Case No: B1/2001/1643, Neutral Citation Number: [2002] EWCA Civ 365

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL COURT)
ON APPEAL FROM LEEDS COUNTY COURT
(HIS HON. JUDGE LIGHTFOOT)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 21st March, 2002

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE LAWS

LORD JUSTICE DYSON

AND

MASTER HURST

– – – – – – –

HOME OFFICE

Appellant

– v –

LOWNDS

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

Mr Alexander Hutton and Mr Mark Friston (instructed by the Treasury Solicitor)
appeared for the Appellant
Mr Graham Robinson (instructed by Lester Morrill, Leeds)
appeared for the Respondent

J U D G M E N T
As Approved by the Court

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Lord Woolf CJ: This is the judgment of the Court

INTRODUCTION

1. Although this appeal only relates to a detailed assessment of costs in a relatively modest action, it raises issues of principle which have a direct bearing on the policy on which the effectiveness of the Civil Procedure Rules depends. That policy is that litigation should be conducted in a proportionate manner and, where possible, at a proportionate cost. The policy is reflected in the Overriding Objective set out in CPR 1.1 which provides:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable−
> (c) Dealing with the case in ways which are proportionate
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;"

2. Proportionality played no part in the taxation of costs under the Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when the professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable.

3. The requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order has been made. Part 44.3 which deals with the making of an order for costs does not specifically use the word proportionate but the considerations which should be taken into account when making an order for costs are redolent of proportionality. Parts 44.3 (4) and (5) provide as follows:

> "(4) in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including−
> (a) the conduct of the parties;
> (b) whether a party has succeeded on part of this case, even if he has not been wholly successful; and
> (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).
> (5) the conduct of the parties includes−

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre−action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

4. Part 44.4 provides for two basis of assessment. The first is the standard basis and the second is the indemnity basis. In both cases the court will not allow the recovery of costs which have been unreasonably incurred or costs which are unreasonable in amount. The important distinction between the standard basis and the indemnity basis is that on an assessment on the standard basis the court will only allow costs which are proportionate. Part 44.4 (2) provides:

"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; and
(b) resolve any doubt which it may have as to whether costs were unreasonably incurred or reasonable and proportionate in amount in favour of the paying party.
(Factors which the court may take into account are set out in rule 44.5)"

5. Part 44.5 is in the following terms:

"44.5−(1) The court is to have regard to all the circumstances in deciding whether costs were -
(a) if it is assessing costs on the standard basis -
(i) proportionately and reasonably incurred; or
(ii) were proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis -
(i) unreasonably incurred; or
(ii) unreasonable in amount.
(2) In particular the court must give effect to any orders which have already been made.
(3) The court must also have regard to -
(a) the conduct of all parties, including in particular -
(i) conduct before, as well as during, the proceedings; and
(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case; and
(g) the place where and the circumstances in which work or any part of it was done.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

6. The fact that when costs are to be assessed on an indemnity basis there is no requirement of proportionality and, in addition, that where there is any doubt, the court will resolve that doubt (as to whether costs were unreasonably incurred or were reasonable in amount) in favour of the receiving party, means that the indemnity basis of costs is considerably more favourable to the receiving party than the standard basis of costs.

7. Prior to the CPR coming into force it was already possible for a court to make an indemnity order for costs. This did no more, however, than to reverse the burden of proof in respect of disputed items of costs. The advantages of an indemnity order over a standard order are now far more significant.

8. The new requirement of proportionality, which is in mandatory and unqualified terms in Part 44.4(2), is important in itself, since it should discourage parties from incurring disproportionate costs as those costs will not be recoverable unless an indemnity order is made. This restriction on costs should encourage parties to conduct litigation in a proportionate manner, which is an important objective of the CPR. The contrast between standard costs and indemnity costs is also important because of the impact it has on offers to settle, whether under Part 36 or otherwise, by claimants. A defendant, unlike a claimant, does not need to have an additional or particular incentive to make an offer to settle, since an offer to settle is likely to result in his obtaining an order for costs in his favour if the claimant does not obtain a better result than that which was offered. (See Part 36.20). A claimant does need to have an incentive to make an offer to settle since if he succeeds in an action he is normally entitled, without making any offer to settle, to his standard costs and interest. It is in order to provide the required incentive that Part 36.21 provides that the claimant who obtains a more favourable result than that contained in his Part 36 offer can receive interest at a higher rate and an indemnity order for costs from the latest date when the defendant could have accepted the offer without needing the permission of the court.

9. The encouragement of settlement of disputes, preferably without the need to commence proceedings, is an important objective of the CPR. The contribution which the new requirement of proportionality in the case of standard orders for costs

makes to the early resolution of disputes is an added reason why the role of proportionality is so fundamental to the proper functioning of the CPR.

10. Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing the amount of costs. What has however caused practitioners and the members of the judiciary who have to assess costs difficulty is how to give effect to the requirement of proportionality. In particular there is uncertainty as to the relationship between the requirement of reasonableness and the requirement of proportionality. Where there is a conflict between reasonableness and proportionality does one requirement prevail over the other and, if so, which requirement is it that takes precedence? There is also the question of whether the proportionality test is to be applied globally or on an item by item basis, or both globally and on an item by item basis. These are the questions which directly arise on this appeal and explain why this judgment is so important.

THE FACTUAL BACKGROUND OF THIS APPEAL

11. The appeal is brought by the Home Office against the decision of His Honour Judge Lightfoot of 10 July 2001 at Leeds County Court dismissing an appeal against the order made on an assessment of costs by District Judge Bellamy on 26 January 2001. The order was made in an action for clinical negligence brought by the claimant, who was a prisoner, against the Home Office. The claimant relied upon two separate causes of action. The first was based upon the failure of the prison service adequately and timeously to diagnose and treat the gallstone condition from which he was suffering. The second related to the failure of the prison service adequately to advise and treat his dental condition. Permission to make the second appeal was granted by Lord Justice May because the appeal raises "important points of principle, including:

> (a) whether the costs to be awarded to a successful litigant may or should be reduced if they are disproportionate to the amount claimed in the action;
>
> (b) whether such costs may or should be reduced if they are disproportionate to the amount recovered in the action;
>
> taking into account other relevant considerations"

12. The proceedings were issued on 23 September 1998, the particulars of claim were amended on 15 April 1999 and a defence denying liability and causation was filed on 23 July 1999. On 10 August 1999 the claimant made a Part 36 offer to settle of £5,000. The following day the claimant's allocation questionnaire was filed. On 16 November 1999 the Home Office offered to settle the claims for £1,000. On 9 December 1999 the Home Office wrote offering £2,500 and upon 6 January 2000 the

action was settled for £3,000 and costs which were to be the subject of a detailed assessment.

13. The amount of costs which were included in the claimant's bill was £17,126.78 plus VAT of £2,278.60, making a total of £19,405.38. The District Judge assessed the costs at £14,871.30 plus VAT of £1,913.23, a total of £16,784.53.

14. As there was no trial because of the settlement of the proceedings the general impression created by the District Judge's decision is that the costs were assessed at a figure which was manifestly not proportionate. However, a complicating factor was the fact that the major part of the costs had been incurred by the claimant's solicitors prior to the CPR coming into force on 26 April 1999.

15. Because of the importance of the issues raised on the appeal the Senior Costs Judge, Peter Hurst, was appointed an assessor. We are most grateful for the advice which he gave us which was based upon his vast practical experience of assessing costs. His advice was disclosed to the parties. Included in his advice, which we accepted, was his opinion that only £6,987.58 of the sum claimed as costs, in relation to which the sum of £5,623.70 had been assessed as payable, applied to the period after the CPR came into force on 26 April 1999.

16. Mr Graham Robinson, who appeared on behalf of the claimant, accepted that the whole bill should be assessed in accordance with the CPR, subject to the application of the transitional arrangements contained in the Practice Direction to Part 51, paragraph 18. This provides so far as relevant:

> (1) any assessment of costs that takes place on or after 26 April 1999 will be in accordance with CPR Parts 43 to 48.
>
> (2) The general presumption is that no costs for work undertaken before 26 April 1999 will be disallowed if those costs would have been allowed in a costs taxation before 26 April 1999.

17. In view of the terms of the practice direction, it appears to us, that Mr Robinson's approach is the one that we should adopt. This means that in monetary terms this appeal could only have a very modest impact on the amount payable by the Home Office since the Home Office do not contest the reasonableness of the sums claimed for the individual items set out in the bill. As Mr Alexander Hutton made clear, in his argument on behalf of the Home Office, it was the total sum assessed and not the sums claimed for individual items in the bill which he contended was disproportionate and therefore not recoverable. The point of principle which he wished to establish was that the Circuit Judge and the District Judge had been wrong in not applying the proportionality test by taking a global view of the costs claimed (that is, by looking at the total quantum of the costs and deciding whether these were proportionate having regard to all of the factors set out in CPR Part 1 (2) (c)). He

argued that if this had not been a transitional case, the District Judge having assessed the sums due for each item on the basis of reasonableness should then have considered the total sum and decided that it was manifestly disproportionate and then reduced it to an amount which was proportionate in accordance with the factors set out in the CPR.

18. We do not have a transcript of what occurred during the detailed assessment by the District Judge. We do however have a note which shows the care with which the District Judge approached the question of assessment. In particular, he took into account the impact of the transitional provision. As he said correctly:

> "That must mean that any issue of proportionality must give way to the approach the court would have taken to such an assessment prior to 26 April 1999".

19. He recognised that in relation to costs incurred after 26 April 1999 it would be possible for a court to stand back and take a global view of the costs and ask if those costs were proportionate to the issues which had been litigated. Nonetheless he stated:

> "I don't consider that that is an appropriate view to take today and even if it were I do not consider it to be self−evident that the £17,000 in costs claimed in this bill was disproportionate to the complex issues that are litigated in this case and for all those reasons I do not propose to take a global approach to proportionality but I will take the approach that I would have done before 26 April 1999 and go through the bill item by item and listen to individual objections to particular items that are chargeable against the paying party."

20. Judge Lightfoot who heard the defendant's appeal from the District Judge's decision rejected the suggestion that the CPR placed any cap on costs. He said that if this was intended the CPR would have an express provision to this effect, which is not the case. He considered that the District Judge had clearly exercised his discretion, there was nothing to indicate that he had exercised that discretion wrongly or in a non−judicial manner and his decision was within "the generous ambit of reasonable disagreement". Accordingly he dismissed the appeal.

The Approach Required by the CPR

21. In view of the impact of the transitional provisions we do not consider that we should interfere with the conclusions as to the amount of the bill reached by the District Judge which were endorsed by His Honour Judge Lightfoot. If, however, the entire bill had related to expenditure which occurred after 26 April 1999 we would have taken a significantly different view. To do otherwise would have been to negate the changes in the approach to litigation which the CPR are intended to bring about.

Although this does not affect the result of this appeal we have had the benefit of full argument by counsel on the issues and we are grateful for their assistance.

22. We consider that the importance of applying the new approach is illustrated by the figures for costs in this case. Although we recognise that clinical negligence cases are usually complex we do not consider that on any approach the amount of costs assessed in this case can be regarded as being proportionate. They are not. In saying that we recognise the special difficulties created by the fact that the claimant was in prison. We also recognise that there was a need to consult three different experts because of the two different conditions in relation to which claims were made.

23. In our judgment what cases of this sort call out for is a recognition at the outset that the case could easily result in disproportionate costs being incurred. The nature of the claims required the parties conducting the litigation to plan how it should be carried out so as to minimise expense. Here for example there were about eight visits to the prison which proved to be very expensive. Four visits should have been ample. We would repeat the approach of Judge Alton, which was approved in *Jefferson v National Freight Carriers Ltd* [2001] 2 Costs L.R. 313. The judge said, in particular:

> "In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality."

24. Based on his experience, the Senior Costs Judge considered that, normally, a Costs Judge could be reasonably satisfied that if the costs for conducting this litigation up to the stage when the proceedings were settled, instead of amounting to over £15,000, were in the region of £6,500 to £7,000 there would be no significant issue as to proportionality. To this sum there would have to be added some additional cost to reflect the fact that the claimant was in prison which would make it more difficult to take instructions.

25. Under Part 44.5 the court is required to have regard to "the conduct of all the parties". In this case neither side paid proper attention to the clinical negligence protocol. The case was one which called out for a compromise being reached before proceedings commenced. Because of the time which elapsed a protective claim was needed to prevent the claim becoming statute barred, but once the claim had been

issued the proceedings could and should then have been stayed. There should have been offers to settle by both sides.

26. Of course the protocols require a considerable amount of work to be done and the claimant is entitled to be paid proportionately for this. Here the Costs Practice Direction is relevant. We refer to paragraphs 11.1 and 11.2. They provide:

> "11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.
>
> 11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute."

27. Attention can also be usefully given by practitioners to the proposals as to costs contained in the Birmingham County Court Clinical Negligence Pilot scheme which were acceptable to those consulted on the Pilot.

28. The reference in 11.2 to costs "which are necessary" is the key to how judges in assessing costs should give effect to the requirement of proportionality. If the appropriate conduct of the proceedings makes costs necessary then the requirement of proportionality does not prevent all the costs being recovered either on an item by item approach or on a global approach. The need to consider what costs are necessary is not a novel requirement. It was reflected by the former provisions of RSC order 62 which applied to the taxation of costs prior to 1986. Rule 28 (2) dealt with costs on a party and party basis and stated:

> "..... there shall be allowed all such costs as were necessary or proper for the attainment of justice..."

29. In assessing costs judges should have no difficulty in deciding whether, in order to conduct the litigation successfully, it was necessary to incur each item of costs. When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed. Any item that was not necessary should be disallowed.

30. In his advice the Senior Costs Judge drew attention to the problems that can arise from "double jeopardy"; in other words from making a deduction when considering the bill item by item and then looking again at the situation as a whole and making a

further global deduction. This danger will be avoided if a party receives at least a reasonable sum for the items of costs which were necessarily incurred.

31. In other words what is required is a two−stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. 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. This is turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.

32. The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.

33. This approach does not conflict with that of this Court in *Flowers Inc v Phonenames Ltd* [2001] EWCA Civ 721 2 Costs L.R. 286. There a summary assessment had been conducted by the Registrar of Trade Marks in relation to an application for £38,842.46 costs for a one−day hearing in the High Court. (The other side put their costs at £65,009.51!) The Registrar considered such a claim simply out of order and awarded £10,000 which he considered to be the proper sum for a case which was admittedly of great importance to the parties.

34. Jonathan Parker LJ giving the first judgment stated:

> "114. In my judgment, it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement. In so doing, the court may find it helpful to draw to a greater or lesser extent on its own experience of summary assessments of costs in what it considers to be comparable cases. Equally, having dealt with the costs by reference to the detailed items in the statement of costs which is before it, the

> court may find it helpful to look at the total sum at which it has arrived in order to see whether that sum falls within the bounds of what it considers reasonable and proportionate. If the court considers the total sum to be unreasonable or disproportionate, it may wish to look again at the various detailed items in order to see what further reductions should be made. Such an approach is wholly unobjectionable. It is, however, to be contrasted with the approach adopted by the judge in the instant case.
>
> 115. In the instant case, the judge does not appear to have focused at all on the detailed items in the opponent's statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high he then proceeded to apply his own tariff - a tariff, moreover, which appears to have been derived primarily from a case in which the opponent had not been involved and about which it and its advisers knew nothing. In my judgment the jurisdiction to assess costs summarily is not to be used as a vehicle for the introduction of a scale of judicial tariffs for different categories of case."

35. Although Jonathan Parker LJ did not refer specifically to the need for the costs to be necessarily incurred if they would be otherwise disproportionate, his approach of looking again at each item "if the court considered the total sum to be unreasonable or disproportionate" is very much in accord with the two−stage approach we commend. We agree the judge was wrong to base his decision on his experience of a single case, but this does not mean he was not entitled to have regard to his general experience.

36. Based on their experience costs judges will be well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the Costs Judge applies the correct approach to the detailed assessment. In considering that question the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item.

37. Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent

practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party.

38. In deciding what is necessary the conduct of the other party is highly relevant. The other party by co−operation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary.

39. Turning to the specific points of principle raised by May LJ (paragraph 11 above), where a claimant recovers significantly less than he has claimed, the following approach should be followed:−

Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus

(i) The proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim.

(ii) The proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover, should his claim succeed. This is likely to be the amount that the claimant has claimed, for a defendant will normally be entitled to take a claim at its face value.

40. The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption.

41. The approach which we have sought to explain and which is required by the CPR will not make litigation inexpensive but should help to ensure that costs are kept within proper bounds. Costs assessed in the way we have indicated will also underline the advantages to a claimant, before embarking on litigation, of making a formal offer to settle which will avoid the risks of litigation if the offer is accepted or provide a real prospect of obtaining an indemnity order for costs if the offer is rejected.

42. Because of the effect of the transitional provisions and because we do not consider that the guidance we have provided should be applied retrospectively to cases in which costs have already been assessed we dismiss this appeal.

Order: Appeal dismissed; order made in terms agreed between counsel.

(Order does not form part of the approved judgment)