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**Court of Appeal reserves
judgment as to the
interpretation of new
'*proportionality*' test in
contentious costs case**

BNM v. MGN Limited
A2/2016/3832

Article by David Bowden

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Court of Appeal reserves judgment as to the interpretation of new 'proportionality' test in contentious costs case

BNM v. MGN Limited - A2/2016/3832

Executive speed read summary

BNM is a school teacher who had an affair with a footballer. Her mobile phone was stolen and a reporter visited her house to ask questions about this of her parents. She obtained an anonymity order. She brought proceedings for damages against the newspaper. Her solicitors acted on a 'no win, no fee' conditional fee agreement and she had the benefit of 'after the event' insurance. BNM accepted £20k in agreed damages. Her solicitors submitted a bill for legal costs including success fee, ATE and VAT of over £240k. These costs were assessed by the senior costs judge. He ruled that a reasonable amount for base costs was just over £46k, allowed a 30% success fee and £61k for ATE. However he ruled that he had to apply the new 'proportionality' test noting that the base costs were 2½ times the damages. When he applied this he reduced the costs yet further to a global sum of just under £84k. He reduced the ATE premium in half. BNM appealed to the Court of Appeal contending that this was wrong and that the new 'proportionality' test only applied to base costs not to either success fees or ATE. The newspaper cross-appealed contending that proceedings were premature as no letter before action was ever sent. The newspaper said if such a letter had been sent the case would have settled amicably and therefore no costs are due other than BNM's costs in obtaining a pre-action anonymity order. Judgement was reserved. However on 17/18 October 2017 the Court of Appeal will hear 2 other appeals in cases involving the NHS involving the same point as to whether 'proportionality' applies just to base costs or not. Two other cases have also been granted permission to appeal and are awaiting a hearing date in the Court of Appeal on 'proportionality' under the post April 2013 costs rules.

*BNM v. MGN Limited
A2/2016/3832*

11 October 2017

Court of Appeal, Civil Division (Sir Terence Etherton, Master of the Rolls, Lord Justice Longmore and Lord Justice Irwin)

What are the facts of the case?

BNM is a primary school teacher and with no public or media profile. For 3 years starting in 2008 she had a relationship with a successful premiership footballer. In March 2011 BNM lost her mobile phone which contained private and personal information. BNM was then contacted by a journalist working for the publisher to ask her about her relationship. Before commencing proceedings, BNM sought and was granted an anonymity order under CPR part 16 by Mr Justice Mann so that she would be identified by the initials BNM in court proceedings rather than by her own name.

BNM then commenced proceedings against the publisher on 31st July 2013 (being 2 years after she had lost her phone) seeking an injunction to restrain the publisher from using or publishing confidential information taken from her mobile phone, damages and an order for delivery up of any confidential information. The publisher made substantial admissions in its defence. The claim was concluded by a consent order dated 14th July 2014 under which the publisher:

- undertook not to use or disclose the confidential information,
- agreed to pay damages of £20,000, and
- agreed to pay BNM's costs of the action.

How was the case funded? What about 'after the event' insurance?

BNM's solicitors (Atkins Thomson in London) acted for her on a 'no win, no fee' conditional fee agreement (CFA). A success fee of 100% was claimed by her firm. The CFA was taken out on 18 April 2013 being **after** LASPO came into force on 1 April 2013. She also had the benefit of an 'after the event' (ATE) insurance policy from Temple Legal Protection Limited which provided indemnity of up to £165,000 against liability for adverse costs. She sought to recover the full costs of all this from MGN Limited as publisher.

What costs were incurred?

Detailed assessment proceedings were started in which BNM's solicitors claimed an amount for total costs in the eye-watering sum of £241,817 including success fee, ATE and VAT. The base costs claimed were £46,321 being over 2½ times the amount of compensation awarded. The ATE premium was £58k plus insurance premium tax of £3,480.

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What objections were taken by the paying party in the Points of Dispute?

In addition to a number of points about hourly rates, grades of fee earners and number of hours claimed, the main thrust of the objections from the publisher as paying party was that the total costs incurred were both unreasonable in amount and disproportionate to the amount of damages recovered.

Was this case covered by costs budgeting?

Yes. As proceedings were started after April 2013, it was subject to the new costs budgeting rules under Civil Procedure Rules 1998 (CPR) part 3.

Who acted in this case in the Court of Appeal?

Below in the SCCO Mr Jamie Carpenter instructed by RPC represented the publisher as paying party and appellant. He also represented MGN on the appeal but he was led by Mr Alexander Hutton QC (both of Hailsham Chambers). Below Mr Simon Browne QC (of Temple Garden Chambers) represented BNM instructed by Atkins Thomson and he led Mr James Laughland (who did not appear below)

Who was in Court?

BNM did not attend court. In some ways this is surprising as she will remain liable to her solicitors for any success fee or ATE premium they cannot recover from the publisher. A representative from the firm acting for the NHS Litigation Authority on their appeals where 'proportionality' is in issue was in court with a noting brief.

What other rulings have there been on this point?

This is the first time that the Court of Appeal has looked at the new 'proportionality' provisions which were added in to the Civil Procedure Rules and took effect from April 2013.

What did the Master Gordon-Saker in the SCCO below rule?

Following a hearing in November 2015 [2015] EWHC 3602 (Ch) both sides agreed the figures resulting from the line by line assessment as follows:

- Base profit cost - £46,321,
- success fee - £16,780.83,
- counsel's success fee - £4,846.88,
- ATE premium - £61,480,
- VAT - £17,433.24,
- Total base costs - £62,318.50, and
- Total costs - **£167,389.45**

At a hearing in April 2016 the publisher submitted that these sums were disproportionate and should be reduced further. The costs judge agreed that these reasonable costs were nevertheless disproportionate and were twice the sum which would be proportionate. In a reserved judgment dated 3 June 2016 **AGS/1501540** following a detailed assessment hearing on 29 April 2016, Senior Costs Judge Master Gordon-Saker broadly found in favour of the paying party publisher. He concluded that the reasonable and proportionate costs which should be allowed to the phone hacking victim was the sum of £83,964.80.

As to ATE, the senior costs judge ruled that a 'premium of £58,000 at the stage that the claim settled, potentially doubling to £112,500, cannot be said to bear a reasonable relationship to a claim which settles for £20,000, where there was no substantial claim for non-monetary relief, which was not particularly complex, where no significant additional work was generated by the conduct of the paying party and where there were no wider factors involved'. He concluded that 'no more than one half of that amount could be considered proportionate' being a maximum amount of £29,000.

What does the legislation provide?

CPR part 44.4 deals with 'Basis of assessment' and it provides as follows:

44.4—(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 48.3 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; and

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

What was the ground of appeal?

There was only 1 ground of appeal from BNM the phone hacking victim:

- The judge below determined that the new test of 'proportionality' under CPR 1998 part 44.3(2) applies to the assessment of 'additional liabilities' incurred in a privacy case. The appellant submits as a matter of law that this is wrong because 'additional liabilities' remain recoverable from an opponent in limited categories of cases. These are hybrid cases where Parliament in enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') has provided that such 'additional liabilities' remain necessary to maintain access to justice. Correspondingly a hybrid approach is required in the assessment of those costs. The judge below was wrong to introduce the new test of 'proportionality' into assessment of what pre-LASPO but nonetheless still legitimate forms of funding.

Was there a Respondent's Notice by the publisher?

No.

What was the nature of the publisher's cross-appeal?

The publisher sought to cross-appeal the findings of Master Gordon-Saker in the SCCO. Although this was expressed as a cross-appeal, in substance the 1st point raised were more in the nature of a Respondent's Notice as it sought to uphold the decision below on other grounds. These are the 3 grounds:

- uphold the decision below because the SCCO expressly found that base costs were too high and should be halved. In the light of this the success fee inevitably falls to be halved as well,
- If the Court of Appeal forms the view that the judge below erred then the publisher seeks to cross-appeal:
 - if it was reasonable to instruct Atkins Thomson and to issue proceedings without notice and to spend such large amounts of time considering documents, none of this was proportionate and **all costs** (base and additional) arising from the same should be **disallowed**,
 - the test of 'proportionality' should be applied to base costs and additional liabilities separately, and
- the judge below was wrong in finding it was reasonable and/or proportionate for BNM to issue proceedings without notice and/or to make the anonymity application.

What submissions did phone hacking victim BNM respondent as appellant and receiving party make?

BNM submitted that the judge below held that the key part of new CPR 44.3 was CPR 44.3(7) which provides that for the 'cases or costs' to which it applies, rule 44.4(2)(a) as it was in force immediately before 1 April 2013 will apply instead. The pre-April 2013 CPR part 44.4(2)(a) ('the old test of proportionality') provided:

'Where the amount of costs is to be assessed on the standard basis, the court will—

(a) only allow costs which are proportionate to the matters in issue, and

(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.'

The post-April 2013 CPR part 48.1 (*Transitional Provision for post-LASPO Additional Liability cases*) 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.'

It is common ground that BNM's claim had been brought using such 'a pre-commencement funding arrangement'. The Costs Practice Direction to CPR part 48 provides as follows:

'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.'

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2.1 ...It will accordingly remain possible for a costs order in favour of a party to such proceedings to include provision requiring the payment of success fees and premiums under after the event costs insurance policies, and so the provisions of the CPR relating to funding arrangements as in force immediately prior to 1 April 2013 will continue to apply in relation to such proceedings, whether commenced before or after 1 April 2013...

3.2 Similarly, sections 44 and 46 of the 2012 Act are not being commenced immediately in respect of publication and privacy proceedings, which will accordingly be in a similar position as regards funding arrangements to mesothelioma claims and insolvency-related proceedings until such time as those sections are commenced in relation to them'.

BNM submitted it was not unreasonable to issue proceedings without a letter before action to the publisher because (a) she feared publication, (b) a reporter had already been to her house asking questions, (c) her phone had been stolen, (d) once private information had been published the genie could not be put back in the bottle, and (e) the newspaper's belligerent attitude on all the other phone hacking cases was such that any pre-action letter would be met with blanket denials anywhere. BNM said the situation was analogous to a party applying for an *Anton Piller* search and seizure order where a pre-action letter would tip-off the IP rights infringer with the result that counterfeit material would be destroyed.

BNM submitted in relation to ATE that the publisher's points went only to the staging of the premium.

What submissions did the publisher appellant as receiving party make?

The published submitted that the judge below (subject to its cross-appeal) came to the correct conclusion. It also submitted that BNM did not seek injunctive relief in her claim.

Were any new points advanced at this appeal hearing?

Yes. The publisher made one new point about section 46 of LASPO. This also depended on the definition of 'cost' in paragraph 4.1(b) of the Costs Practice Direction. Its submission was that properly interpreted ATE was not 'costs' at all.

It also continued to submit forcefully the point in its cross-appeal that legal proceedings (other than those under CPR part 16 to obtain an anonymity order for BNM) were unnecessary. It said there had been no letter before action from BNM and if the publisher had received one it would have settled this case. The logical consequence of this submission succeeding would be that BNM would be able to recover hardly any costs at all.

Is this the only appeal the Court of Appeal has on 'proportionality'?

No.

The list of appeals keeps on growing - predominantly fed by challenges to bills brought on the UK taxpayer's behalf by the NHS Litigation Authority. Although this may not be a comprehensive list there are at least these 4 appeals that the Court of Appeal will hear in the 2017/18 legal year:

- *Reynolds v. Nottingham University Hospitals Foundation Trust - A2/2017/0112* – to be heard over 2 days as a floater to start on either 17 or 18 October 2017. This is an appeal from District Judge Rogers in Norwich County Court Centre dated 15 February 2016. The provisional panel to hear this appeal is Lords Justices Lewison, Beatson and Briggs. As Lord Briggs of Westbourne JSC has now been promoted to the Supreme Court, he will not hear this appeal. It is likely that one of the judges on the *BNM* will hear this appeal now to ensure consistency.
- *McMenemy v. Peterborough & Stamford Hospitals NHS Foundation Trust - A2/2016/0926*. Listed to be heard at the same time and with the same panel as *Reynolds*. This is an appeal from HHJ Pearce in Liverpool Civil and Family Court dated 15 February 2016.
- *West v. Stockport NHS Foundation Trust - A2/2017/0928*. This was granted permission to appeal on 22 July 2017 and is waiting a hearing date. This is an appeal from HHJ Smith in Manchester County Court dated 13 March 2017.
- *Demouilpied v. Stockport NHS Foundation Trust - A2/2017/0930*. This too was granted permission to appeal on 22 July 2017, is waiting a hearing date and will be listed with *West*. This too is an appeal from HHJ Smith in Manchester County Court.

What interventions did the judges make? What points seemed to be troubling them?

The Master of the Rolls made the most interventions. He was annoyed and said he was 'quite troubled' that this appeal had come on for hearing without any reference to the other 4 pending appeals. Once the

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Court of Appeal has ruled on '*proportionality*' it will be bound by its decision in all other cases. There was an extended lunch break during which a judicial assistant made inquiries as to the issue(s) in the other 4 pending appeals. The Master of the Rolls said that *Demouilpied* did '*expressly raise the old and new test in a clinical negligence case*' in relation to an ATE premium. He said it was '*worrying*' that this was not mentioned by either side in their skeleton arguments.

The Master of the Rolls noted that *Reynolds* and *McMenemy* were seeking to rely on 2 previous decisions. The first is *King v. Basildon & Thurrock University Hospitals NHS Trust* [2016] EWHC B32 (Costs) in which Master Rowley in the SCCO had ruled that the definition of 'costs' in the pre-April 2013 CPR included '*additional liabilities*' but that the definition after April 2013 referred to '*profit costs*' and '*disbursements*' but did not include '*additional liabilities*'. As the '*proportionality*' test in CPR part 44.3(5) only applied to work carried out since that definition came into being, the interpretation is that the test only related to the base costs of a CFA.

The second is *Murrells v. Cambridgeshire NHS Trust* [2017] EWHC B2 (Costs) in which Master Brown in the SCCO had ruled that '*additional liabilities*' were not subject to the new test of proportionality under CPR part 44.3 or, even if they were, they should not be aggregated with the claimant's base costs for the purposes of that test. Although these cases were in the authorities bundle, the Master of the Rolls observed that he could '*see the tail wagging the dog here*'. He also seemed to side with the publisher being skeptical that there was an urgent need for BNM to issue noting that the newspaper hadn't used BNM's information for 2 years.

The Master of the Rolls wanted to know when the issue of premature proceedings had been raised by the published and BNM's counsel said it was in the conjoined reply in the assessment proceedings below. Longmore LJ was more generous to BNM observing the point had been taken '*some time in 2016*' but the Master of the Rolls said it was '*autumn 2014*'. In another testy exchange with BNM's counsel, the Master of the Rolls interrupted to say he '*we are not going to exercise his discretion and it will go back to him*' – this intervention was in relation to whether proceedings were premature and what costs should be disallowed as a result

What did the Court say about judgment in this case?

The Master of the Rolls said a draft judgment would be sent to counsel to both sides and for any typographical errors to be sent it. No indication was given as to when judgement would appear. It seems likely that no draft judgment will be prepared until after *Reynolds* and *McMenemy* have been heard next week. Although nothing was said in court, it seems inevitable that at least 1 judge on the *BNM* panel will have to sit on *Reynolds* and *McMenemy* as well. It is highly likely that judgment in all 3 cases will be handed down at the same time. Whether these judgements appear this side of Christmas 2017 remains to be seen.

12 October 2017

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