“”

Case No: 1604060

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Date: 17 January 2017

Before :

MASTER BROWN (sitting as a Judge of the County Court)

- -

Between :

BERNARD MURRELLS (Executor of the Estate of Jill Murrells deceased)	**Claimant**
- and -	
CAMBRIDGE UNIVERSITY NHS FOUNDATION TRUST	**Defendant**

- -
- -

Mr. Kapoor (instructed by **Gadsby Wicks**) for the **Claimant**
Mr. Wilcock (instructed by **Acumension**) for the **Defendant**

Hearing dates: 23, 24 November and 12 December 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER BROWN

Master Brown:

Introduction

1. I am asked to rule in respect of an issue that arises in a detailed assessment of the Claimant's Bill of Costs. I have already made a number of determinations in the assessment. The issue that arises is whether the sums remaining after my earlier decisions are disproportionate pursuant to the provisions of CPR 44.3 (2) (a), and, if so, whether further reductions from the costs claimed are appropriate.

Background and relevant earlier decisions

2. The Claimant is the widower of Mrs. Jill Murrells, a nurse, who sadly died on 24 July 2012 in the course of operation at Addenbrooke's Hospital, Cambridge, aged 59. He sought damages from the Defendant alleging that his wife's death was caused by the negligence of the Defendant's clinical staff in the course of that operation. Proceedings were issued on 9 February 2015.

3. The claim settled and the Claimant's entitlement to costs arise out of his acceptance, on or about 2 September 2015, of an offer by the Defendant. That offer was made after a Defence had been filed denying liability and before any Cost and Case Management Conference. The offer was to pay damages of £9,650 plus costs on the standard basis.

4. In his Bill of Costs, the Claimant seeks the sum of £163,358.71 inclusive of VAT. Exclusive of VAT the costs are £140,539.05. I understood it to be common ground that VAT is to be ignored for the purposes of determining whether the costs claimed are proportionate; it would, in any event, seem unlikely that the determination of this issue can be affected by whether a party is registered for VAT. Accordingly, the figures provided below are net of VAT (except where indicated) and I have proceeded on the basis that the Court should assess proportionality on this basis.

5. The Bill of Costs has been divided into two parts: Part 1 is in the sum of £59,520.50 and deals with work carried out prior to 1 April 2013; Part 2 is in the sum of £81,048.55 and covers work after this date.

6. The Claimant's solicitors acted under a conditional fee agreement entered into with the Claimant on or about 4 September 2012. The Claimant also had the benefit of an ATE insurance policy taken out on 11 September 2012; the ATE premium was staged such that £5,506.80 was payable on settlement prior to issue, £22,737 following issue and £56,476.80 up to 45 days before trial or if the claim went to trial. The policy was self-insuring and the premium was payable on success only. As is commonly the case, the policy provided an indemnity in respect of adverse costs (i.e. costs payable to the Defendant pursuant to a costs order) and the Claimant's own disbursements. A success fee of 100% was claimed on all the profit costs.

7. It was agreed by the parties at the outset that I should determine whether the Part 1 base costs (i.e. excluding additional liabilities) amounting to some £32,000 were disproportionate pursuant to CPR 44.4 (2) as it was before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') came into force. This required me to apply the test in *Home Office v Lownds* [2002] EWCA Civ 365. It appeared to be common ground that the Claimant's claim was unlikely to exceed £25,000 and I determined that the Part 1 base costs were disproportionate. Applying the test of necessity to the line by line assessment, I determined that the profit costs in Part 1 of the bill should be allowed in the sum of

£11,613.25. and disbursements should be allowed in the sum £4,440 giving a total for base costs of £16,053.25. I considered this sum to be necessarily incurred.

8. Thereafter, applying the test of reasonableness set out in new CPR 44.3(2) I reduced Part 2 base costs incurred up to and including the date of settlement to £11,366.25 in respect of profit costs and to £5,440.50 in respect of disbursements (including court fees), giving a total of £16,806.75. To this were added the costs of preparing the bill of £3,630. Thus the total figure for the Part 2 base costs which I determined to be reasonably incurred and reasonable in amount was £20,436.75.

9. I found that the success fee of 100% was too high and that the prospects of success were better than 50/50. I determined that there was nevertheless a significant risk of losing the claim assessed as at the time when the CFA was entered into, and that the appropriate success fee was 82%. There was no individual challenge to the reasonableness of the ATE premium claimed in Part 2 of Bill in the sum of £22,737.

10. For clarity I have set out the findings in tabulated form below:

Part 1	
Base profit costs	£12,761.25
Success fee	£14,464.23
VAT on profit costs	£4,645.1
Disbursements	£4,400
VAT on disbursements	£550
Subtotal	£32,820.58

Part 2	
Base profit costs	£14,862.75
Success fee	£12,187.46
VAT on profit costs	£5,410.04
Disbursements less ATE premium	£5,470.50
ATE premium	£22,737
VAT on disbursements	£683.35
Subtotal	£61351.10

Total	£94,076.68

11. I am now asked to determine whether the remaining Part 2 costs (after my earlier deductions) are disproportionate.

The provisions of new CPR 44.3 and CPR 44.4

12. CPR 44.3 provides inter alia:

….

(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

…

(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.

…

(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.

12. New CPR 44.4 provides, inter alia:

(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

….

(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.

The Parties' Outline Submissions

13. Mr Wilcock, for the Defendant, contended that I should aggregate the base costs with additional liabilities and that the resulting total sum for Part 2 is disproportionate. In particular, he said that it does not bear a reasonable relationship to the sum in issue in the claim, which he puts at no more than £25,000. He did not accept that the litigation was complex either legally or factually and denied that there were any other relevant factors which might render the sums claimed proportionate. In support of his contention he relied upon the decision of Master Gordon-Saker in *BNM v MGN Ltd* [2016] EWHC B13, in particular paragraphs 25 to 32 of that decision.

14. Mr. Wilcock further contended that even if it were not appropriate to aggregate the sums in the way that he alleged that I should nevertheless reduce the base costs and the additional liabilities on the grounds that, considered individually, they remained disproportionate notwithstanding my earlier deductions.

15. When it became apparent towards the end of the second day of the detailed assessment (on 24 November 2016) that there was an issue as to whether or not I should follow the

decision in *BNM*, my strong instinct was to adjourn this matter pending the outcome of the appeal in this case to the Court of Appeal. Mr. Kapoor however contended that the *BNM* decision could be readily distinguished on the grounds that the additional liabilities in this case related to funding arrangements which had been entered into before 1 April 2013, unlike those in *BNM* (which had been entered into after 1 April 2013) and that the new proportionality test cannot apply to these additional liabilities. Indeed, it was submitted by both parties that there were other issues not arising in *BNM* which needed to be determined so that I should proceed now and not wait. I, accordingly, set aside a further hearing to deal with the outstanding issues.

16. In the event, Master Rowley handed down judgment in the case of *King v Basildon & Thurrock University Hospitals NHS Foundation Trust* on 30 November 2016. In this decision, which also concerned funding arrangements entered into before 1 April 2013, Master Rowley decided that additional liabilities should not be aggregated with base costs for the purposes of determining proportionality under the new rules and that the proportionality of additional liabilities should be dealt with under the old rules, in particular CPR 44.4 (2) (as it then was) having regard to the guidance in CPD 11. Mr. Kapoor relies on this decision and submitted that whether or not BNM can be distinguished, it was not correctly decided.

17. Further, Mr. Kapoor says that base costs and additional liabilities are not disproportionate applying the correct tests. He accepts that the claim had a modest value but submits, inter alia, that it did carry with it substantial complexity, which he says, is clearly evidenced by the Defendant's own Costs Budget and the contents of the Defendant's Directions Questionnaire.

Does the new test of proportionality in CPR 44.3 apply to additional liabilities and, if so, how?

18. I agree with the decision of Master Rowley in *King* on this point. I do not accept that additional liabilities are subject to the new test of proportionality or, even if they were, that they should be aggregated with the Claimant's base costs for the purposes of that test.

19. To my mind, it is relevant to have particular regard to the approach to the assessment of additional liabilities under the old pre-LASPO rules. That approach is summarised at paragraphs 40 and 41 of *Coventry v Lawrence* [2015] A.C. 106. In short, the Court does not ask itself whether the costs of an ATE premium or a success fee are proportionate to the importance of the case and what was at stake but looks at the litigation risk. If the premium is necessarily incurred, it is proportionate and it is proportionate even in the event that it is disproportionately high when compared with the damages reasonably claimed. The same reasoning applies to a success fee claimed by solicitors or counsel: such a fee is recoverable if it is proportionate to the risk of the lawyer not being paid (using the 'ready reckoner' tables).

20. This approach arises from decisions made by the Court of Appeal, including in particular *Atack v Lee* [2005] 1 WLR 2643 (in respect of success fees) and *Rogers v Merthyr Tydfil* [2007] 1 WLR 808 (in respect of ATE premiums) (see in particular paragraphs 102 to 106). In practice the issues of reasonableness and proportionality are effectively merged so that under the old rules there is no separate assessment of the proportionality of additional liabilities, as there is with base costs.

21. Such an approach has been followed notwithstanding that additional liabilities were specifically defined as "*costs*" (see old CPR 42.3) and that only costs which were proportionate to the "*matters in issue*" were to be allowed (see old CPR 44.4 (2) (a)).

22. CPD 11.5, as it was pre-LASPO, provides that the proportionality test is applied to additional liabilities but that they are to be assessed separately from base costs.

23. Old CPD 11.9 provides that:

> *A percentage increase will not be reduced simply on the ground that when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate*.

24. CPD 11.9 was itself guidance on the approach to be taken, but its drafters had anticipated the decisions that were later made by the Court of Appeal (see above).

25. In *Coventry* it was observed that the application of the test of proportionality by reference to the amount at stake would imperil the viability of the Pre- LASPO scheme and the objective of improving access to justice, see the judgements of Lords Neuberger and Dyson (with whom the majority agreed). At paragraph 78 of their judgement it is stated:

> "*In summary, if the basis upon which Mr. McCracken's attack on section 11.7 and 11.9* [of the Costs Practice Direction] *was founded were to be accepted, it would have imperilled the whole scheme put in place by the 1999 Act because lawyers would have been unwilling to enter into CFAs for fear that, even if successful, the uplift which that had agreed on the basis envisaged by the system embodied in the 1999 Act would have been liable to be reduced or disallowed on the assessment because it would have been held to be disproportionate what was at stake in the litigation. "*

26. The guidance set out CPD 11.9, was held to be "*necessary to make the scheme work*" (see *Coventry*, paragraph 77) and "*integral to the scheme*" (see *Coventry*, paragraph. 88).

27. By section 44 (4) and 46 (1) of LASPO costs orders were deemed no longer to include additional liabilities, subject to certain exceptions. Consistent with this change the new CPR 44.1 (in contrast to its predecessor, CPR 43.1(2)) does not include additional liabilities within its definition of "*costs*". That, as Master Rowley has found, supports the conclusion that *"costs*" in new CPR 43 should not encompass additional liabilities.

28. Section 44 (6) of LASPO provides that the amendment made by section 44 (4) does not prevent a costs order including provision in relation to a success fee payable by a person under a relevant pre-commencement funding arrangement. A similar provision is found in Section 46 (3) of LASPO in respect of ATE insurance premiums. Thus, costs orders may still permit the recovery of an additional liability notwithstanding the provisions of section 44(4) and 46 (1) of LASPO and the revised definition of "*costs*" in circumstances where the receiving party acted under a pre-commencement funding arrangement.

29. CPR 48.1 provides:

> *The provisions of CPR Parts 43 to 48 relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date.*

30. To my mind, it is clear from this provision that the intention of Parliament was to preserve the rules which related to the recovery of additional liabilities. This is so not least because it is with the recovery of such liabilities that the relevant rules "*relating to funding arrangements*" are principally concerned; indeed, it was in respect of the recovery of

additional liabilities that the relevant changes in LASPO were themselves principally concerned. Old 44.4(2) and CPR 44.5 and the test of proportionality under these provisions applied to the recovery of additional liabilities but they were to be to be read subject to CPD 11; see *Coventry*, paragraph 38:

> *"An additional liability was an element of costs: see CPR43.2(1)(o). Costs which were unreasonably incurred or which were unreasonable in amount would not be allowed (CPR 44.4(1)). Accordingly, a success fee and an ATE premium would only be allowed to the extent that they were reasonably incurred and were reasonable in amount, having regard to the factors set out at CPR 44.5(3). On the standard basis, only costs which were proportionate to the matters in issue would be allowed (CPR 44.4(2)(a)). The proportionality limitation, therefore, applied to additional liabilities as well as to base costs. CPD para 11.5 did not disapply the proportionality criterion, but confirmed that additional liabilities were to be judged by reference to proportionality, albeit separately from the base costs. The criterion of proportionality therefore applied subject only to the limitation imposed by para 11.9."*

31. CPD 48 is relied upon in support of the contention that the new rules of proportionality apply to additional liabilities. It was brought in pursuant to the 60th update and, as I understand it, first appeared in the White Book in the Supplement of October 2013. I set out section 1 in full below:

> *Transitional Provisions: General*
>
> *1.1*
>
> *Sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the 2012 Act') make changes to the effect that a costs order may not include, respectively, provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement or of an amount in respect of all or part of the premium of a costs insurance policy taken out by another party. These changes come into force on 1 April 2013.*
>
> *1.2*
>
> *Sections 44(6) and 46(3) of the 2012 Act make saving provisions to the effect, respectively, that these changes do not apply so as to prevent a costs order including such provision where the conditional fee agreement in relation to the proceedings was entered into (or, in relation to a collective conditional fee agreement, services were provided to the party under the agreement), or the costs insurance policy in relation to the proceedings taken out, before the date on which the changes come into force.*
>
> *1.3*
>
> *The provisions in the CPR relating to funding arrangements have accordingly been revoked (either in whole or in part as they relate to funding arrangements) with effect from 1 April 2013; but they will remain relevant, and will continue to have effect notwithstanding the revocations, after that date for those cases covered by the saving provisions.*
>
> *1.4*

The provisions in the CPR in force prior to 1 April 2012 relating to funding arrangements include –

(a) CPR 43.2(1)(a), (k), (l), (m), (n), (o), 43.2(3) and 43.2(4);

(b) CPR 44.3A, 44.3B, 44.12B, 44.15 and 44.16;

(c) CPR 45.8, 45.10, 45.12, 45.13, Sections III to V (45.15 to 45.19, 45.20 to 22 and 45.23 to 26), 45.28 and 45.31 to 45.40;

(d) CPR 46.3;

(e) CPR 48.8.

32. I do not accept that the provisions of new CPR 48.1, read with this guidance, can bear the interpretation that is placed upon them by the Defendant. My reasons are as follows:

(1) I would, as I have indicated above, read CPR 48.1 as simply preserving the approach under the old rules to the recovery and assessment of additional liabilities. Read naturally, it seems to be clear that it was intended to preserve CPD 11.9 which was essential to the function of the relevant funding arrangements and integral to them.

(2) I agree with Master Rowley that the restricted meaning of "*costs*" applies to new CPR 44.3. It seems to me that the effect of sections 44(3) and 46 (4) of LASPO is to preserve the recoverability of additional liabilities as an item of costs subject to assessment under the old rules only.

As Master Rowley has noted, the use of the term "*costs*" in Part 3 and the costs budgeting provisions and practices follow this restricted meaning of "*costs*" in new CPR 44.1 in cases where additional liabilities are claimed. Courts do not costs manage additional liabilities (*Various Claimants v MGN* [2016] EWHC 1894 (Ch)). If the Defendant were right (and "costs" had a wider meaning), then there would need to be an assessment of proportionality at two stages: one in the costs management process and another in detailed assessment when the additional liabilities are known. This cannot have been intended.

(3) Practice Directions do not of themselves have legislative force: see *Re C (Legal Aid Preparation of Bill of Costs*) [2011] 1 FLR 602, *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, *Leigh v Michelin* [2013] EWCA Civ 1766 and KU *v Liverpool* [2005] EWCA Civ 475. CPD 48 cannot itself amend CPR 48.1. I agree with Master Rowley that Section 1.4 of the CPD 48 does not purport to set out an exclusive list of the provisions relating to pre-commencement funding arrangements. Moreover, I consider it important to see the section in context: Sections 1-3 appear to be mere descriptions of the effect of the legislative provisions but not in themselves modifications of any of the primary or secondary legislation; I do not accept that Section 1.4 should be read any differently.

(4) It does not strike me, in any event, as surprising that the list in Section 1.4 of CD 48 should exclude old CPR 44.4 (2) because the approach to the assessment of an additional liability has been as set out above: the tests of proportionality and

reasonableness/necessity generally overlapped; this is in contrast to the practice in respect of base costs.

(5) The references at section 1.4 (c) appear to confirm that in circumstances where pre-LASPO the success fee was fixed, it will remain fixed under the transitional provisions. As I see it, there is no indication in CPD 48 that a claim in respect of which the success fee was fixed under CPR 45 would also be subject to the new proportionality rules. But if the Defendant were right it would, seemingly, be necessary to aggregate such a fee with the base costs and the total would be subject to full or partial disallowance on the grounds of proportionality. This is notwithstanding the provisions of old CPR 45 which set out the amount to be allowed for an uplift in certain prescribed circumstances.

(6) New CPR 44.3 makes no reference to additional liabilities; indeed, I have difficulty reconciling its provisions, including in particular the transitional provisions at CPR 44.3 (7), with the Defendant's contention. In respect of cases commenced after 1 April 2013 the section provides that the new test does not apply to costs incurred in respect of "*work done before 1 April 2013*" (underlining added). It is difficult to see how the taking out of an ATE premium could be regarded as "*work done*". But, if it could not be so regarded, then if the Defendant is right, all such liabilities whenever incurred would, for cases issued after 1 April 2013, be caught by CPR 44.3(7). It strikes me as unlikely that the provision could be intended to have such retrospective effect; this is particularly so in circumstances where the provision does not apply retrospectively in respect of base costs. Accordingly, if I have understood CPR 44.3 (7) correctly, then it appears to support the contention that CPR 44.3 was not intended to apply to additional liabilities.

(7) If it were right that new proportionality test applied in the way contended for by the Defendant, it would moreover have a considerable prejudicial effect upon those litigants and lawyers who have entered into pre-commencement funding arrangements. It seems likely that they will have entered into such arrangements in the reasonable expectation that the additional liabilities would continue to be recoverable as they were pre-LASPO. To apply the new test to additional liabilities in the way contended for would however require many litigants to submit to a substantial, if not complete, disallowance of their additional liabilities as against the other party or parties to the litigation whilst at the same time the liability to pay an insurer or the lawyers the additional liability would be preserved. If that were right it would inevitably lead to many litigants, including -it might be observed- victims of mesothelioma, having to give up deserving claims or defences (see *Coventry*, paragraph 93). I agree with Master Rowley: in these circumstances the Defendant's contention cannot be reconciled with transitional provisions and the clear will of Parliament. The intention must have been to provide, at the very least, an orderly retreat from the old funding scheme.

(8) The further practical issue that arose in the course of argument was this: how should the court determine what sum is proportionate if additional liabilities are to be aggregated with base costs? I intend no disservice to Mr. Wilcock's helpful and thoughtful submissions if I were to confess that following argument it was unclear on what specific basis how in this case I should determine that any particular figure, following aggregation, was proportionate (bearing in mind the test in CPR 44.3 (5) and that additional liabilities are otherwise, in principle, recoverable). On one reading of that provision no allowance should be made for the fact that a party is acting under a funding arrangement which provides for an additional liability; a proportionate figure

> might well be the same or similar whether allowance is made for additional liabilities or not. If that were right, the effect of applying the proportionality rules would be simply to make additional liabilities wholly or substantially irrecoverable in many instances.

33. To the extent that there is any ambiguity in respect of the relevant statutory provision, ordinary principles of statutory interpretation would, for the reasons set out, have lead me to the same conclusion. Parliament could not have intended such a radical departure from the previous approach to the assessment of additional liabilities. It would have had in mind the earlier authorities referred to above (*Atack, Rogers* and others) and could not have intended an outcome which would preclude the recovery in many cases of any or any substantial proportion of additional liabilities reasonably incurred. Indeed, had it intended such a radical departure from the earlier approach the rules would have done so expressly.

34. In the circumstances I respectfully disagree with the decision of Master Gordon-Saker in *BNM* as to the application of the new proportionality test to additional liabilities and therefore also as to the need to aggregate base costs with additional liabilities.

35. In the event that I had accepted the Defendants' contentions as to the application of new CPR 44.3(2) to additional liabilities, I would have reached the same conclusion, that is that it was not appropriate to aggregate additional liabilities with base costs for the purposes of this test. That would be because it would seem to me that even if the new proportionality test was to apply to the additional liabilities such a conclusion could only be reached if CPR 44.3(5) were read as being a non-exclusive test; and, if that were the case, that in turn would have led to the conclusion that the test did not prevent a court applying the approach set out in CPD 11 5-9. Both old and new tests require the court to consider, in the first instance, whether costs are proportionate to the "*matters in issue*": on the earlier authorities, as set out above, such a term is to be read widely.

36. In the event it has not been necessary for me to deal with the very first point made by Mr. Kapoor, namely whether the decision in *BNM* can be distinguished. On my reading the provisions of CPR 48.1 expressly preserve old CPR 44.4 (2) and CPR 44.5 and the approach set out in CPD 11 to claims where the receiving party has entered into a pre-commencement funding arrangement. Different considerations may however apply in respect of the funding arrangements entered into before 1 April 2013 from those that apply to funding arrangements that were entered into after this date but I do not need to decide that issue.

Are the Part 2 base cost disproportionate under the new test of proportionality and should any further deduction should be made?

37. I remind myself of the provisions of Rule 44.3(2) which states:

> *Where the amount of costs is to be assessed on the standard basis … Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred …*

38. There remains little by way of authoritative guidance as to how this new test is to be applied. The provision however implements one of the recommendations made by Sir Rupert Jackson in his Review of Civil Litigation Costs: Final Report (December 2009);

> "*… in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the*

> *individual items in the bill, the time reasonably spent on those items and the other factors listed in [what is now CPR 44.4(3)] and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see R v Supreme Court Taxing Office ex p John Singh and Co [1997] 1 Costs LR 49.*" (Final Report, para.37).

39. *R v Supreme Court Taxing Office ex p John Singh and Co* concerned the assessment of costs in criminal cases. It gave rise to what is known there as the "*Singh adjustment*". This obliges the court to carry out "*what might be called the audit exercise in relation to the individual items on the bill*" (see judgment of Latham J., approved by Henry L.J. at p.56). Thereafter, there must be

> "*a sensible assessment of the consequence of aggregation in the light of the overall complexities of the case and, above all, the experience of the Determining Officer and Taxing Master*".

40. Further persuasive guidance has been given by Lord Neuberger in a lecture delivered on May 29, 2012.

> "*… the obvious way of introducing proportionality is that … adopted in the [Final Report], namely by effectively reversing the approach taken in Lownds. In this way, as Sir Rupert said, disproportionate costs, whether necessarily incurred or reasonably incurred, should not be recoverable from the paying party. To put the point quite simply: necessity does not render costs proportionate. Reference to necessity can be said to be positively misleading as it suggests necessary to achieve justice on the merits: substantive justice. A fundamental tenet of both Woolf and Jackson, accepts that that aim must be tempered by the need for economy and efficiency, and, above all proportionality. On one view, once one has a proportionality requirement, necessity may add nothing; on another view, any test which incorporates necessity is one which will all too easily see necessity trump proportionality. However, it may well be that it is right to retain necessity as a requirement, provided that it is borne firmly in mind that it is one of two hurdles which have to be cleared*."(Lord Neuberger MR)

41. In *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm) Leggatt J gave guidance on the approach to proportionality.

> "*[13] In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the*

other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

42. In Hobbs *v Guy's and St Thomas's NHS Foundation Trust* (2 November 2015) Master O'Hare said this with reference to the decision in *Kazkhstan*:

"I next considered whether the sum allowed as reasonable was also proportionate. The answer would be yes if I were to apply the test propounded by Leggatt J: I had already assessed what was the lowest amount which the Claimant could reasonably have been expected to spend in order to have this case conducted and presented proficiently, having regard to all the relevant circumstances. However, I do not think that test applies in cases such as this where the amount of reasonable costs will inevitably exceed the value of the claim. Kazakhstan Kagazy PLC was a case where the sums in issue bore no relation to the costs however high they were. However the amount of the sums in issue is one of the factors I have to take into account here and, indeed, it is the first factor listed in CPR 44.3."

43. In *May v Wyvell Group* [2016] EWHC B16 Costs, agreeing with Master O'Hare, Master Rowley said this:

"*The dicta of Leggatt J in the Kazakhstan case demonstrates an understanding that there are cases where the sums at stake will be so large that the costs involved in bringing proceedings will always be "proportionate" if the costs are simply compared to the sums at stake. It was for that reason that Leggatt J cautioned against parties taking the approach of "no expense being spared" in such cases. At the other end of the scale, the case of Hobbs involved the settlement of a clinical negligence claim for £3,500 plus costs. At this lower end of the scale, it is not the case that a minimum necessary spend approach is proportionate in the way that it would be in a Kazakhstan type case*." (para. 39)

44. The claim with which Master Rowley was then dealing was of low value. He went on to say this:

In cases such as this, it seems to me that the new test of proportionality as described in paragraphs 5.5 and 5.6 of the final report (see [30] above), will require legal representatives to inform their clients that, even if successful, they will receive no more than a contribution to the costs that will be incurred. It may be that such advice proves to be a driver for the costs to be reduced or for alternative dispute resolution mechanisms to be explored. It is to be hoped that cases such as this one, which are in a transitional phase of understanding the new proportionality test, will be relatively rare. (para. 41)

45. Turning then to the facts of this case. Part 1 costs relate to work from the initial instruction in or about July 2012 and include obtaining and consideration of medical records, the instruction of an expert, work undertaken in respect of an inquest (at which some 5 doctors were to be called as witnesses), and the preparation of a witness statement as well as the first version of a letter of claim. Part 2 covers a conference with counsel, the preparation

of a revised letter of claim and the drafting and issue of proceedings up to settlement some three years after the initial instruction. Had the claim been costs managed I would have anticipated relatively modest allowances would have been made for further work by the Claimant on disclosure, witness statements and the Statements of Case: in these respects, particularly, his case had already reached an advanced state of preparation by the time of settlement.

46. I have had specific regard to the factors at CPR 44.3 (5).

47. The sum recovered was less than the full value of the case; it was clearly a figure reached as a compromise. Nevertheless, this was always a modest claim in value and that it was unlikely to have exceeded some £20-£25,000, particularly when regard is had to the poor prognosis for Mrs. Murrells irrespective of any negligence, a matter which is dealt with in the pre-action correspondence. No non-monetary relief was sought.

48. Liability remained in dispute until settlement and in my judgment there was clearly a significant degree of complexity in respect of the issues arising, particularly as to breach of duty. The procedure undertaken by Mrs. Murrells was complex and, whilst it does not necessarily follow, the issues that arose in determining whether the surgical staff had acted in breach were also complex. These issues included the question as to whether the events which occurred in the course of the operation (and which led to Mrs. Murrell's death) were recognised complications of the surgery; there was also an issue as to whether surgical staff had misinterpreted radiological evidence. Whilst the burden of this complexity was borne in part by the experts, the lawyers also had to understand, investigate and consider the matters that arose. It impacted on the length of the inquest, the length and the complexity of the expert's report, the expert's input generally, and the work that was necessary in order to prepare the Statement of Case. There were also detailed medical records which needed to be considered closely. The issues were canvassed in some detail in the pre-action correspondence in accordance with the relevant pre-action protocol after the inquest. It is to be noted that the Defendant obtained its own medical report before issue, and had responded in detail to the claim. I understand that at the inquest the clinical staff had given evidence that they had taken the recognised procedures or steps in the course of the surgical procedure. It was investigations by the Claimant's lawyers, with expert input, which gave rise to the Claimant's case which amounted to an allegation that there had been a serious departure from the standards reasonably to be expected.

49. The Defendant's Costs Budget, served just before settlement, amounted to £66,662.20. In its Directions Questionnaire the Defendant intimated that it would be seeking permission to instruct two separate experts, an expert in Acute Medicine and an expert in Interventional Radiology; the latter expert may have been required because of the issue arising as to misinterpretation of certain imagery. Further, the Defendant anticipated a three day trial in the Multi Track. Whilst the costs which the Defendant had incurred by the date of settlement were less than those which the Claimant had incurred, some of the work which had been done by the Claimant was still to be done by the Defendant; indeed, in making such a comparison some allowance should be made for the lower hourly rates of the solicitors instructed by the Defendant (and the ability to of the Defendant to procure rates that are less than the market rate). Even allowing for the prospect that this Costs Budget may have been reduced and for the fact that the Defendant's own costs are not themselves determinative of the issue of proportionately, the Defendant's approach appears to confirm that this was a relatively complex claim even by the standards of other clinical negligence claims. Moreover, the budget appears to confirm that the Defendant was prepared to commit substantial resources to

defending the matter on account of the claim's complexity; this was so even before the Defendant had received a costs budget from the Claimant.

50. There was considerable argument about whether the conduct of the Defendant was unreasonable. It is true that the Defendant was given an opportunity before issue to settle the claim and chose not to do so. But I do not think it was unreasonable to resist liability or that this could be said to be a factor which generated additional work for the purposes of CPR 44.3 (5) (d). It is not open to me to speculate as to the substance of the Defendant's medical evidence.

51. I do not accept that the claim carried any significant public importance. I accept that the claim was a matter of importance to the Claimant and it was important to know how his wife came to such a sudden death. I also accept that the fact that a claim may be of particular importance to a party (beyond the sums at stake) may, perhaps exceptionally, be a factor for the purposes of CPR 44.3 (5) (e). But this factor is however to be seen in this case in the context of the fact that there had been an inquest into Mrs. Murrells' death. I accept too that the potential nature of the allegations were such that it is possible that it may have had some reputational significance for the surgical staff but this factor is, of course, present in many clinical negligence claims.

52. Considering all these matters but having particular regard to the complexity of the matter, in my judgement the remaining Part 2 base costs are not disproportionate. I consider that the base costs already allowed bear a reasonable relationship to the sums in issue bearing in mind, in particular, the complexity of the litigation. In making this assessment I have made allowance for substantial base costs in Part 1 and have had specific regard to the work required in Part 2. Accordingly, no further reduction is appropriate.

53. I bear in mind also that necessity is trumped by proportionality. I have already made substantial disallowances to the claimed costs on the basis that the value of the claim was clearly modest: more work should, in the circumstances, have been delegated to a fee earner on a substantially lower hourly rate and less time should have been taken for the tasks in hand. But having made those discounts, leaving a sum of £20,436.75 for Part 2 base costs (including disbursement and court fees) it is not irrelevant that to reduce it further on similar grounds would reduce the sum to one below an amount that was necessary in order proficiently to advance the claim in the circumstances set out above.

Are the additional liabilities disproportionate and should any further deduction should be made?

The costs of the ATE premium

54. The ATE premium was taken out on the basis of authority delegated to solicitors and was block-rated. As indicated above no issue was taken with the reasonableness of the premium or that it was disproportionate to the costs risks. It has not been said that the premium was assessed on an unreasonably pessimistic view of the prospects of success or an overstatement of the potential liability for costs; or, that other cheaper policies are likely to have existed and that the choice of policy was unreasonable. Had this matter gone to trial it would appear that the Defendant's costs and the Claimant's own disbursements were likely to be substantial. The prospects of the claim being lost were also substantial, particularly when assessed at the time that the policy was taken out.

55. Mr. Wilcock argues that the premium should be reduced on the grounds that the cost of the premium is disproportionate to the sums at stake. In my judgement, for the reasons given above, that it is not the right approach.

56. In *Rogers*, giving the judgement of the Court, Brooke LJ said:

> "*For all but the more serious or specialised personal injury claims, ATE insurance is block rated rather than individually assessed. For block rating to work the insurer needs to be sure that it is receiving a full and fair selection of cases, ranging from those where liability is unlikely to be in doubt to those where it is contested. In order to avoid adverse selection it is standard practice for ATE insurers to require solicitors to insure all available cases with the ATE provider. In practice, therefore, claimants' solicitors cannot simply pick and choose from a variety of products and offer different policies to different clients. This approach is, in any event, incompatible with block rating.*" (para. 33)

57. Applying the approach to set out in *Rogers* (see also para. 117) I do not consider that any reduction is appropriate on the grounds of proportionality.

58. I should record that there was also dispute as to whether these costs can be regarded as costs incurred *"in respect of work done before 1 April 2013"* (see CPR 44.3(7)) so that the new test of proportionality would not apply even if the approach in *BNM* were otherwise correct. The relevant policy was taken out prior to 1 April 2013 and the relevant premiums might be said to have been incurred (albeit contingently) prior to this date. Mr. Kapoor argued that whatever my determination of the issue arising in *BNM* these costs are not caught by the transitional provisions at CPR 44.3 (7). In the event it has not been necessary for me to decide this issue but it did seem improbable for the reasons given above that the new provisions could have the retrospective effect contended for by the Defendant.

Success fee

59. I have already assessed the reasonableness of the success fee and proportionality of the success fee by reference to the risk of losing the claim and I do not consider there are any further grounds for further reducing this sum for the reasons given above.

60. I should also record that there were similar arguments to those set out above at paragraph 54 about the extent of application of CPR 43.3 (7) to this element of the claim were the new test to apply. As I understood it, the Defendant's contention at one stage appeared to be that all of the success fee incurred, even those in respect of the Part 1 costs would be subject to the new test of proportionality since the fee was not incurred until success was achieved, that is after 1 April 2013. It was not necessary for me to resolve this issue either.