In April 2013, the overriding objective, was amended to provide at CPR 1.1(1) that:

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

In simple terms this means that when making procedural decisions on any case the court must ensure that the outcome enables the claim to be determined at proportionate cost. This led to concern from across the legal community that pursuit of justice had been qualified – that claims would no longer be investigated fully. In some quarters, the concern still remains that the court is compelled to dispense a lesser, cost constrained, version of justice. This debate will be considered in more detail below.

Proportionality is expressly defined within the rules. After an amendment in 2021 to link to a similar change within the overriding objective at CPR 1.1(2)(a), CPR 44.3(5) provides as follows:

> '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;
> (e) any wider factors involved in the proceedings, such as reputation or public importance; and
> (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.'

However, in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220, the Court of Appeal concluded that the definition in CPR 44.3(5) was not an exclusive one. Whilst costs will be proportionate if they are determined to be so when judged against these criteria, the fact that they are not does not necessarily lead to a finding of disproportionality. This is because, amongst other things, CPR 44.3(5) does not say 'if, and only if'. The court found that under the rules 'questions of proportionality are to be considered by reference to the specific matters noted in 44.3(5) and, if relevant, any wider circumstances identified under r.44.4(1)'. Accordingly, the test of proportionality is broader than some first thought, although by how much is a matter of conjecture, for as we have repeatedly advocated, CPR 44.3(5) is, itself, suitably crafted to cover almost every relevant circumstance. Accordingly, even expressly adding in 'all the circumstances' to the consideration of proportionality, still begs the question, what does this all mean? Like many statutory and procedural checklists and considerations of 'all the circumstances', this does not lead to a clear and precise specific outcome. Indeed the additional consideration of 'all the circumstances', arguably, just broadens the exercise of discretion. One person's view of proportionality may still differ from that of another. The answer is that, ultimately, the outcome will be whatever an individual judge, in the context of the particular case before the court, decides is proportionate within the parameters of a reasonable exercise of judicial discretion. Unsurprisingly, this, too, has come in for sustained criticism. Different judges considering the same case might come to different views. The easy answer is that this is nothing new! Up and down the country every day this happens – not just on a procedural level, but also in terms of the final decisions made. Exercises of discretion and particular factual findings, inevitably lead to different conclusions.

The clarification that CPR 44.3(5) is not the only route to a determination of proportionality, raises the clear possibility of a two-stage approach to determinations of proportionality. This is because it is only if the consideration of the CPR 44.3(5) criteria leads to the conclusion that the costs are not proportionate, that the court will need to consider 'all the circumstances' to see if those add anything that renders the costs proportionate (see *West v Stockport NHS Foundation Trust* at para 76). As an exercise in keeping proportionate the determination of proportionality itself, it is entirely appropriate for the court to consider CPR 44.3(5) first and only proceed to submissions and judgment under 'all the circumstances' if it needs so to do. However, experience is that parties' submissions include, as a matter of course, reference to 'all the circumstances', and that determinations of proportionality include comments to the effect that 'there are no circumstances that are relevant to the determination of proportionality' or that 'the following circumstances are relevant to the determination of proportionality', effectively rolling the two stages into one.

The application of the test – Introduction

[14.4]

Many commentators spent nearly seven years waiting eagerly for the Court of Appeal to give guidance on the proportionality test. We have consistently said that such guidance could only ever, at best, be general, as proportionality in pure monetary terms will, in the absence of the absolute certainty of a full 'fixed recoverable costs' regime, always be case specific. Whilst the Court of Appeal spoke in *West*, the guidance given was, inevitably, in general terms. We wonder

if those who urged Court of Appeal intervention think that the breath holding exercise was justified. Certainly, the guidance provided some clarification, but, as we shall explore in [**14.5**] below, in so doing it is arguable that this is off-set by the creation of fresh fields of uncertainty and, despite an express statement to the contrary, a backwards nod in the direction of *Lownds* and necessary costs.

The application of the test – Court of Appeal Guidance

[14.5]

In *West* the Court of Appeal also took the opportunity to make some general observations about the practice and process for determining proportionality. As we shall see below, the guidance given introduces some practical challenges for budgeting and assessing judges, some new costs battles on fields of uncertainty and arguably a move away from proportionality. The guidance provides that:

- whilst the assessing judge should first go through the bill on an item-by-item basis assessing reasonableness, where appropriate there is no reason why the court cannot undertake the assessment of the proportionality of an item at the same time. However, the court acknowledged that these are separate exercises that are 'conceptually distinct'. Our difficulty with this, as set out in the 2019 edition, is that there is a danger of eliding the rules and drawing no clear distinction between the separate functions with which the assessing judge is charged. This remains a real concern (particularly on a summary assessment where reasons for decisions are correctly brief). Another concern is that when the court steps back at the end of the item-by-item assessment to consider overall proportionality there is a genuine risk of an element of double deduction, if the court is not astute to those findings on proportionality it has already made;
- once the court has concluded the item-by-item assessment, it must assess the proportionality of that total figure (guarding against the double deduction to which reference is made above). If that total figure is found to be proportionate, then no further assessment is required. However, if the court regards the overall figure as disproportionate, then a further assessment is required. The Court of Appeal was clear that this should not be line-by-line, but should instead be by consideration of various categories of cost, such as disclosure or experts' reports, or specific periods where particular costs were incurred, or particular parts of the profit costs. Whilst this is more targeted than one overall proportionality determination, it should still be a relatively short and straightforward process as the court will be familiar with the case at this stage and ideally placed to determine where further deductions should be made.
- when the court considers proportionality those items of cost which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed 'are to be left out of account' (paras 81 and 82). The first of these exceptions presents no problem. A classic illustration is court fees. It matters not whether one simply makes the assumption that they are proportionate or leaves them out of the account altogether, the reality is that they must be approved (for budgeting) or allowed (on assessment) as they are mandatory and fixed in prescribed sums. However, we struggle to reconcile the second exception with CPR 44.3(2)(a). Whilst the court was keen to stress that

it should be apparent that the decision does not resurrect *Lownds*, the reality is that, at first blush, taking out of the proportionality account those items reasonably incurred which have irreducible minimums, regardless of amount, resonates uncomfortably with the recovery of costs necessarily incurred. They are still part of the 'global costs' to which Sir Rupert referred. The exercise becomes one of semantics, not financial reality. The fact that it may be only certain items, still has the potential to undermine overall proportionality. As there is a financial incentive to exclude items from the constraints of proportionality, it seems inevitable that arguments will abound as to whether certain expenditure is an irreducible minimum and should be excluded (eg in the context of expert fees).

- the exclusion of some items from the proportionality considerations should not undermine overall proportionality. However, this is easier to state than to comprehend and/or apply, in particular the clear tension between para 84, which states:

> 'This [the exclusion of costs which are fixed and unavoidable, or which have an irreducible minimum] ought not to disadvantage the paying party. Take as an example a claim that was settled for £10,000 but where the costs were £50,000, of which £5,000 was made up of the recoverable element of the ATE insurance premium. In those circumstances, when working through the various categories of cost to assess proportionality, the judge may have some overall figure in mind that would be proportionate. That figure will remain unchanged: the reductions to achieve it will simply be by reference to other elements of cost, not the ATE insurance premium.'

and the explanation of the proportionality cross-check at the end of the assessment as set out in para 92, which states:

> 'The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in. respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.'

The tension arises if, on undertaking the proportionality assessment, the costs of the different categories of costs are deemed to be proportionate but the addition of the costs excluded renders the overall figure the judge has in mind disproportionate. Paragraph 84 suggests that, in order to ensure that the paying party is not disadvantaged, the court will have to make reductions to the elements of costs not excluded to achieve the overall figure. How can the court do that fairly, when the cross-check of the non-excluded categories of costs under para 92 leads to the conclusion that they are proportionate?

The application of the test – some general points

[14.6]

There are some things that seem to be established and clear:

1. Consideration of proportionality under CPR 44.3(5) involves all six (formerly five) factors, as the then Senior Costs Judge succinctly stated in *Wave 1 of the Mirror Newspapers Hacking Litigation v MGN Ltd* [2018] EWHC B13 (Costs):

> 'Rule 44.3(5) does not identify any of the five factors as being more important than the others.'

That certain factors do not arise in a particular case is as important to the determination of proportionality as those that do.

2. Proportionality is central to the costs management regime. CPR PD 3D, para 12 sets out the way in which the court will determine the budget. It provides:

> 'When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.'

In other words, the court will consider the CPR 44.4(3) and CPR 44.3(5) factors and 'all the circumstances' and will then determine the reasonable and proportionate costs for each phase of the proceedings. As the budget figure for each phase will be set as a total sum under CPR 3.15(8), and as under CPR 44.3(2)(a) considerations of proportionality prevail over determinations of reasonableness, it is the consideration of proportionality that ultimately will usually be determinative of that amount (see below for consideration of CPR 44.3(2)(a)) and, in synthesis, the appropriate case management decision.

At first blush, it seems curious that one of the six factors seemingly cannot inform that decision. At the time of setting the budget, the identity of the paying party will not be known. Does this mean that the court must assume, for the purposes of setting a particular party's budget, that it will be the receiving party? This was the approach adopted by the court in *Group Seven Ltd v Nasir* [2016] EWHC 629 (Ch), albeit that the court accepted this to be hypothetical. However, there is nothing expressly in CPR 3.12–CPR 3.18 or CPR PD 3D that supports this broad interpretation. Accordingly, it is arguable that even if the conduct of one party has already increased the costs of the other, this cannot be taken into account at this stage as that party may not ultimately be the paying party.

There is certainly an argument to be made for ignoring conduct at the costs management stage. This is because unless the parties have agreed all the incurred costs or those on any specific phase (CPR 3.15(2)(c)), the court is not able to make a costs management order in respect of costs already incurred. It is also not, at this stage, undertaking an assessment of those costs. Accordingly, any arguments on conduct increasing incurred costs can be taken when considering the reasonableness of costs and the overall proportionality at any subsequent assessment.

However, this argument overlooks the fact that when setting the budget for a phase the court is required to take into account the incurred expenditure under CPR 3.17(3)(b). There may well be situations where the party whose budget is being set has incurred costs of a significantly higher level than might be expected because of the conduct of the other party. If that is the case, then this should be taken into account by the costs managing court as otherwise the budgeted costs under CPR 3.15(2) may be too low, because the court has taken account of the incurred costs without accepting that, whilst high, part of this is

due to the other party's conduct. But there is a practical difficulty in that costs management hearings are usually listed with relatively short time estimates. Identifying conduct which has (or will) generate additional work will likely require written evidence. The prospects of such evidence being accepted without reply from the opponent are low. We would suggest that a budgeting judge, pressed for time, will rarely be minded to engage in a fact-finding exercise when such matters can be (and routinely are) dealt with at detailed assessment. In such circumstances, a budgeting judge might be persuaded to record in a recital to the Costs Management Order the basis upon which the budget has been approved, permitting parties to argue against the 'good reason' test in CPR 3.18 at any subsequent assessment.

As to conduct as a factor to be considered at detailed assessment, in *XX v Young* [2025] EWHC 2073 (SCCO), Costs Judge Nagalingam considered that all conduct which generated costs – good or bad – must be considered, but he declined to conduct a 'mini-trial' on an allegation of exaggeration where a defendant had not run the argument to a trial, but had rather compromised the claim on terms that it would pay the claimant's costs without, eg a percentage reduction. In a detailed judgment on proportionality, he also considered how to balance the 'amount in dispute' where a receiving party's valuation had been unreasonable and the isolating effect that the COVID-19 pandemic had on a litigant as a matter of vulnerability.

As an aside, there has been some concern that the conduct of the receiving party is omitted from the proportionality checklist. This can be readily explained – it would be superfluous. In respect of those costs not budgeted, then any conduct issues will be dealt with, as appropriate, on the award of costs (CPR 44.2(5)), whether in respect of free-standing applications or the overall claim and at any subsequent assessment of the reasonable costs under such orders (CPR 44.4(3)). Both these provisions contain clear obligations on the court to consider conduct. In respect of budgeted costs, as has already been stated, these are set by reference to reasonableness as well as proportionality. Accordingly, there is already provision for the consideration of conduct in the 'reasonableness' part of the determination – indeed CPR PD 3D, para 5 expressly refers to CPR 44.4(3). In addition, CPR 3.17(3)(b) provides that the court may take into account incurred costs when setting the budget. The court also has the power to grant a party relief under CPR PD 3D, para 13, in the event it concludes that one party is behaving oppressively in seeking to cause another party to incur disproportionate costs. Both these provisions allow the court to 'manage' disproportionate expenditure.

3. Despite the concerns expressed above about the effect of excluding from the proportionality determination items of work with an irreducible minimum cost as per West, the final proportionality procedural change in 2013 was intended to be the most pervasive and seismic. It resulted in the demise of the *Lownds* test and its replacement by something altogether more consequential. *Lownds* had received sustained criticism from the Court of Appeal and it was no surprise to find that Sir Rupert Jackson recommended its reversal in the final report:

> '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) (now 44.4(3)).

> The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction.'

This recommendation found its way in to the CPR at CPR 44.3(2)(a):

> 'Where the amount of costs is to be assessed on the standard basis, the court will—
>
> (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;'

Whilst stating clearly that the exclusion from the proportionality determination costs that are subject to an irreducible minimum did not reintroduce the *Lownds* test by making the point that under that test, necessity always trumped proportionality and that was not the effect of their decision, it is arguable that it has done precisely that. Certainly, a consequence of *West* may be to water down the effect of CPR 44.3(2)(a), although there have yet to be any authorities dealing specifically with arguments on irreducible minimums.

TRANSITIONAL PROVISIONS

[14.7]

As some cases (now a rapidly vanishing minority) remain extant that are subject to the transitional provisions, they still merit consideration. They are found in CPR 44.3(7), which provides that the provisions of CPR 44.3(2)(a) and CPR 44.3(5) do not apply to cases commenced before 1 April 2013 and, in cases issued after that date, to the costs incurred before that date. The Court of Appeal decision in *BNM v MGN Ltd* [2017] EWCA Civ 1767 clarified that the pre-April 2013 '*Lownds*' proportionality test applies to recoverable additional liabilities. The court reached this conclusion by the following route:

- The definition of costs in CPR 44.1 no longer includes additional liabilities, so they cannot be governed by the proportionality provisions at CPR 44.3(2)(a) and CPR 44.3(5) as these provisions relate only to costs as defined under CPR 44.1.
- In contrast the 'old' definition of costs included reference to additional liabilities and this rule is mentioned in CPR PD 48, para 3.1. As the 'Lownds' proportionality test applies to costs falling within the pre-April 2013 definition of costs, then this test is the one that relates to funding arrangements (even though it is not expressly mentioned in CPR PD 48).

Albeit as an aside, we pause to note that the conclusion that additional liabilities are not 'costs' under CPR 44.1 extends beyond the determination of *BNM*. There are still a few bills for detailed assessment that include recoverable additional liabilities. We suspect that in calculating whether the costs exceed the £75,000 limit for provisional assessment under CPR 47.15, most practitioners and courts have been including the additional liabilities. However, as the limit is expressly in respect of costs claimed, and as additional liabilities are not

'costs', then they should be excluded from the calculation. If this is correct, then, for the run-off period of recoverable additional liabilities, it may be that more cases fall within the provisional assessment regime than was previously thought.

PROPORTIONALITY AND BUDGETED COSTS

[14.8]

The prospect of a proportionality cross-check at the conclusion of an assessment of costs, ought to be enough to persuade parties to sign up willingly to prospective costs management! The combination of Sir Rupert Jackson's comments and the rule itself suggest that the court undertakes an assessment of the non-budgeted costs on a reasonableness test, stands back at the end and, if the overall costs are not proportionate (budgeted plus non-budgeted), reduces the overall amount to the figure that the court determines to be proportionate by application of the CPR 44.3(5) factors and any wider circumstances. The irreducible minimum will be the budgeted costs as, of course, unless there is a 'good reason' to depart from the budget, CPR 3.18 protects the budgeted costs (see analysis in Chapter 15).

We say that the provisions of CPR 3.18 protect the budgeted costs because they have already been subjected to a proportionality (and indeed reasonableness) analysis under CPR PD 3D, para 12 when the budget was set. However, it may be that this certainty has to be tempered slightly as a result of comments made by Davis LJ in giving judgment (with which the MR and Black LJ agreed) in *Harrison* (above). At para 52, he commented:

> 'I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of "good reason") the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate having regard to CPR 44.3(2)(a) and (5) . . . '

Some have taken the comments in para 52 to suggest that under CPR 44.3(2)(a), the court may, at the end of the assessment, determine an overall proportionality figure below the budgeted costs (see for example *Reynolds v One Stop Stores Ltd* (21 September 2018, unreported, CC)). This argument relies on there being no qualification in para 52 limiting any reduction to the sum of the budgeted costs, as opposed to a positive affirmation that CPR 44.3(2)(a) permits the court to revisit the proportionality of budgeted costs. The contrary view is supported by a reading of the judgment as a whole. It is patently apparent that the court was astute to the fact that budgeted costs have already been subjected to a determination of proportionality – see paras 31–33, in particular the comment at para 32 that:

> 'In this regard, it is also in my view particularly important overall to bear in mind that a judge who is being asked to approve a budget at a costs management hearing must take into account, in assessing each budgeted phase, considerations both of reasonableness and of proportionality.'

We remain firmly of the view that revisiting reasonableness and proportionality of budgeted costs on assessment will be extremely rare and can only be done within an argument that there is 'good reason' to depart from the budget – eg where decisions on the reasonableness and proportionality of a claimant's costs have been made by the costs managing judge on the basis of a high value claim that transpires to have been exaggerated. In other words, the application of CPR 44.3(2)(a) on the assessed non-budgeted costs and the budgeted costs cannot, in the absence of 'good reason', result in a lower figure than the total of the budgeted costs. Whether anyone has the appetite to try to take this argument back to the Court of Appeal remains to be seen.

In any event the wording of CPR 44.3(2)(a) has consequences that extend far further than merely to an assessment of costs. It is simply here that it becomes glaringly apparent that proportionality trumps necessity. It is the practical consequences of this provision at a far earlier stage on case and costs management that support the argument of those who believe justice has been compromised.

PROPORTIONALITY AND JUSTICE

[14.9]

The concerns expressed by the legal community have been referred to above – cut price justice not being justice at all, unpredictability as one court may take a different view of proportionality from another (even one sitting in the court/room next door) and a victory of process over outcome. Years of the debate about 'justice' and arguments on the practical application of proportionality have not completely disappeared. Some have taken the approach to proportionality in the frequently cited case of *Kazakhstan Kagazy v Zhunus* [2015] EWHC 404 (Comm) as watering down the primacy of proportionality. In that case, the court purported to define proportionality as ' . . . the lowest amount (of costs) which it (a party) could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the circumstances'. We have always said that this definition should be treated with extreme caution as it sits unhappily with CPR 44.3(2)(a), which is not mentioned in the judgment, and which unequivocally states that costs may be disproportionate even if they were reasonably or necessarily incurred. Our caution has been vindicated. In *PGI Group Ltd v Thomas (application for permission to appeal)* [2022] EWCA Civ 233, this proposition was dismissed. In refusing permission to appeal, Coulson LJ referred to the passage in *Kazakhstan Kagazy*, which the first instance judge had cited as follows:

> 'However, just as the judge did, I accept that there may be cases in which the reasonable and necessary costs required to enable the claimant to fight the case through to trial were disproportionate, and would therefore justify a CCO (*costs capping order*) in a lesser amount. Indeed, that is more than just a theoretical possibility (which is how the judge wrongly described it): that principle is enshrined in r.44.3(2)(a), which provides for such a result in terms (even though it is concerned primarily with assessment after the event, not limiting the incurring of such costs in the first place by way of a CCO). So in principle, a costs budget or a CCO could be set at a sum that was less than the reasonable and necessary costs to be incurred, because that sum might still be disproportionate . . .

> I accept [the] submission that one or two passages in the judgment, in particular at [72], suggest that the judge may have thought that there was a principle that any sum less than "the lowest amount which [a party] could reasonably been expected to spend in order to have its case conducted and presented efficiently, having regard to all the relevant circumstances," could not be proportionate . . . I should make it clear that, if that was what the judge thought, he was incorrect.
>
> The judge's formulation cited in the preceding paragraph was taken from [13] of the judgment of Leggatt J (as he then was) in *Kazakhstan Kagazy PLC and Others v Baglan Zhunus and others*. But *Kagazy* was concerned with an interim payment on account of costs and addresses what is recoverable on assessment. It was not expressly concerned with proportionality. Accordingly, to the extent that subsequent judgments have treated it as if were (such as the reference at [50] in *May v Wavell Group Limited*) they should be treated with caution.'

Notwithstanding this clear statement, routinely reported decisions still make reference to *Kagazy*. Indeed, the *Kagazy* approach was more recently adopted by the Court of Appeal when considering an application for payments on account of costs in both *Kington SARL v Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 1003 and *Saipem SPA v Petrofac Ltd* [2025] EWCA Civ 1106. In the latter, whilst proportionality was not mentioned by name, it was expressly held that when estimating likely recovery at assessment for the purposes of such an application, 'the court will have to consider the tests to be applied on that assessment'.

Even the staunchest supporters of the reforms accept that in some cases, proportionate costs management (which inevitably involves robust case management) will result in a risk of less just outcomes in the substantive dispute than had there been a lesser form of costs control. The analysis set out in Chapter 15 – Prospective Costs Control – Costs and Case Management below, of how directions may have to be tailored out of the cloth available, renders this an inevitability.

However, those supporters are keen to stress that in the majority of cases, there will be no discernible difference in outcome. In the large part, the 2013 reforms were aimed to take waste out of the justice system. To target statements to essential material by limiting the number of witnesses and the length of their statements, to limit disclosure to fewer, key documents (that this is so is confirmed by the acceptance that disclosure has become unmanageable and disproportionate in its current guise, with a pilot introducing amended disclosure obligations in the Business and Property Courts – which has now, after much experience based alteration, been enshrined in the CPR (PD 57AD)), to avoid waste of valuable resources by ensuring that parties comply with court orders and rules and to reduce the length of the trial, will avoid prolix and unfocused hearings where the judge is referred to only a few pages of the plethora of paper paginated in many lever arch files or the digital file and hears a number of witnesses saying the same thing and will ensure that cases are pursued efficiently or run the risk of being struck out.

Those advocates of proportionality of process advance the case that without change justice had become the right of all, but the privilege of only the few – those with sufficient financial resources or those under a funding scheme that gave them total immunity from risk (and therefore no interest in controlling cost). This view was adopted by Briggs LJ at para 5.23 of his December 2015 Civil Courts Structure Review: Interim Report and repeated by Sir Rupert Jackson at para 1.9 of Chapter 1 of his July 2017 Review of Civil Litiga-

tion Costs: Supplemental Report Fixed Recoverable Costs. As such, an imperfect system that re-opens the court doors to a greater number, results in better justice than where many cannot afford the entry fee to ring the doorbell, which is no system at all. At a time when 'exorbitant' and 'very disturbing costs' have troubled even the Supreme Court in the context of Human Rights, this argument carries weight (see *Coventry v Lawrence* [2015] UKSC 50).

Whatever the force of the competing views, the proportionality reforms have been in place for over 12 years. Proportionality remains centre stage and practitioners and judges have long since moved from theory to practice. The final word goes to Jacob LJ in *Nichia Corpn v Argos Ltd* [2007] EWCA Civ 741, who, perhaps, even 19 years on, best expresses the inevitable compromise that was necessary:

> '"Perfect justice" in one sense involves a tribunal examining every conceivable aspect of a dispute . . . No stone, however small, should remain unturned . . . But a system which sought . . . "perfect justice" in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with a lesser procedure even though it may result in the justice being rougher. Putting it another way, better justice is achieved by risking a little bit of injustice.'