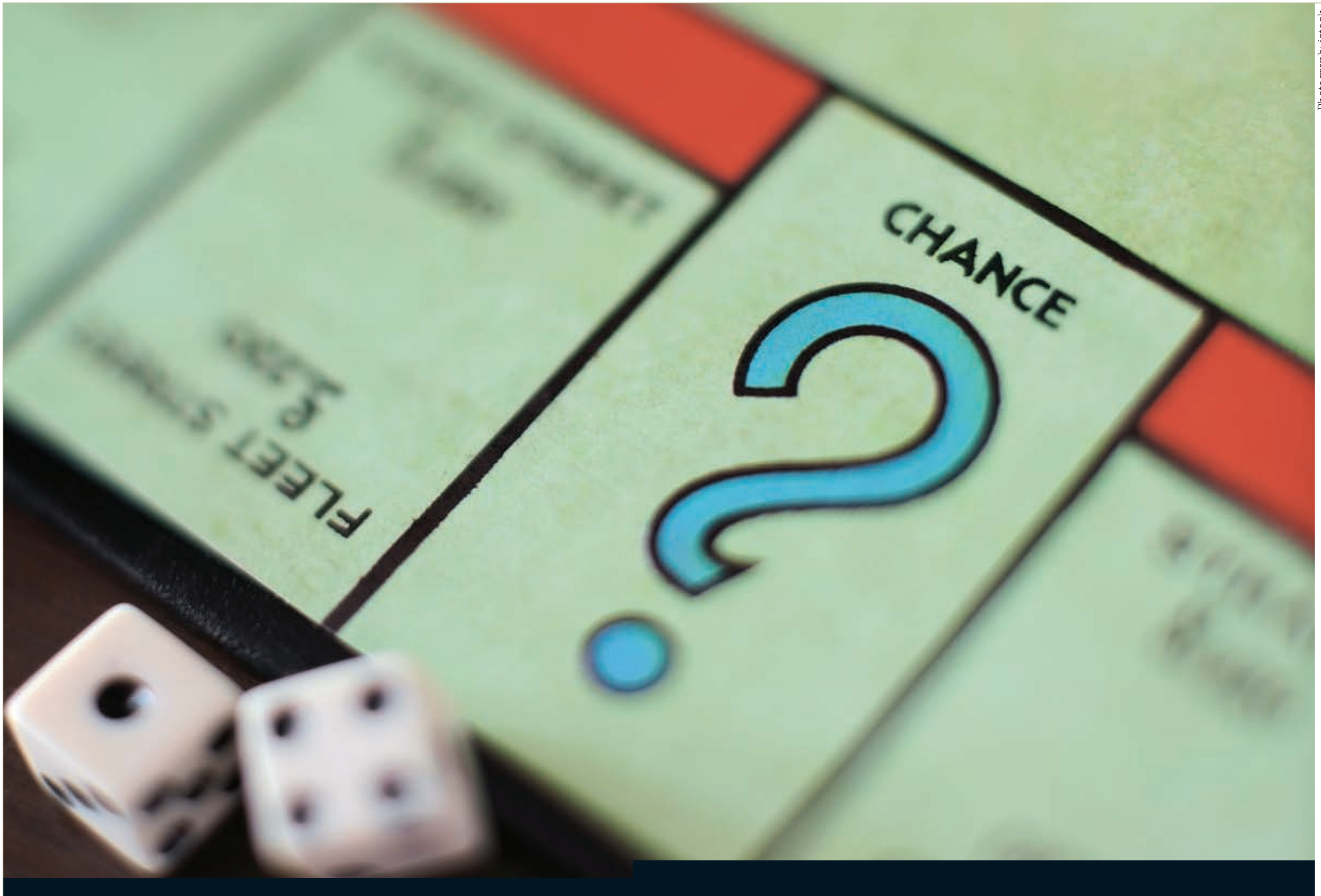
Guessing game

Dominic Regan assesses the continuing uncertainty over proportionality



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Almost five years on, and we remain clueless about proportionality. It would not matter so much if it just nibbled away at recoverable costs. Unfortunately and unscientifically, it has blown gaping holes in bills.

The test of proportionality applies to standard basis costs incurred in matters issued on or after 'J day', 1 April 2013, when the Jackson reforms kicked in. In the run-up to implementation, Lord Neuberger delivered an implementation lecture in which he stressed that proportionality trumped reasonableness and necessity. So, a bill deemed proper under the conventional standard basis is nevertheless susceptible to a drastic reduction.

We have no Practice Direction; no guidance. One must work with the bare bones that make up CPR 44.3 (5). Costs are proportionate when they bear a reasonable relationship to five specific factors. They are:

- the sums in issue in the proceedings;
- the value of any non- monetary relief in issue;
- the complexity of the litigation;
- any additional work generated by the conduct of the paying party;
- any wider factors involved in the proceedings such as reputation or public importance.

There you have the entire law wrapped up in five factors. The second consideration is obviously aimed at declarations, injunctions and the like, which lack an obvious value but can be the primary remedy sought.

Please appreciate that the fourth factor, the conduct of the paying party, could enable one to evade proportionality. If conduct is bad, then it can be punished by an award of indemnity costs, which are exempt from proportionality. By the same token, a good Part 36 offer from a claimant which goes unaccepted will also pave the way for an indemnity costs recovery.

The dilemma is to gather up these random ingredients and then somehow work up a formula to give effect to them. Does any particular factor attract more weight than the others? That, by the way, was the problem with the old shopping list of things to consider on an application for relief from sanctions. Perversely, on the very day that list went, another one took its place.

In the autumn of 2013 Sir Rupert stated in his introduction to *The White Book* supplement that Court of Appeal guidance would be necessary, and cases (note the plural) would shed light on the workings of his nebulous creation.

THE COURT OF APPEAL

BNM v MGN (2016) EWHC B13 (Costs) was the first case to get to the Court of Appeal in the name of proportionality. It was a privacy claim which settled for damages of £20,000 and an undertaking from the defendant not to make use of personal information gleaned from the mobile phone of the claimant.

No less a person than the senior costs judge dealt with the assessment. He decided that the costs incurred were disproportionate and, as a conjuror with a reluctant rabbit, he produced out of nowhere a 50% reduction in every element of the bill save court fees, which are in fact wildly unreasonable – but the loot goes to the Ministry of Justice, so that is okay then.

The senior costs judge explained: 'In these circumstances base profit costs of £46,000 and base counsel's fees of £14,000 must be disproportionate under the new test, being over three times the agreed damages and covering work which fell far short of trial.'

The just published *O'Hare and Browne: Civil Litigation* speculates (at page 570) that 50% was taken as the default deduction unless some good reason is shown for selecting a different reduction.

This arbitrary approach is not to be condoned. To bundle five discrete considerations into an unexplained determination is the last thing we need when significant sums are at stake.

Off to the Court of Appeal went BNM, represented by Simon Browne QC. This, we hoped, would be the opportunity for flesh to be put upon the skeleton. No chance. The matter was remitted for further consideration and lips remained sealed. Frankly, we know about as much after the appeal as we did before.

What does the creator, Sir Rupert Jackson, think about all this? In his 2016 book, *The Reform of Civil Litigation*, he said: 'At the risk of stating the obvious, any court assessing recoverable costs under the new Rule 44.3 will sometimes find itself constrained to cut down substantially the costs which the receiving party reasonably incurred in order to "win" the case.... as happened in *BNM*.' Not a hint of criticism, which is telling, because in other parts of his book he does utter warnings about, for example, the proper application of Part 36.

FIRST INSTANCE DECISIONS

Other first instance judgments have been delivered but demonstrate inconsistencies. *Khazakhstan Kagary Plc v Zhunas* (2015) EWHC 404 (Comm) was a claim pleaded in the tens of millions. Legatt J, who was appointed to the High Court in 2012, held that in this case he should only allow the minimum sum necessary to do the job. This has been challenged by a district judge who has declared this approach to be wrong for it failed to apply proportionality; interesting.

In *Hobbs v Guy's and St Thomas' NHS Foundation Trust* (2015) EWHC B20, the court was concerned with a modest settlement, pre-issue, of £3,500. Reasonable costs were determined at about £12,000, but then reduced by some 12%.

The novelty here was that Master O' Hare took a forensic approach and identified three areas of activity that 'now appear, with hindsight, to be inconsistent with the true value of the claim'.

Master Rowley went for the blunt instrument approach in *May v Wavell Group Plc* (2016) EWHC B16. The claim settled for £25,000 after proceedings were issued, but prior to service of a defence. Standard costs were meticulously calculated to be £99,000 before the axe was wielded. Call it £42,000 (inclusive of VAT) was the adjusted amount.

One recurring point is that in every one of these cases, the recovery exceeded the sum at stake. This is all the more significant when one takes into account the fact that none got anywhere near trial. When the 2013 reforms took force, some did suggest that it could not be proportionate to spend more on the claim than the amount at stake; not so.

PRACTICAL STEPS

While we remain in legal limbo, what practical steps can be taken to minimise the risk? Wise words about modestly valued claims were uttered in *Rezek-Clarke v Moorfields Eye Hospital* (2017) EWHC B5 (Costs). It is imperative to plan at the outset how to handle the claim in a cost effective manner. The Master invited the claimant to disclose a copy of the game plan which seemingly did not exist. Whereas costs were once an afterthought, today they should be at the forefront of considerations. What grade fee-earner should handle the claim? Obviously, give the defendant ample opportunity to settle fast and cheap.

As ever, a decent Part 36 offer can work wonders since, if it is not accepted, we enter the realm of indemnity costs where the proportionality test does not apply.

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The conduct of the paying party has potentially dual significance. It is one of the five factors that shape the proportionality test on the standard basis. Sufficiently serious misconduct by the paying party could justify an award of indemnity costs, quite apart from any Part 36 activity.

The Appeal Court upheld an order penalising a defendant on account of conduct in *Manna v Central Manchester NHS Trust* (2017) EWCA Civ 12. The trial judge had awarded the claimant indemnity costs for the final five months of the litigation. This was because she regarded the defendant as having taken an unreasonable stance as to the quantum of the claim. It was a clinical negligence action. The case advanced by the defendant was found to have caused distress to the parents of the victim and to have lengthened the trial. It is incumbent on parties to pick their fights carefully, and only proceed with sustainable arguments.

On 22 November 2017, the Supreme Court heard *Barton v Wright Hassall*. One ground of appeal was whether the costs awarded against the losing party were disproportionate. The bench included Lady Hale, Lord Briggs and Lord Sumption. When the judgment appears next year, it will be fascinating to see what the highest court in the land has to say about the test. It may be that we get substantive enlightenment. Equally, the question might be lightly brushed aside. We live in hope.

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