Case No: A79YM916

IN THE COUNTY COURT AT NORWICH AND AT CAMBRIDGE

Heard on 29 August 2018
Handed down on 21 September 2018

Before :

HHJ AUERBACH

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Between :

Miss Sarah Jane Reynolds	**Appellant**
- and -	
One Stop Stores Limited	**Respondent**

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- -

Andrew Hogan of counsel, instructed by BLB Solicitors, for the Appellant
Robin Dunne of counsel, instructed by Keoghs LLP, for the Respondent

Hearing dates: 29 August 2018 (heard at Norwich)
21 September 2018 (reserved judgment handed down at Cambridge)

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JUDGMENT

HHJ Auerbach:

Introduction

1 The Claimant in this action, and now the Appellant in this appeal, suffered a wrist injury at work on 25 January 2012. She brought a claim in negligence against her then employer, the Defendant in this action, and now the Respondent to this appeal. I will refer to them as Claimant and Defendant.

2 Following service of a notice of claim in November 2012 the Respondent made an early admission of negligence and, in November 2013, a settlement offer, pursuant to part 36 of the Civil Procedure Rules, of £35,000. However, that was not accepted and quantum (including causation) remained in dispute. The claim form was issued on 23 July 2014 and the litigation progressed over the next three years.

3 The matter was in due course listed for a three-day trial to open on 18 October 2017. The Claimant claimed to have suffered a soft tissue injury with consequent physical impairment, chronic pain, depression and anxiety. Experts in the disciplines of pain management and psychiatry were allowed and the extent of disagreement was such that oral expert evidence at trial was ordered.

4 However, at the doors of the Court a settlement was agreed, and the trial Judge was presented with an agreed draft *Tomlin* order. She made an order in the proffered terms. This including provision for the Defendant to pay the Claimant's costs, to be assessed on the standard basis, if not agreed.

5 A detailed assessment hearing took place before District Judge Reeves on 1 May 2018. There was some discussion in the early stages as to how he should deal with the issue of proportionality. DJ Reeves suggested that he could determine any issues about the proportionality of particular items or matters (in addition to their reasonableness) as the assessment went along. Alternatively, the impact of the proportionality principle could be decided at the end, once a reasonable global total had been determined. The learned District Judge was urged, and agreed, to take the latter approach. Accordingly, although some particular issues about the proportionality of certain items or figures were raised as the discussion went along, DJ Reeves did not determine proportionality item by item.

6 After completing the line by line assessment of incurred costs, and his review of budgeted costs, from which he did not depart, not being satisfied that there was good reason to do so, the learned District Judge reached a provisional total base figure of £115,906.09. He then heard further submissions on proportionality and then gave a decision specifically on that aspect. On consideration of proportionality, he revised the award of base costs to £75,000.

7 The award attracted a success fee of 25% on base costs payable. In an adjournment, counsel agreed a proposed calculation of that (together with VAT), which brought the inclusive total to £86,250. DJ Reeves then approved that figure and made an order assessing the costs in the sum of £86,250. After further argument, he also awarded the Defendant its costs of the assessment, summarily assessed at £3500.

8 The Claimant appealed against DJ Reeves' order, solely in respect of the decision on proportionality. Permission to appeal having been granted, the substantive appeal came before me on 29 August 2018.

9 I had a two-volume bundle and was referred to various authorities and other legal materials. I had skeleton arguments and heard oral argument from Mr Hogan for the Claimant (Mr Foster having appeared below) and Mr Dunne for the Defendant (who had also appeared below), both of counsel. This is my reserved decision.

10 In view of how the arguments on the appeal were couched, I need to set out some further aspects of the history of the litigation. In what follows I refer to the particular aspects of the expert evidence highlighted in submissions.

11 A report from the Claimant's pain expert, Dr Munglani, from July 2013, indicated that he considered that she was functionally limited. But he thought that pre-existing anxious traits might be playing a role, and he recommended the involvement of a psychiatrist specialising in chronic pain. Nevertheless, he considered the prognosis good, and that the Claimant did not have a complex regional pain syndrome (CRPS), but did have a residual complex pain syndrome.

12 In November 2013 the Claimant's expert psychiatrist, Dr Spencer, diagnosed a major depressive disorder, exhibiting as a moderate depressive episode, and chronic pain disorder. The pain and disability and the depression were mutually reinforcing in a vicious cycle. This interaction was the key to prognosis. In a March 2015 report Dr Spencer repeated this concern.

13 In an April 2015 report Dr Munglani now considered that there had been a change and that the Claimant "seems, if anything, to have a slowly progressively deteriorating CRPS of the right hand." He recommended a further procedure and that prognosis be held in reserve. Work capacity was "difficult to say." He described this report as interim.

14 In April 2016 Dr Spencer opined that the Claimant continued to have moderate major depressive disorder and chronic pain disorder and that the interaction between psychological and pain aspects remained a key issue for prognosis.

15 In a report of May 2016 Dr Munglani wrote that the Claimant continued to have significant disability. The primary diagnosis was CRPS. A second possibility was neuropathic pain with autonomic features. Both had been compounded by "an increased perception of

disability by the Claimant." He was concerned that her mental state was making the disability appear worse, which was a feature of chronic pain disorder and depression. His report was again interim. He was concerned that as time passed she might well become *less* likely to improve.

16 At some point after that, the Defendant tabled surveillance footage that had been captured over a few days in 2015. The Defendant asserted that this showed that the Claimant had exaggerated her functional disability, and the value of her claim. The Claimant vigorously disputed that, her case being that what the surveillance showed was consistent with what she had otherwise reported, and that, in terms of functionality, she had good days and bad days.

17 On 6 March 2017 the Claimant applied to amend the value of the claim. At a hearing on 29 March 2017 (order issued on 12 April) DJ McLoughlin permitted this to be increased to a sum not exceeding £300,000. The orders also recorded that the Claimant's budget was revised to the total sum of £117,352.65 plus 3% for the drafting of the budget and costs management, and that "[t]he Court records that the totality of the Claimant's budget appears disproportionate."

18 In April 2017, having reviewed the surveillance material and other further reports, Dr Munglani had "little doubt that the Claimant suffered from a CRPS." He noted that symptoms of CRPS can remain notwithstanding functional improvement. However, her previous description of lack of function to him was "at variance with the seemingly normal function seen on the surveillance from around 2015." He could not say how functionally disabled she currently was because he could not easily find evidence of significant disability on the surveillance videos. The original diagnosis stood, but the prognosis may be different.

19 On 29 May 2017 the parties' pain management consultants issued their joint report. Both agreed that the surveillance evidence raised an issue of credibility on which they deferred to the Court. Dr Munglani maintained his diagnosis of CRPS. The Respondent's expert, Dr Glyn, confirmed his previous diagnosis of chronic neuropathic pain with a significant emotional component.

20 An updated schedule of loss as at 31 May 2017 claimed special damages, including loss of earnings, of £79,234 (consisting of past loss, of £69,749 and future loss of £9,485). A counter-schedule offered £1100 in respect of past costs of care and assistance and travel. The Claimant also sought unquantified general damages.

21 The expert psychiatrists tabled their joint report on 6 July 2017. They agreed that the Claimant had some pre-accident symptomology and that, if found credible by the Court, her post-accident depression and CPD/SSD were probably attributable to the accident. They deferred to the Court on the issue of veracity and credibility.

22 In the run up to the trial the Claimant tabled a further report from Dr Munglani, dated 3 October 2017, setting out a revised opinion, he now having read, for the first time, the Claimant's witness statement of 14 April 2016. That statement was to the effect that she could do things with her right arm, and had good days and bad days. Taking account of that, alongside the surveillance material, he was now of the view that she had ongoing CRPS, though she could do a significant amount with her right arm on an intermittent basis. Her mood and financial concerns would interact with ongoing pain symptoms. The financial distress would likely reduce with the end of the litigation, but overall it was likely that she would always experience pain. On balance it was likely that she would be able to work on a part-time basis, but heavier repetitive tasks were likely to be painful.

23 The Claimant also tabled a further revised schedule of loss as at 18 October 2017. This claimed past losses, down to that date, of £74,067.88, together with future losses of £100,907.72, totalling special damages of £174,975.60. The increase from the previous schedule was largely accounted for by a more pessimistic view being taken of future loss of earnings and care needs.

24 Had the trial proceeded, the Claimant would have sought to rely on the October report from Dr Munglani and the October schedule of loss.

25 The Schedule to the *Tomlin* order included the following recital:

UPON it being agreed:

i that the court has previously recorded that the totality of the Claimant's budget appears disproportionate

ii that the recovery of £50,000 in damages is less than the amendment of the value of the claim, pursuant to the order dated 12 April 2017, to increase the statement of value on the Claim Form to not exceeding £300,000;

iii that the costs associated with and consequent to Dr Munglani's report dated 3 October 2017 and Dr Spencer's report dated 25 September 2017 and the update Schedule of Loss dated 18 October 2017 shall not be payable by the Defendant.

The Rules

26 Part 44 of the Civil Procedure Rules sets out what are described as General Rules About Costs. In argument before me, the focus was on rule 44.3, and in particular rule 44.3(5). But it is important to remember that they fit within the wider overall scheme of rule 44. Within that rule, rules 44.3 and 44.4 provide:

Basis of assessment

44.3

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)
(2) 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; 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.
(Factors which the court may take into account are set out in rule 44.4.)
(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
(4) Where –
(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,
the costs will be assessed on the standard basis.
(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.
(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974, the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.4.
(7) Paragraphs (2)(a) and (5) do not apply in relation to –
(a) cases commenced before 1st April 2013; or
(b) costs incurred in respect of work done before 1st April 2013,
and in relation to such cases or costs, rule 44.4(2)(a) as it was in force immediately before 1st April 2013 will apply instead.

Factors to be taken into account in deciding the amount of costs

44.4

(1) The court will 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) 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 will give effect to any orders which have already been made.
(3) The court will also have regard to –
(a) the conduct of all the 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;
(g) the place where and the circumstances in which work or any part of it was done; and
(h) the receiving party's last approved or agreed budget.
(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.)

The Decision of DJ Reeves

27 I had a transcript of the whole of the hearing before DJ Reeves. As I have described, he agreed to leave the application of proportionality until after he had come to a provisional total award. Then he heard further argument on proportionality, and then he gave a decision, specifically addressing that question, extending to ten paragraphs in the transcript.

28 The learned District Judge began that decision by citing from paragraph 52 of the decision of the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 wherein Davis LJ (with whose judgment Black LJ and Sir Terence Etherton MR concurred) said:

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): a further potential safeguard, therefore, for the paying party.

29 DJ Reeves then referred to recitals (i) and (ii) in the schedule to the *Tomlin* order.

30 After citing pertinent parts of CPR 44, the learned District Judge then referred, at paragraph 2 of his decision, to the original claim having been put at £50,000, the Defendant having offered £35,000 and an application being thereafter made to "raise it to £300,000, and that was the position as fought by the claimant. It engendered medical evidence in which one of the claimant's experts began to take and have second thoughts. But the matter was teed up for a full fight and the court was led to believe it was £300,000. That was the sum to the maximum."

31 The learned District Judge then referred, at paragraph 3, to the increased offer made on the first day of the trial and the matter settling "very much closer to the defendant's figure; not anywhere near where the claimant was putting their case. So, if there's a question of reasonableness one has to say that a party who overstates their case, and then settles at an amount on which they originally pleaded, then one has to say that it's their conduct that must be looked at. The defendant, one can say without too much of a problem, was consistent."

32 DJ Reeves then said that there was no value of non-monetary relief as such, of relevance, issues of that ilk being dealt with as part of payments on account.

33 The learned District Judge continued, at paragraphs 4 – 7:

4 Complexity of the litigation. Well, the litigation itself isn't complex; it is the medical opinion that was divergent, and ultimately it would appear that that became less bold, otherwise it would not have settled on the first day of trial by negotiations if the claimant believed their case was so strong

for which it would be in the region of 2 to 300,000. It was not. They came down; the defendant came up to settle. That would suggest on the face of it more reasonable conduct by the defendant. One could say that, had the claimant taken a more reasonable stance, using a hindsight test and I do accept that, then the costs of the hearing could have been avoided.

5 Additional work generated by the conduct of the paying party. That, I have actually dealt with.

6 Wider factors involved in the proceedings such as reputation or public importance. Nothing there of any particular note.

7 So, I am left with a situation where the claimant has overstated their case; has increased the value of their claim; has fought it on the basis of £300,000; has had it cost budgeted having increased the value on £300,000; and then on the day of trial has accepted a much reduced figure than it was originally seeking.

34 The next few lines, in paragraphs 8 and 9, perhaps reflect some compression of thought, and inexactitude of expression, which may be found in any transcript of an *ex tempore* decision, and DJ Reeves was also evidently referring in shorthand to aspects of the materials before him and to earlier discussion and submissions. But the general sense is clear. He was now turning to his overall conclusion. He asked himself: "are the costs proportionate?" He used what he calls "the test that is now applied by *Harrison*, effectively leaving the question of proportionality, budgeted costs to the conclusion."

35 He then looked back at the cost budgeting process, and said (continuing paragraph 9):

… the original costs put forward … which Mr Foster tells me were reduced by some large sum; slashed swingeing budget hacked down. The fact they are asked for does not in any sense suggest that they are reasonable. The court itself commented and noted that the figures appeared disproportionate. The sum recovered: £50,000. Does this bill bear any reflection to that? And I, for my part, struggle to say that even at the present costs with the base figure of £115,906.09, that they do resemble a reasonable relationship. It's always accepted in medical cases that there is work that has to be done, but one would have thought after something like nine reports, the very consistent view taken by the defendant, that something might be amiss, but they still fought it on. There have been a plethora of cases where judges have taken a very robust view where the damages [*sic – he clearly meant "costs"*] bear no proportion to the actual sums recovered and have reduced them. For my part these costs still trouble me and as I indicated at the outset that I would look at them; that I would deal with them at the end on the basis that the parties did not wish me to deal with them as I went through the bill.

36 The learned District Judge then concluded (in paragraph 10): "In my judgment a proportionate sum as a base cost before the additional ones, should be a sum of £75,000 …".

37 In order to calculate the success fee, counsel asked what part of that figure represented profit costs and what disbursements. DJ Reeves responded:

Well that, I'm afraid, I don't have to give you, because if you want to take it as a proportionate reduction that's entirely a matter for you, but you've had your opportunity of detailed assessment which you have rejected, and I have now taken the view that the sum total which is reasonable for this litigation is £75,000 base costs, which then leaves it a problem for the solicitor to sort it out.

38 As I have already noted, in a short adjournment counsel then agreed a proposed calculation of the success fee, and VAT thereon, and DJ Reeves then made a final assessment adopting their proposed final figure.

The Grounds of Appeal

39 The amended grounds of appeal identify four particular grounds of challenge to DJ Reeves' decision on proportionality. In summary, they are as follows.

40 Ground 1 relates to the "sums in issue". It is said that the learned District Judge erred in considering proportionality by reference to the amount of the settlement of £50,000, and in drawing on his view that the value of the claim had been overstated by the Claimant. It is said that he should have considered proportionality relative to a claim for special damages of £174,975.60, together with general damages.

41 Ground 2 relates to "complexity". It is said that DJ Reeves erred in finding the litigation not to be complex. He should have considered it complex, having regard to the involvement of multiple experts who were to give oral evidence, and by comparison with other claims of similar value in the County Court.

42 Ground 3 relates to "conduct". The learned District Judge is said to have wrongly failed to recognise that the litigation had been prolonged by the conduct of the Defendant only substantially increasing its offer at the doors of the Court. Rather, it is said, he wrongly viewed the Claimant's conduct in relation to settlement as unreasonable, and that of the Defendant as consistent.

43 Ground 4 is headed "approach". The learned District Judge is said to have wrongly treated the issue of proportionality "as a discretionary one rather than an issue of judgment" and to have erred in failing to "attribute appropriate weight" to each of the five factors in CPR 44.3(5); and to have reduced the award on an arbitrary basis "without regard to the component parts of the rule, and with neither a mathematical calculation nor an explanation of how the weighting of the various factors resulted in the final figure."

44 The Defendant's position, in summary, is this.

45 As to ground 1, the learned District Judge had been perfectly entitled to focus on the fact that, for most of the claim's life, it had been valued at no more than £50,000, and that was the figure at which it settled; and he was entitled, on the materials before him, to take a view that the Claimant had overstated her case.

46 As to ground 2, DJ Reeves' view that the litigation was not complex was perfectly permissible, and he took account of the fact that the medical opinions diverged.

47 As to ground 3, the learned District Judge was entitled to take the view that he did of the conduct issues, in circumstances where the Claimant had litigated for some four years and then settled for only £15,000 more than she was originally offered.

48 As to ground 4, DJ Reeves had gone through the rule 44.3(5) factors and then come to his overall conclusion on proportionality. He was not required to perform a detailed reassessment of the costs claimed, by reference to proportionality, or to apply some mathematical formula.

49 In support of his arguments, Mr Hogan drew on a number of passages in the decision of the Central London County Court (HHJ Dight sitting with Master Whalan) in *May and May v Wavell Group and another*, 22 December 2017, though he accepted that I was not bound to follow it. Both counsel referred me to a passage in the final report of Sir Rupert Jackson on the then-proposed costs reforms. Mr Dunne also referred to extra-judicial commentary by Regional Costs Judge DJ Middleton.[1] I was invited to consider all of this material on the basis that it was persuasive and worthy of respect; but that I was not bound to follow it.

Discussion

50 In what follows, I do not set out all the detailed points of argument in the written and oral submissions, though I have considered them all. Rather, I highlight those which seemed to me to be most significant.

51 I start with some observations about the relevant rules.

52 First, the wording of Rule 44 does not prescribe at what *stage* or stages in the conduct of a detailed assessment the Court should address proportionality. However, Sir Rupert Jackson, in his final report, envisaged that, under the new regime, the impact of proportionality would be determined only after the detailed assessment by reference to reasonableness had been completed. The assessing Judge could then consider whether the total figure is proportionate, "alternatively some element within that total figure."[2] That is also the approach envisaged in the passage from the *Harrison* case, that DJ Reeves cited in his decision.

53 Further, as Sir Rupert Jackson envisaged, the Court may, in a given case, focus on the proportionality of one or more *elements* of the overall costs, or it may consider the proportionality of the overall provisional total, taken as a whole. The rule leaves it open to

[1] In *Costs and Funding Following the Civil Justice Reforms: Questions and Answers* (4th Edition, 2018).
[2] *Review of Civil Litigation Costs: Final Report* (December 2009) chapter 3, paragraphs 5.12 and 5.13.

the assessing Judge to decide, given the nature of the issues in the particular case, what approach (or mixture of approaches) is more apposite.

54 Secondly, proportionality, at the detailed assessment stage, applies to *all* of the costs under assessment, both those which were, at the costs budgeting hearing, incurred costs and those which were budgeted costs. That is, I think, clear from the language of Rule 44. It does not restrict the application of the proportionality principle to any particular element of the costs submitted. The observations in *Harrison* at paragraph 52 are also to that effect; and, in particular, the budgeted costs are susceptible to proportionality review, notwithstanding that, upon initial consideration, the Court will not depart from the budget without good reason.

55 This does not, however, mean that the distinction between incurred and budgeted costs, and/or what happened at the case management stage in a given case, are irrelevant at the assessment stage. Rule 3.15(4) provides that, whether or not the Court makes a costs management order "it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings."

56 Practice Direction 3E, concerning costs management, includes the following:

> **7.3** If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. 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.
> **7.4** As part of the costs management process the court may not approve costs incurred before the date of any costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.

57 Rule 3.18 then provides that, when assessing costs on the standard basis, the Court will have regard to the last approved or budgeted costs, not depart from them unless there is good reason to do so, but also take into account any comments recorded on the order pursuant to Rule 3.15(4) or paragraph 7.4 of PD3E.

58 The Judge conducting the detailed assessment may not know precisely what impact proportionality had on the approved budgeted amount, but will know that it will (or, at any rate, should) have been considered. Further, although the case managing Judge cannot approve incurred costs, they must take them into account when considering the (reasonableness and) proportionality of the budgeted costs. And any comments of the case managing Judge, touching on the proportionality of incurred costs, *must* be taken into account by the assessing Judge, although they do not fetter what the assessing Judge may do.

59 The fact that the Court, when conducting a detailed costs assessment, may bring proportionality to bear on *all* of the costs, does not, in my view, mean that there is a form of double counting, by the Court as it were *further* cutting down for proportionality, costs which may have already been cut down for proportionality. Rather, the Court is simply applying, and then later reapplying, the same filter at two different stages. At the assessment stage it does so with the benefit of different information, and bringing hindsight to bear, which it is entitled to do.

60 To what extent does Rule 44 in any other way prescribe how the assessing Judge should approach the reaching of a decision on proportionality?

61 First, in accordance with Rule 44.3(2)(a) the Court "will" – therefore must – only allow costs which are proportionate. The fact that this provision goes on to say that costs which are disproportionate "may be disallowed or reduced" does not mean that the Court has a discretion to award disproportionate costs. The whole phrase is: "may be disallowed or reduced even if they were reasonably or necessarily incurred." The purpose is surely to reinforce the message of the first sentence, that under the new regime proportionality overrides everything else – "may be" meaning, here: "are liable to be". Accordingly, the assessing Judge must decide whether the costs are proportionate or disproportionate, and, if the latter, must either disallow them wholly, or substitute an amount which *is* proportionate.

62 Secondly, Rule 44.3(5) expands on the meaning of "proportionate", and an assessing Judge will certainly err if they do not engage with it. Further, even though the sub-rule does not, as well as saying: "if", add: "but only if"[3], the list of factors in (a) – (e) is, on its face, exhaustive, and designated as being matters which the Court should take into account, or to which it should have regard.

63 That said, the list does not set a series of discrete hurdles, each to be considered in turn, and in isolation from the others. Rather, the Court must decide whether the costs bear a reasonable relationship to these factors, viewed in the round. The Court must still, in my judgment, consider the salience of each of them in the given case, but it only then decides on proportionality by looking at the overall picture which they paint, taken together. So, for example, costs which might look worryingly disparate when compared, in isolation, to the sums in issue, might ultimately be found proportionate, once the implications of the complexity of the particular litigation have also been factored in.

64 Mr Hogan submitted that this process does not involve the exercise of a discretion, but, as he put it, the making of a judgment. Further, to apply the rule correctly in law, he argued, the Judge must decide what weight to attach to each of the factors in the Rule 44.3(5) list, and thereby arrive at a particular figure for a reduction of the provisional total in some mathematically-reasoned way.

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[3] As Sir Rupert Jackson's suggested draft rule provided: *ibid*., paragraph 5.15.

65 Mr Dunne disagreed. He submitted that the correct construction of the words of the rule – or parts of it, *is* a question of law. But the rule itself confers a discretion on the assessing Judge. It does not require a mathematical process to be followed, nor could it: a judgment about proportionality is inherently qualitative, though it must find its expression as a numerical result. Nor, similarly, does the rule require the Judge to identify and attach a particular numerical weighting to each of the Rule 44.3(5) factors.

66 I, broadly speaking, agree with Mr Dunne, and disagree with Mr Hogan. More specifically, my reasons are as follows.

67 Firstly, while it is correct that the construction and meaning of the words of the rules, or parts of them, is a question of law, or what Mr Hogan called "judgment", and indeed I have already set out some propositions of law about that, it does not follow merely from this that the rules cannot and do not also confer a discretion on the Judge who applies them.

68 Secondly, in my view it is plain that Rules 44.3 and 44.4 do indeed confer a discretion on the Judge who is called upon to apply them, in the sense that it cannot be said that a given set of underlying facts and figures will necessary point to only one legally correct costs award, as would be the case in a fixed costs regime. These rules allow for, indeed necessitate, the Judge who applies them exercising a measure of discretion, or (which to my mind is, in this context, another way of saying the same thing) making a value judgment.

69 That is clear, I think, from a number of features.

70 First, neither Rule 44.3(5), nor any other part of the rule, requires the Judge to apply any particular mathematical formula or algorithm. It simply contains none. It does not do so where it could have – for example it could have provided that costs are not proportionate to the extent that they exceed a certain multiple of the sums in issue; but it also refers to factors which are not inherently quantitative, such as complexity and public importance, and which simply could not be amenable to the application of a rigid formula. It plainly cannot be right that, on a given set of facts, or underlying figures, a particular proportionality impact (whether in absolute or percentage terms) must necessarily follow.[4]

71 Further, the overriding requirement is that the costs "bear a reasonable relationship" to the Rule 44.3(5) factors. This masterly choice of phrase itself confers a degree of latitude on the assessing Judge in coming to a discretionary value judgment. It is designed, it seems to me, to provide a temper to the rigours of the "trump card" status of proportionality, and

[4] I am inclined to think this is reinforced by the provision in Rule 44.2(1) that the Court "has discretion as to (a) whether costs are payable by one party to another; (b) *the amount of those costs*; and (c) when they are to be paid." (My emphasis). I acknowledge, however, that the rest of that sub-Rule is effectively concerned with (a), and the reference in (b) could be said to point merely to the options of summarily assessing or directing a detailed assessment. But even if Rule 44.2(1)(b) does not reinforce it, my conclusion would be the same.

its role as a safeguard for payers, so that, without detracting from that, it need not bear oppressively on payees.

72 Further, while the list of matters in Rule 44.3(5) is, as such, exhaustive, and the Court has to correctly construe what each of them means, in judging whether the costs in question bear a reasonable relationship to them, the Court does not decide this in a vacuum, but *in all the relevant circumstances*. That, it seems to me, is both unavoidable, and in any event is contemplated by Rule 44.4(1), which refers to proportionality as well as to reasonableness. Indeed, it seems to me that the items in the list at 44.4(3) potentially come in to the general picture as well, although some of them may be seen as more relevant to reasonableness, and others to proportionality, and there is also a degree of overlap with Rule 44.3(5).

73 That does not, of course, mean that the Judge can come up with any figure they like, without applying any form of reasoning. All discretions conferred on Judges must be exercised judicially: in a reasoned and not an arbitrary fashion, taking account of relevant considerations, and not taking account of irrelevant considerations; and, of course, by applying the overriding objective. Further, I have already identified the framework created by these rules, within which the assessing Judge must come to their assessment or value judgment.

74 In particular, the need to engage with the 44.3(5) factors, and then to come to a holistic view of whether the costs bear a reasonable relationship to them, requires the Court, in my judgment, to identify any particular features of the case in hand that are thought to be pertinent in respect of each of them – or to identify if there are none; and to convey its view of how they interact or work in harness in the given case, so as to inform its overall conclusion on proportionality. In going through this process, the Court must apply a correct understanding of what each of these factors actually means. The Court should also indicate any wider background or circumstantial features which have contributed to its view of how those factors play out in the instant case.

75 However, whilst the Court needs to consider the significance that it attaches to those factors that it finds are salient in the given case, and how they interact, it must do so in a qualitative or value-judgment sense. It is not required to do so by assigning each factor a precise numerical weighting, scoring it in some way, or performing any other kind of mathematical calculation. Further, where the Court is applying proportionality to a global provisional total, rather than to an individual element, it is bound, inevitably, to paint with a somewhat broader brush.

76 In presenting its decision, in order that the parties have a sufficient understanding of its reasons, the Court must demonstrate that it has engaged with the rule in the required manner, and followed the above approach. If the provisional total is found disproportionate, and a different final figure found proportionate, the final figure must be one that can be seen to be in keeping with the Court's reasoning leading up to it, and not

perverse or irrational. But the Court does not have to set out a precise mathematical calculation by which it is reached.

77 I add this. The reference, in Rule 44.3(2)(a), to costs being *reduced*, is simply to the mechanism by which the Court replaces a disproportionate figure with a proportionate one. It does not mean that the Court has to come up with a *formula to reduce it*, in order to then *discover* what the proportionate figure is. Rather, it has to decide what figure *is* proportionate – either the provisional amount or, if not, then some other, lower, amount. It must only allow costs which *are* proportionate (Rule 44.5(2)(a)), which is perhaps why Rule 44.3(5) states when costs *are* proportionate, rather than when they are *dis*proportionate. Or, as Sir Rupert Jackson put it, the process of applying the test of reasonableness will usually also result in a figure which is proportionate. "However, if the process … results in a figure which is not 'proportionate', then the receiving party's entitlement to costs will be limited to such sum as is proportionate."[5]

78 So, I come back to the decision under appeal, and the specific grounds of appeal.

79 I note, first, that this was an *ex tempore* decision, given at the end of a full day's assessment hearing. The learned District Judge had before him detailed written points of dispute (incorporating responses to those points). During the course of the discussion of the line-by-line assessment, and the budgeted costs, a number of points touching on proportionality had been flagged by both counsel. DJ Reeves himself had made a number of observations, while, as I have noted, flagging that determination of proportionality was being parked until the end. Further, he had heard additional oral submissions on proportionality before giving his decision on it. That decision plainly drew upon, and at points specifically referred back to aspects of, all of that prior engagement.

80 So, in order to understand the learned District Judge's decision, the ten paragraphs of it should not be read in isolation, but in conjunction with those other materials that fed into it. That is what I have done, and, of course, what the parties were able to do, in order to sufficiently understand his reasons.

81 There are some further preliminary general points regarding DJ Reeves' decision. First, it follows from all I have said – and this as such was not disputed before me – that the learned District Judge did not err in determining the question of proportionality after he had completed his line by line consideration of the incurred costs, and the budgeted costs; and he did not err in doing so on a global basis, rather than, say, phase by phase. Secondly, he did not err in applying proportionality to the whole total of both incurred and budgeted costs.

82 Thirdly, it is clear from his reasoning that he did consider each of the topics in the 44.3(5) list, in turn, identifying whether there were any matters material to each in the case

[5] In the *Final Report* chapter 3, paragraph 5.18.

before him, and considering what he made of them, before then turning to come to a decision on the proportionality question, having regard to all these matters in the round.

83 So the learned District Judge did not fail to follow those aspects of the decision-making framework that I believe ought to have been followed, as such.

84 However, coming now to ground 1, did DJ Reeves err in his approach to the first item on that list: the "sums in issue"?

85 Mr Hogan submitted that DJ Reeves took a view that the sum in issue was the sum that the case settled for, and which was also the upper limit of the amount originally claimed. He argued that that was descriptively wrong: the amount of the settlement was not what was "in issue" at all; and it was in principle wrong to attach significance to it, because cases settle, or settle at given figures, for all sorts of reasons. The best measure, he argued, would be the amount of special damages claimed in the schedule of loss, less the amount conceded in the counter-schedule, and plus a fair valuation of general damages. Specifically, Mr Hogan relied upon the October 2017 schedule, claiming just under £175,000 in special damages (of which only £1100 was conceded); and, he argued, for injuries of the type and extent claimed, general damages would likely be upwards of £20,000.

86 Further, said Mr Hogan, notwithstanding that the Claimant's credibility was in issue, there had been no trial and hence no finding at trial that the claim was exaggerated. Nor was it obviously unreasonable or untenable. This was a difficult case where the medical advice had evolved and changed over time. At any given point in the litigation the view the Claimant took of the value of her claims was one reasonably open to her, in light of the latest expert evidence. The learned District Judge had therefore been wrong to describe the claim as overvalued.

87 Mr Dunne submitted that there was nothing wrong with DJ Reeves' approach. For most of the life of the litigation – up to March 2017 – the Claimant herself had valued the claim at a maximum at £50,000. The surveillance evidence put the Claimant's credibility centre stage, and her pain management consultant had, as Mr Foster himself had put it at the costs assessment, wobbled. The *Tomlin* order itself highlighted the disparity between the settlement amount and the revised upper limit. The proportionality test allowed for the application of hindsight.

88 My conclusions on this ground are these.

89 First, the correct approach to the construction of the rule is, as such, a question of law. But, as with all questions of construction, the phrase must be understood objectively within the context of the instrument in which it is found. These rules do not themselves define what "sums in issue" means – but the concern of these particular rules is, of course, the issue of proportionality of costs. The approach to take to the "sums in issue" must therefore be determined through that lens.

90 The general intention is not hard to grasp. Other things being equal (and the inclusion of the other factors in the list recognises that they may not be) proportionality dictates that the costs should bear a reasonable relationship to the amount at stake. It must also be right that what the assessing Judge needs to consider is a *reasonable view* of the sums in issue. That may fall within a range.

91 I also consider that, in principle, what is a reasonable view of the sums in issue falls to be decided, objectively, by the assessing Judge, on all the material available to them when the assessment is conducted. That may include an element of hindsight. Nor can there be any rigid approach to the effect that in every case the right answer (or range) must come from one particular source. The task of the assessing Judge is to decide what is a reasonable view of the sums in issue, drawing on any relevant material in all the circumstances of the particular case, and then how that feeds into the determination of proportionality. Only if they draw on irrelevant considerations, omit relevant considerations, or otherwise reach a perverse view, should an appellate Judge intervene.

92 In this case, if the learned District Judge had simply taken the amount of the settlement automatically to be the measure of the sums in issue, that would have been wrong. But that is not what he did. He was alive to the facts that the Claimant's credibility was in issue, that the medical evidence varied, that there was surveillance evidence, and that the experts ultimately all deferred to the trial Judge on the credibility issue. It is also clear that he was aware of the course of the offers and counter-offers (Mr Foster laid this out and also referred to a counter-offer that had been made by the Claimant at some point of £70,000).

93 The learned District Judge also appears to have considered what the claim was being valued at by the Claimant, based on the revised schedules of loss, commenting at one point (page 7 of the transcript): "taken to trial for 200,000 and settled at 50." Further, Mr Foster argued before him that the claim was worth "an awful lot more than £50,000", and that "it only became worth as little as £15,000 following the service of the surveillance evidence when Dr Munglani started to wobble" (page 18 of the transcript). Mr Dunne also later suggested to DJ Reeves that, with "good general damages" it was pleaded at "at least 200,000" which, Mr Dunne submitted to him, was "a bold assertion" (page 62 of the transcript).

94 Further, after an extended exchange with Mr Foster in which the learned District Judge maintained (correctly) that he was entitled to apply proportionality to budgeted, as well as incurred, costs, DJ Reeves observed (page 26 of the transcript) that this was:

…only a problem in certain cases, and that's where the recovery is entirely at odds with the costs incurred. Every other case, it works beautifully. And that's why we're here today; this was a relatively minor incident but the ramifications were quite significant according to the claimant. It was pushed for five years, it was going to a three-day trial, there was heavily opposed medical

evidence and the claim was increased to [*sic*] 50 to 200,000, the defendant stuck to his guns, it kept to the trial, and then I have no way of knowing whether it was pragmatic to avoid future costs or whatever, a slightly increased offer was put, and settled. Well, what a surprise. And there is guidance to certainly in the lower cases where for example it's been in the fast track, and for example somebody's been pursuing something like £20,000 damages and they've been awarded 1500. There's loads of authorities. That's all down to proportionality. But no, I can easily see why it got to this stage, it's not difficult. That's always one of the great advantages of 20/20 hindsight. When you sit up here and you look at it as it's now turned out, you rest upon your client's instructions, you're guided by the medical evidence and you have to follow your client's instructions on withdrawal. Hence six medical reports or seven medical reports per expert, all incrementing it forward. The psychiatrist was the only one I think who was actually consistent throughout, but then again he's explaining that you're dealing with a person of a particular bent, and that hadn't altered, but it was the other one, Mr Munglani, where in fact there was a change taking place. Now I understand that. But that's – that's why budgeting doesn't work in these cases, because there is a change in the complexion.

95 Further on, there was also discussion of the issue fee for the application to increase the value of the claim, and the recitals in the *Tomlin* order, with DJ Reeves commenting: "It's an application which – well, with hindsight is demonstrated to be without merit."

96 It is against all of that background that the learned District Judge then addressed, in his decision on proportionality, the "sums in issue", in the terms that I have described. In my judgment it is clear that he did not take a mechanistic view based on the settlement amount or the amount originally claimed on the claim form. He *highlighted* the settlement amount, because he regarded it, in all the circumstances, as *reflective* of an underlying reasonable valuation of the claim. He was also entitled to express his view that the claim had been overvalued, drawing as it did, on his reasoned appreciation of all the material before him, not just the amount of the settlement. He was also entitled to take a view that this was (unusually in his stated experience of the new rules in operation) a case in which the impact of proportionality on the provisional total should be significant.

97 I therefore find no error of law or perversity in this part of DJ Reeves' decision, and ground 1 fails.

98 I turn to ground 2, concerning complexity. First, I observe that the rule simply refers to the "complexity of the litigation." "Complexity" is also an ordinary-language word, and not defined further in the rule. Once again, the Court should construe it objectively in the context of the purpose of the rule concerned. The Court should therefore consider it by reference to whether the litigation was complex, in ways that could reasonably be expected to have an impact on costs levels. Beyond that, the rule does not require the assessing Judge to deploy any particular kind of comparative yardstick.

99 In this case it was, unsurprisingly, not contested that the nature of the issues required expert medical evidence; but it was not suggested before DJ Reeves (or before me) that this fact, *by itself*, made this litigation complex in the relevant sense. Rather, it was said, for the

Claimant, that *particular* features of the medical evidence itself – especially the changing views of Dr Munglani, and the extent of the differences between experts, leading to oral expert evidence being permitted at trial – should have led to the conclusion that the litigation was complex in a way which impinged on proportionality in the Claimant's favour.

100 It is clear to me that the learned District Judge plainly had a good grasp of the particular features of the expert evidence in this case. He was aware of the number of reports, and of their varying contents. But he considered that the underlying litigation was not complex, and he took a view that the fact that the medical opinion was "divergent" did not make it so, in this particular case, observing that it "ultimately became less bold". He plainly set this in the context of his view of the fair value of the claim; but he was fully entitled (indeed, obliged) to consider the relation of these aspects to one another.

101 Once again, I conclude that DJ Reeves reached a reasoned view, drawing on all the materials available to him, which he was fully entitled to reach. Ground 2 therefore also fails.

102 I turn to ground 3, relating to the learned District Judge's approach to "conduct". The focus of Rule 44.3(5)(d) is specifically on whether, in the given case, additional costs have been generated *by the conduct of the paying party*. The specific argument advanced for the Claimant in this case, was that the Defendant had, unreasonably, failed to table its offer of £50,000 until the start of the trial, thereby putting the Claimant to the additional cost of fighting the matter to trial.

103 When the point was canvassed during the course of the hearing before him, DJ Reeves remarked on the high number of medical reports, adding: "Taken to trial for 200,000 and settled at 50. And on the face of it that one would almost say the Defendants were perfectly entitled to defend this" (transcript page 7). In giving his decision he observed that the Defendant's conduct was reasonable. In also expressing a critical view of the Claimant's conduct in this regard, he did not, in my judgment, err in law. In judging whether the criticism of the *Defendant's* approach to settlement was well-founded, he was fully entitled to set that within the context of the wider conduct and evolution of the litigation (and, as I have noted, conduct of the parties generally is a contextual factor referred to in Rule 44.4).

104 Mr Hogan argued, further, however, that DJ Reeves' criticism of the Claimant's conduct in relation to settlement was misplaced. The increase of £15,000 on the Defendant's earlier offer was a significant one in both percentage and absolute financial terms for her. She reasonably held out for it, he said. But what the District Judge had to consider, I repeat, was whether the *Defendant's* conduct was unreasonable. He considered that in the context of *all* the circumstances of this case, including the Claimant's *overall* approach to the litigation. He was fully entitled to do so. I add that, even had he thought that the Claimant's approach to settlement had itself been reasonable, it would not have necessarily followed that he should therefore have concluded that that of the Defendant was *unreasonable*.

105 Ground 3 of this appeal therefore also fails.

106 I come to ground 4 – the general approach. As I have already indicated, DJ Reeves did not err in taking proportionality at the end, and in the round, nor in applying it to the whole of the provisional total, that is, to both incurred and budgeted costs. He did not fail to consider each of the 44.3(5) factors in turn, and he properly then turned to draw the threads together, coming to a decision on proportionality in the round. I also consider that he sufficiently conveyed how those factors interacted and fed into his view on proportionality, when giving his oral decision, building on the earlier discussions during the hearing. In short, it is quite clear that he considered that the costs were disproportionate to the sums in issue (about which he took a properly-reasoned view), and that this was not a case where the complexity of the litigation, additional work generated by the paying party's conduct, nor any other factors in the Rule 44.3(5) list, had a countervailing impact, such as to lead to a different overall conclusion.

107 The learned District Judge was not bound, in addition, to apply some mathematical formula or algorithm, to arrive at the final costs figure. The question I ask myself, on appeal, is whether the figure he arrived at – £75,000 – was consistent with the evaluative conclusion he had come to in his decision thus far. My answer is this.

108 First, DJ Reeves, properly, rejected the argument that it would be wrong to apply proportionality to the budgeted costs. Mr Hogan, however, submitted to me that a relevant consideration, when applying proportionality, was the relative proportions of the costs under assessment attributable respectively to incurred and to budgeted costs. But the breakdown of the budgeted and incurred costs was summarised in the Precedent Q (also in my bundle), and the learned District Judge would have obviously appreciated the picture. Nor do I consider that he was obliged, in his decision, to identify, or separately determine, sub-amounts of his final award, attributable to incurred and to budgeted costs; nor that the relative proportions of incurred and budgeted costs under assessment in this case were such that it was not open to him to make a final award in the amount that he did.

109 The learned District Judge also considered the submission that the Claimant's budget had been, earlier, subjected to what Mr Foster had called "swingeing" reduction; but he properly concluded that this fact did not of itself make the reduced costs more defensible. He, rather, properly considered, first, whether the provisional total of just under £116,000 costs reached in his assessment was proportionate, but "struggle[d] to say … that they do resemble a reasonable relationship." He described *why* he considered the costs to be disproportionate to the sums in issue. The tenor and substance of his overall analysis, naturally pointed, in my judgment, to his conclusion that a significantly lower figure was proportionate in this case. The award of £75,000 was, I conclude, wholly consistent with DJ Reeves' overall reasoning, and flowed from it.

110 Mr Hogan observed that £75,000 was precisely 1 ½ times the settlement amount and the original claim limit. He said that it rather looked as if the learned District Judge had effectively applied a tariff. But that criticism is in my view not merely speculative but wrong. For reasons I have given, specifically in relation to ground 1, I am satisfied that DJ Reeves did not take a mechanistic approach of that sort. If, however, in arriving at his final figure in this case, he took account of its relation to his view of the reasonable valuation of the underlying sums in issue, there was nothing wrong about that at all, given his view of the overwhelming significance of that to proportionality in this particular case. That does not, however, amount to the application of a tariff.

111 Ground 4 also, therefore, fails.

Outcome

112 Mr Hogan, in the course of argument, submitted that, if the Defendant's submissions about these rules were right, it would be very hard for parties to litigation in general in multi-track cases to predict the outcome of the proportionality exercise and, hence, to settle costs without taking them to a detailed assessment. That is an empirical question. DJ Reeves' comments, during the course of the conduct of this assessment, on his own experience, however, suggest otherwise.

113 But, in any event, my task was to decide whether DJ Reeves had erred in law in his decision on proportionality. For all the reasons I have given, he did not, this appeal fails, and the final costs award made by him therefore stands.

114 Counsel have submitted an agreed draft of the order that should flow from my decision, including as to the costs of this appeal, and I will make an order in those terms.

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