

Proportionality – the shape of things to come.

Lord Neuberger, in a talk entitled “**Proportionate Costs**”, the 15th lecture in the Jackson Implementation programme, delivered at the Law Society on May 29, gave some valuable insights into how he (and presumably other members of the Court of Appeal) saw the changes that will come into force next April.

We have taken the following extensive quotations from the transcript of that lecture because they appear to be of considerable importance to all practitioners involved with costs. Having indicated that the focus of his lecture would be costs management, Lord Neuberger stated:

“4. One of the problems which beset the successful implementation of the Wolf reforms was the failure effectively to implement proportionality as a test in respect of cost assessments. As Sir Anthony May PQBD explained, such assessments have so far tended to proceed with ‘only a nodding respect only to proportionality’. Sir Rupert rightly identified the fault at the heart of this as being the approach articulated, ironically by Lord Woolf himself, as Master of the Rolls, in *Lownds v Home Office* [2002] 1 WLR 2450. That fault was to follow the old approach of allowing costs which were considered to be reasonable and necessary to the litigation, with reasonableness and necessity being considered on a narrow basis, largely without regard to the ultimate value of what was at stake in the proceedings. How best to deal with this fault and ensure that the new costs rule is implemented effectively are still ongoing. The precise details of any reform will no doubt have to be worked out, as is evidenced by the Civil Justice Council’s recent valuable work on proportionality.”

Lord Neuberger then set out what he considered would be the new approach to costs:

“10. Putting to one side that aspect of proportionality, the forthcoming new approach to proportionate costs, as implemented through the new costs rule [CPR 44.4(5)] will operate before the issue of the claim form, throughout the life of proceedings, and then at the end of proceedings when costs come to be assessed. The focus of discussion of the new proportionate costs rule has so far been on its operation when costs come to be assessed. However, an equally important, and rather more novel, effect of the new rule will be during the life of proceedings, and even during the pre-trial stage of litigation. ...

13. The effective, and consistent, implementation of case and costs management informed by the new costs rule should have a salutary effect on litigation conduct and costs. It should focus the minds of all involved on the need to consider the costs and benefits of each step proposed to be taken in proceedings; not least because the parties will need to be made fully aware of the facts that certain steps taken may, or will, be at their own cost, or may be futile ...

17. A consistent approach by the courts to this application of the new costs rule is obviously necessary, as inconsistency always brings the law into disrepute, and, more particularly as parties and their advisers must know where they stand in advance of having to make strategic and tactical decisions. A consistent approach by the Court of Appeal is equally important, but so is a strong respect for, and inclination to uphold, first instance decisions on costs issues. When making costs decisions, first instance judges should not be looking over their shoulders, and parties should not be encouraged to appeal costs decisions. In that connection, I have agreed with Sir Rupert, that, in due course, two specific members of the Court of Appeal will be asked to sit on all appeals arising out of the Jackson reforms to ensure consistency and efficiency ...

18. A new approach to litigation costs based on proportionality should produce a culture which sees litigation conducted at proportionate, more economical and thereby lower, cost. This in turn should help to create a culture where costs assessments at the conclusion of proceedings are, ultimately, reduced in scope, as parties will, through effective proportionate costs management, ensure that proceedings were conducted and charged to the parties at proportionate cost. In other words, the application of proportionality at the costs management stage, should, in an ideal world, avoid any need for assessments after the substantive hearing. However, not only would one have to be naïve to believe that will be the reality, especially in the first few years of the new regime. It is also true that proportionality can only be finally assessed at the end of a case.”

Lord Neuberger has now been appointed the Senior Supreme Court Justice, and no doubt whoever takes his place will be as determined to drive this new culture forward.