

# Two reasons for sleepless nights?

According to Phoenix Legal Services' Stephen Averill, there are many things keeping the world of costs awake at night. Here he shares two of them with Modern Law.



The first concern I'd like to share is the immortal question "When will there be coherent guidance on the new test of Proportionality?"

To be blunt, there won't be. The problem with guidance is that it is general in nature and is only beneficial to cases that are identical in circumstance. The challenge raised by a paying party to a Costs Judge is: "The costs in this case are disproportionate and so need to be reduced." What does the Costs Judge then do? The Judge will delve into the facts of the case and will weigh up the appropriate factors set out in CPR 44.4. The Judge may ask questions of the parties if the assessment is taking place in person. Otherwise the Judge will make a decision based upon the specific facts of that particular case. End of Story! The decision is therefore unique as no two cases are identical. The only guidance required by practitioners is that contained within CPR 44.4.

If there is to be a proportionality challenge then a receiving party should be asking themselves this: "How can I use my knowledge of the case to persuade the court that the time and effort I have expended on this case is proportionate?" Once again this is answered by delving into the individual facts and circumstance of the

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case and cross referencing it against CPR 44.4. There should no longer be any calls for coherent guidance as we have enough contained within the rules to help us.

The second point is about technological improvements. Over the years these have allowed the profession to make huge strides in streamlining processes and making itself more efficient. Don't get me wrong, I am a firm believer in the benefits of things that improve the way we work. Sadly, there is a limit as to how far technology can go before it becomes counter-productive. Take the new electronic bill – oh! I can hear the groans. It is one of the most unwieldy pieces of software created which has replaced something that actually worked perfectly well. There is an acceptance that the new form of bill takes considerably longer to prepare than the one it replaced. Every item, including routine items, now

have to be individually identified. There is also an acceptance that the time to prepare Points of Dispute and Replies will also take longer as the parties are searching through the numerous worksheets. One can only imagine how much extra time will be required for a detailed assessment as the parties and Judge try to navigate around the document on three laptops to find that elusive 6 minutes that has been challenged.

There is an old adage – "if it ain't broke don't fix it"



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