Case No: AGS/1600058

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice,
London, WC2A 2LL

Date: 03/08/2018

Before :

MASTER GORDON-SAKER

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Between :

VARIOUS CLAIMANTS in Wave 2 of the Mirror Newspapers Hacking Litigation	**Claimants**
- and -	
MGN LIMITED	**Defendant**

- -
- -

Mr Simon Browne QC and **Mr David Sherborne** (instructed by **Atkins Thomson**) for the **Claimants**
Mr George McDonald (instructed by **RPC**) for the **Defendant**

Hearing date: 4th June 2018

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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.

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MASTER GORDON-SAKER

Master Gordon-Saker :

1. With one exception, the parties have been able to agree the reasonable individual base costs in respect of each of the 65 Wave 2 claims which has settled and in respect of which detailed assessment proceedings have commenced. The exception, the costs of the claim of Mr Jackson Scott, were not agreed and so were assessed by me. On 12th December 2017 I gave my decisions on the additional liabilities that should be allowed in relation to the Wave 2 claims which had then settled.

2. The parties have also been able to agree the reasonable and proportionate common costs of those Wave 2 Claimants who settled their claims after the issue of proceedings (there being no common costs for those who settled pre-issue), and whose claims for costs are before this court, in the sum of £2.26m including interest. There will be a further common costs bill in relation to Wave 2, but not in respect of the Claimants to whom this judgment applies.

3. The parties have not been able to agree what effect, if any, the post-2013 test of proportionality should have on the agreed costs of the individual Wave 2 Claimants. They did however agree that this issue should be considered only after the Court of Appeal had handed down judgment in *BNM v MGN Ltd*. While that judgment[1] answered the question of which version of the test of proportionality should apply to additional liabilities, in the event the Court was not asked to address the application of the post-2013 test of proportionality to base costs.

4. Accordingly the proportionality of the costs of the Wave 2 Claimants was listed for a hearing at the beginning of June 2018. In the fortnight before the hearing Chief Master Marsh handed down his decisions on the costs management of the remaining two Wave 2 claims which were proceeding to trial.[2] Coincidentally, at about the same time, I circulated my draft judgment on the proportionality of the costs of the Wave 1 Claimants.[3]

5. Shortly before the hearing the parties were able to agree the amount of the proportionate costs of all but 10 of the Wave 2 Claimants and this judgment is therefore concerned only with that issue in relation to those 10 Claimants.

6. The claims in which the proportionality of the agreed reasonable costs (or assessed in the case of Mr Scott) remain in issue are:

[1] [2018] 1 WLR 1450 (CA)
[2] [2018] EWHC 1244 (Ch)
[3] [2018] EWHC B13 (Costs)

Claimant	Damages agreed	Agreed reasonable Individual base costs, (excl VAT)	Agreed Common base costs, (excl VAT)	Defendant's offer for Proportionate Base Costs, (excl VAT)
Jackson Scott	85,000	71,173[4]	-	14,000
Jayne Claire Walton/King	40,000	20,413	7,716	14,000
Alison Griffin	50,000	19,604	7,716	14,000
Patricia Lake-Smith	30,000	30,222	7,716	14,000
Ambigai Sithamparanathan	30,000	45,757[5]	7,716	15,000
Sam Rush	31,000	20,940	7,716	15,000
Chris Hughes	60,000	17,074	7,716	16,000
Nigel Havers	42,000	19,374	7,716	16,000
Polly Ravenscroft	70,000	22,648	7,716	16,000
Suzanne Shaw	75,000	22,776	7,716	16,000

7. The figure of £7,716 for the agreed proportionate and reasonable common costs of each Claimant was calculated by the Defendant's lawyers on the assumption that the Claimants' liability is equal and after deducting assumed additional liabilities, value added tax and interest. The Claimants have not challenged that calculation. There are no common costs for Mr Scott, as his claim settled pre-action.

8. In respect of Miss Sithamparanathan, agreement was reached as to the total of her reasonable costs, including additional liabilities, disbursements and interest. The figure set out above for her base costs has been calculated by the Defendant by apportioning the agreed costs pro rata[6]. Again the Claimants have not challenged the calculation.

9. As with the Wave 1 costs, there is no issue that the post-2013 proportionality test applies to each of these claims. There is also no dispute between the parties as to the process. That is that the court should consider, at the end of the assessment, whether the reasonable costs are proportionate and, if not, what other figure should be allowed. Again, as with the Wave 1 claims, the court has the unusual task of considering the proportionality of costs which have been agreed by the parties as reasonable (save in the case of Mr Scott).

10. The post 2013 test of proportionality is provided by rule 44.3 of the Civil Procedure Rules 1998:

> (2) Where the amount of costs is to be assessed on the standard basis, the court will –

[4] Assessed by the Court.
[5] See paragraph 8 of this judgment.
[6] As set out in an email from Miss Ellis to Mr Daval-Bowden dated 17th May 2018 and adjusted in an email from Mr McDonald to the court dated 5th June 2018.

> (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.
>
> …
>
> (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.

11. Following my judgment on the proportionality of the Wave 1 claims, the battlefield appears to have reduced in size.

The Defendant's submissions

12. As part of his overview, Mr McDonald submitted that the court should have regard to the fact that the Wave 2 Claimants had the benefit of the judgment of Mann J on the representative Wave 1 claims. That, he said, will have narrowed the issues. In 9 of the 10 claims, settlement was achieved before a Defence was served. Only in the case of Mr Chris Hughes was a Defence served.

13. Mr McDonald then went on to explain the procedure for these claims. They were stayed until July 2015 pending the outcome of Wave 1. When the stay was lifted the court put in place an early disclosure regime by which the Defendant would disclose certain documents relating to the particular Claimant: call data, private investigators' invoices and any relevant articles. These documents were limited in number. So too, said Mr McDonald, was the disclosure made by the Metropolitan Police Service. Not surprisingly, Mr McDonald explained, the requests for early disclosure and the particulars of claim when proceedings were issued followed a common format with only limited bespoke information.

14. In respect of the sums in issue, Mr McDonald argued that they were the "potential sums in dispute" rather than the value of the claim. So if the Defendant's first offer was accepted straightaway, there was little in issue. His fallback position was that it would be the settlement sum.

15. In relation to non-monetary relief, Mr McDonald took a similar approach. What was in issue was the difference between the relief which the Claimants were seeking and the relief which the Defendant was offering. So credit should be given for any undertakings offered by the Defendant early on. Further, in Wave 2, there was no judgment from which the Claimants benefited.

16. As to complexity, Mr McDonald contended that would be of more relevance to the common costs, rather than the individual costs. Had there been a trial, the claims would have been listed in groups of 4 or 5, to be heard over 10 days.

17. Mr McDonald submitted that the Defendant's conduct was not relevant in these claims. Of the matters relied on by the Claimants, he suggested that the change of stance by the Defendant, in not admitting or denying that the articles relied on were the product of phone hacking, could have had no impact in these cases because (except in the claim of Mr Hughes), they settled before a Defence was served. The costs of resisting the Defendant's applications to stay these claims were part of the common costs; as were the costs of setting up the disclosure regimes.

18. As to the wider factors, Mr McDonald suggested that there was no public importance. The public importance lay in the first wave. He accepted however that reputation was relevant "to a certain extent", although perhaps less in the case of Miss Sithamparanathan, about whom no articles were published.

19. A system of template costs budgets was devised for the Wave 2 claims. Both the Claimants and the Defendant accept that the budgets have no direct effect on the assessment of these costs. But insofar as the Claimants contend that they were within budget, Mr McDonald pointed out that the costs claimed in relation to Mr Scott and Miss Sithamparanathan exceeded the budgets. Perhaps more significantly, he explained that the budget templates were approved by the court after the Defendant had changed its stance and were designed for a "hypothetical reasonable high end case". These claims, he submitted, were not high end.

20. Insofar as the Claimants relied on the costs budgeting of the last two Wave 2 claims carried out by Chief Master Marsh, Mr McDonald explained that they included allegations of fraudulent concealment by the board of the Defendant. That had led to further disclosure, lengthy requests for further information and a trial estimate of 15 days. As the Claimants' solicitors had indicated that fraudulent concealment would be raised in the Wave 3 claims, these two Wave 2 claims would serve as a test case. They were also put at much higher values than the present claims.

21. Mr McDonald explained that the Defendant's open offers of proportionate costs (the right hand column in the table under paragraph 6 above) were in addition to the common costs. The Defendant had taken £15,000 as a starting point, given that these claims all settled at an early point. For those Claimants who had received damages in excess of £60,000, a further £1,000 had been added to the offer. Similarly £1,000 was added where there was a greater dispute as to quantum.

22. Mr McDonald singled out the claims of Mr Scott and Miss Sithamparanathan, where the costs assessed or agreed as reasonable, were the highest. Mr Scott had instructed Janes Solicitors, who acted for no other Claimant, and Mr McDonald's explanation for the amount of costs allowed was that they came to this litigation afresh, having to read,

for example, the trial bundles for wave 1. While it was reasonable that they did that work, it made the costs disproportionate.

23. Miss Sithamparanathan had been a solicitor at Schillings, a firm specialising in media work. No articles had been published about her, although some may have been published about her clients. Like Mr Yentob, in wave 1, she would be entitled to damages for the hacking but would receive no damages for any articles.

The Claimants' submissions

24. Mr Browne QC pointed out that these claims settled between November 2015 and September 2016. Before they settled there was a significant amount of activity in the litigation generally. There were 3 judgments in July 2016 alone: on the Defendant's second stay application, the costs regime and template budgeting, and ATE insurance. While the costs of dealing with these applications were common costs, they generated individual costs because the Claimants had to be kept informed.

25. Of the 10 cases that remain in dispute, Mr Browne QC relied on the fact that in the points of dispute the Defendant had conceded or offered sums in excess of what was now offered. In 4 cases the initial offers were not much greater, but in the case of Miss Sithamparanathan, £31,859 was offered as against £15,000 now offered.

26. Mr Sherborne, who was instructed on behalf of the vast majority of the Wave 2 Claimants, stressed that the difference between Wave 1 and Wave 2 was that at the trial in Wave 1 the Defendant had admitted that over 90 per cent of the articles had resulted from phone hacking, whereas in Wave 2 the Defendant took a different line by admitting only some articles. It was therefore for each individual Claimant to prove that the articles upon which they relied, but which were not admitted by the Defendant, were attributable to the Defendant hacking their phones. In answer to Mr McDonald's suggestion that the Defendant's change of stance would not have been apparent until a defence in each particular case was served, Mr Sherborne explained that the change was apparent when the first defence not admitting or denying particular articles was served in December 2015; and indeed before then the Defendant's solicitors had indicated to the court (in July and August 2015) that more work would be required by them because of the requirement that the Claimants particularise the private information relied on in relation to each of the pleaded articles.

27. This change of stance, Mr Sherborne submitted, was a consequence of the judgment in Wave 1 in which damages were calculated by reference to the number of articles. He took me, in some detail, through the pleadings in the Wave 2 claims to show the particularity with which the articles and the personal information on which they were based were pleaded and how the Defendant responded.

28. In relation to disclosure, Mr Sherborne pointed out that the Defendant had disclosed not only the call data and private investigator invoices but also the articles published by the Defendant in relation to each particular Claimant. In the case of Mr Scott, 80 articles were disclosed. Those articles had to be analysed by the Claimant's solicitors and a view formed as to which could properly be the subject of the claim. In relation to Mr Grant (although he is not one of the 10 Claimants with which this judgment is concerned) about 1,700 articles were disclosed, of which he relied on 60 in his particulars of claim.

29. As to the change in stance, Mr Browne QC drew my attention to the judgment of Mann J in respect of costs budgeting on 21st July 2016 (Mr Browne conceding that only the case of Mr Scott being still then alive) at paragraph 10 (bundle 1 tab 7A) in which the learned judge explained that, by comparison with Wave 1, the scope of Wave 2 had been vastly extended by the fact that the Defendant had challenged the link between a number of articles and any illicit activity. That would require a deeper investigation into the activities of the newspaper and journalists involved and much of that would be case specific. In the course of submissions at that hearing, Mann J had expressed the view that "the individual costs are inevitably going to be higher in this case because there is not a blanket admission of articles".

30. In relation to the two cases where the costs claimed are the greatest, Mr Browne QC pointed out that in respect of Mr Scott work was done over the best part of 2 years. While Janes had not acted for other Claimants in this case, they had acted for Mr Scott in respect of his phone hacking claim against News Group Newspapers. He was connected to 19 articles relied on by Ms Frost in the Wave 1 trial and he relied on a further 55 articles in his claim in Wave 2. It was the slow disclosure of articles by the Defendant that led to the length of time before the claim was settled.

31. In respect of Miss Sithamparanathan Mr Browne QC submitted that, the parties having agreed a global figure for all of the costs including additional liabilities, the Defendant was now in difficulty in arriving at a figure for base costs which it could contend to be disproportionate.

32. She had instructed Slater & Gordon because there would have been conflicts of interest had she instructed what Mr Browne described as the "more regular phone hacking solicitors". There were no specific articles about her. Any articles derived from information obtained in hacking her phone would have been about her clients, who included Naomi Campbell, the model who had herself been involved in well-known litigation against the Defendant in respect of breach of privacy.

33. In relation to the sums in issue in these claims, Mr Browne QC did not accept the Defendant's contention that this should be measured by the difference between the parties, but relied on my conclusion in relation to the Wave 1 claims and referred to the comments of Chief Master Marsh to the effect that budgets could be proportionate even if the costs exceeded the sums in issue.

34. In respect of the value of non-monetary relief, Mr Browne QC again relied on my conclusions in relation to the Wave 1 claims. The non-monetary relief in these claims was just as important and valuable to the Claimants. In respect of complexity, Mr Browne relied on the Defendant's change in stance and the need to prove that each article relied on had derived from the conduct complained of.

35. Mr Browne QC submitted that the additional work generated by the Defendant's conduct included that done as a result of the change in stance, the four applications made by the Defendant to stay the proceedings, difficulties in obtaining disclosure and lack of clarity in what was being admitted. Mr Browne referred me to comments made by Mann J about lack of co-operation by the Defendant and "a calculated tactical stance" in relation to the Defendant's pleaded case.

36. As to the wider factors, Mr Browne QC relied on the public importance, the reputations of the Claimants and the distress that they had been caused.

37. In reply Mr McDonald pointed out that the call data for Miss Sithamparanathan showed that her phone had been hacked on only 3 occasions, so little work should have been involved. In relation to her claim and that of Mr Scott, Mr McDonald submitted that the additional work required because they had instructed different legal teams to those used by the other Claimants was irrelevant to proportionality. Alternatively, if it was relevant, there would have been cheaper ways of proceeding than reading the bundles in relation to the Wave 1 claims.

The relevance of the common base costs

38. In my judgment on the proportionality of the Wave 1 costs I concluded that I must also have regard to the sums agreed for the relevant shares of common costs, but that I should bear in mind that these sums had also been agreed as proportionate. Neither side sought to dissuade me from continuing that approach.

The sums in issue

39. The difficulty with the Defendant's argument that the sum in issue is the difference between the parties, is that in any case there is a point when nothing is in issue (judgment or settlement). There is also a point when everything that is being claimed is potentially in issue (before the claim is first responded to). The difference between the parties will vary over the life of the claim.

40. It seems to me that the purpose of the words "sums in issue" is to reflect the value of the claim as viewed by the parties during the currency of the claim. It is intentionally not as narrow as the sum awarded or agreed.

41. For the reasons that I gave in my Wave 1 judgment on proportionality, it seems to me that one has to take a broad view of the sums in issue.

42. By Wave 2, the approach of the court to the calculation of damages was known. So to that extent there would have been less uncertainty. But there would have remained uncertainty as to how many articles could be proved by any individual claimant to have been the result of phone hacking.

43. Of these 10 claims, 5 settled for sums in the range of £50,000 to £100,000 and 5 settled for sums in the range of £25,000 to £50,000. None of the Wave 2 Claimants as a whole settled for less than £25,000 and the highest sum agreed was £201,000.

44. The values on the claim forms were put at higher figures than in the Wave 1 claims: £100,000 (in the case of Miss Sithamparanathan), £150,000 or £200,000.

45. The figure at which a claim settles will always be within or below the sums in issue in the case. I think that it would be reasonable to take a band of £30,000 to £50,000 as the sums in issue for the 5 claims which settled below £50,000 and a band of £50,000 to £100,000 for the 5 claims which settled at and above £50,000.

The value of any non-monetary relief in issue in the proceedings

46. In addition to damages these Claimants also sought injunctions to restrain further hacking of their phones and the republication of the articles about them. In most cases an undertaking not to intercept voicemail was given by the Defendant.

47. As far as I can tell statements in open court were provided for only 4 of these Claimants (Ms Walton, the Hon. Nigel Havers, Ms Shaw and Ms Griffin). The statements outline the nature of the intrusion and include the apology of the Defendant for that intrusion.

48. Again I cannot accept Mr McDonald's submission that the non-monetary relief in issue is the difference between what the Claimants were seeking and what, if anything, the Defendant was offering. It seems to me that what was in issue was what was being claimed. That remained in issue until the conclusion of the case.

49. I accept that the Claimants in Wave 2 did not benefit from a judgment which explained what had happened. Although, had these claims not settled, that is something that they would have received.

50. It seems to me that the injunctions that were sought and the undertakings, statements in open court and apologies that were given were of substantial value. These claims were not just about damages.

The complexity of the litigation

51. Although the methodology for the calculation of damages was resolved in the Wave 1 judgment and subsequent decision of the Court of Appeal, and although there had been a general acceptance of wrongdoing by the Defendant, I do not accept that these claims were straightforward.

52. The need to establish the articles which resulted from information derived from phone hacking, the number and nature of the interlocutory hearings and the estimated length of the trials (10 days for groups of 4 or 5 cases) take these cases out of any comparison with the straightforward or run-of-the-mill. I accept that much of the complexity will relate to work which would fall within common costs, but, where the common work is complex, inevitably the work on the individual cases will also be made more complex.

Any additional work generated by the conduct of the paying party

53. I do not think that any significant additional work was caused by the conduct of the Defendant. This was hard-fought litigation with fairly major interlocutory skirmishes. The Defendant's change in stance was perhaps the inevitable consequence of the decision in the Wave 1 claims that the damages would be calculated by reference to the number of articles. It was a different battle-field to Wave 1, but it was not conduct which generated additional work.

54. The Defendant could have reduced the costs bill that it faces by settling earlier or making earlier admissions. But this did not generate *additional* work. It generated the work that would be required in any case where liability was in dispute either wholly or in part.

Any wider factors involved in the proceedings, such as reputation or public importance

55. It seems to me that exactly the same wider factors were involved in Wave 2 as were involved in Wave 1.

56. These cases were of significant public importance, even though the Defendant's conduct had been laid bare in the Wave 1 judgment. The number of people whose privacy was invaded and the extent of the deplorable conduct of the Defendant made these claims of continuing public interest and importance.

57. The reputations of these Claimants were involved. The articles published cast them in a negative light. The statement made in open court in the cases of Ms Griffin, Ms Shaw and the Hon. Nigel Havers, exemplifies that.

58. There was also a degree of vindication. I accept that this was less of a factor than in Wave 1 where, until the Defendant made admissions, the Claimants were seeking to prove criminal misconduct by a national newspaper in the face of its denials. But the Wave 2 Claimants were faced with denials and non-admissions in relation to particular articles.

Are the individual costs proportionate?

59. I should take into account that the costs which have been agreed as reasonable include the costs of drawing the bills and court fees. In the case of Mr Scott the cost of drafting the bill was claimed at just over £7,000. In the case of Ms Sithamparanathan, the base costs claimed for drafting and checking the bill were over £7,700 and the court fee on issue was £1,390.

60. In only 2 cases are the agreed reasonable costs (including the agreed reasonable and proportionate common costs) higher than the agreed damages: Ms Lake-Smith and Ms Sithamparanathan. However the sums in issue are but one of the factors and in the present cases it seems to me that the court should take into account also the value of the non-monetary relief in issue, the complexity and the wider factors.

61. Both Mr Browne QC and Mr McDonald made specific submissions in relation to the cases of Mr Scott and Ms Sithamparanathan, where the agreed reasonable costs were significantly higher than in the other cases. The reason for the difference in these two cases is likely to be that in each the client instructed solicitors who were not acting for any other claimant in this litigation. That is not, it seems to me, relevant to the question of proportionality; although it may have been relevant to the question of reasonableness.

62. However it seems to me that even in these two cases the reasonable costs (together, in the case of Miss Sithamparanathan, with the agreed common costs) are not disproportionate having regard in particular to the sums in issue, the value of the non-monetary relief, the complexity and the wider factors. In both cases the total agreed base costs compare favourably to the total agreed base costs of the 10 Wave 1 Claimants where proportionality was in issue.

63. It follows that in relation to the other 8 Wave 2 Claimants, where the agreed figures are significantly lower, I cannot conclude that the agreed reasonable individual costs

(taking into account the agreed reasonable and proportionate base costs) are disproportionate.

64. Accordingly in my judgment there is no basis for allowing lower figures than those which the parties have agreed as reasonable.

Success fees

65. It also follows that as the base costs need not be reduced on the grounds of proportionality applying the post-2013 test, the proportionality of the success fees does not come into question.