**Neutral Citation Number: [2018] EWHC B13 (Costs)**

Case No: AGS/1600058

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Royal Courts of Justice,
London, WC2A 2LL

Date: 01/06/2018

**Before** :

**MASTER GORDON-SAKER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **VARIOUS CLAIMANTS in Wave 1 of the Mirror Newspapers Hacking Litigation** | **Claimants** |
| **- and -** | |
| **MGN LIMITED** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Simon Browne QC** (instructed by **Atkins Thomson**) for the **Claimants**
**Mr Jamie Carpenter** (instructed by **RPC**) for the **Defendant**

Hearing dates: 1st & 2nd May 2018

- - - - - - - - - - - - - - - - - - - - -

# Judgment Approved

**Master Gordon-Saker :**

1. Following my decisions on hourly rates, success fees and after the event insurance premiums[1], the parties were able to agree the reasonable base costs of each of the Claimants in Wave 1 of the Mirror Newspapers Hacking Litigation. They were also able to agree a figure for the reasonable and proportionate common costs. They were unable to agree what effect, if any, the post-2013 test of proportionality should have on the agreed costs of the individual 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[2] 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.

2. The passage of time has however enabled the parties to agree the proportionate costs of a number of the Wave 1 claims. Those which have not been agreed and so are the subject of this judgment are:

| Claimant | Damages | Base costs | Agreed | Defendant's |
|---|---|---|---|---|

[1] [2016] EWHC B29 (Costs)
[2] [2018] 1 WLR 1450 (CA)

| | | claimed (ex VAT) | reasonable base costs (ex VAT) | offer of proportionate costs (ex VAT) |
|---|---|---|---|---|
| Yentob | £85,000 | £129,195 | £85,651 | £40,000 |
| Gascoigne | £188,250 | £239,543 | £158,614 | £80,000 |
| Black/Willis | £47,500 | £40,149 | £27,680 | £15,000 |
| Wallace | £40,000 | £39,588 | £27,243 | £15,000 |
| Jackson | £25,000 | £88,802 | £60,191 | £15,000 |
| Eccleston | £30,000 | £104,039 | £71,453 | £15,000 |
| Andre | £15,000 | £25,257 | £18,504 | £10,000 |
| Horlick | £25,000 | £45,806 | £28,913 | £15,000 |
| Day | £85,000 | £45,600 | £30,565 | £20,000 |
| TOTAL | £540,750 | £757,979 | £508,814 | £225,000 |

3. The costs figures above are for the individual Claimants. The agreed common base costs divided equally between the Wave 1 Claimants, in accordance with the costs sharing agreement between them, would add a further £61,976 per claimant. That is not however the case for Mr Yentob for whom the common base costs were agreed at £33,740, because he was not awarded the costs of his claim in full. For Miss Black and Mr Willis, who were co-claimants, the figure for common base costs would be double, namely £123,951.

4. Of the 10 Claimants to whom this judgment relates, Mr Yentob and Mr Gascoigne were Representative Claimants. Their claims went to trial; and indeed on to the Court of Appeal, although the costs of the appeal are being assessed separately. The other Claimants settled their claims before trial in windows of between 5 months after service of the Particulars of Claim and 10 months after service of the Defence. It is I think uncontroversial that the sums accepted as damages by these Claimants were probably significantly less than the sums that they would have been awarded at trial.

5. It is not in issue that the post 2013 test of proportionality applies to each of the remaining claims. In respect of three of the Claimants a limited amount of work was done before 1st April 2013 to which the *Lownds* test of proportionality would apply: Ms Wallace – 7.1 hours; Mr Jackson – 3.4 hours; Mr Day – 5.1 hours.

6. 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 –

> (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.

7. Proportionality was not further defined in the rules or the Part 44 practice direction and while it was anticipated that guidance on the working of the rule would be given by the Court of Appeal, the opportunity for such guidance has not yet been provided.

8. I must add therefore that this judgment should not be taken as any attempt at providing guidance. I say that because I know that anything said about proportionality, at whatever judicial level, is subjected to anxious scrutiny. First this is not a judgment of the Court of Appeal. Secondly the circumstances which give rise to this judgment are very unusual. These were claims for damages and other relief in respect of breach of privacy through phone hacking and therefore of an unusual nature and outwith the general run of civil litigation. Possibly more unusually, the court is asked to consider the proportionality of costs without first having carried out an item by item assessment, the parties having agreed the amount of reasonable costs.

9. There is however 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.

The Defendant's submissions

10. On behalf of MGN, Mr Carpenter submitted that, in considering whether the individual costs are proportionate, I should take into account the sums agreed for common costs, namely £61,976 per claimant. First, he submitted, the total sum allowed for each claim must be proportionate. Secondly, the individual bill of any one

claimant does not represent all of the work done on the claim for that claimant. Having taken them into account in arriving at a proportionate figure for the individual costs, as a cross-check, I should then consider whether the aggregate of common and individual costs results in a proportionate figure.

11. In considering the factors set out under r.44.3(5), Mr Carpenter submitted that the court should be careful to disregard those factors which are relevant to the common costs, and justify a higher figure for the common costs, but which are not relevant to the individual costs. For example, the work done on the claims collectively may have been more complex than the work done on the individual claims.

12. In relation to the five factors Mr Carpenter submitted that the primary consideration was what the claim was worth: the sums in issue and any non-monetary relief in issue. The remaining factors, complexity, additional work and any wider factors, were secondary. They may render as proportionate costs which, having regard to value alone, were disproportionate; or vice versa.

13. Mr Carpenter explained that in relation to the settled claims, the Defendant's default offer was £15,000. £20,000 was offered in the case of Mr Day because the agreed damages were significantly higher and £10,000 was offered in the case of Mr Andre because the agreed damages were lower.

14. With the exception of the different levels of damages agreed, Mr Carpenter contended that there were no material distinctions between the settled claims. Each started after the Claimants were informed by the Police that they appeared to have been the subject of phone hacking. With the exception of Mrs Horlick (and I think also Mr Andre) each had applied for third party disclosure from the Police. That resulted in the disclosure of a transcript of Mr Evans' police interview and, subsequently, his witness statements (redacted), another transcript and, in the case of some Claimants, some additional disclosure such as Mr Evans' contact list. Letters of claim were written in the case of each Claimant other than Mrs Horlick and, following the issue of proceedings, particulars of claim were served which followed a common format. At the Case Management Conferences in June and July 2014 directions were given for the representative claims to go forward to trial. The claim of Mr Eccleston, who had been identified as a representative claimant, settled in September 2014.

15. Later that month the Defendant made general admissions. Defences were served in the cases of Mr Day, Mr Jackson and Mrs Horlick. According to Mr Carpenter no disclosure was given in relation to the settled claims (although the Defendant's chronology in the case of Mrs Horlick suggests that it was given in that case). The settled claims settled towards the end of 2014 and into early 2015. In relation to each of the settled Claimants, apart from Mrs Horlick, a statement was made in open court.

16. Mr Carpenter emphasised that each of the Claimants relied on inferences to be drawn from general evidence as to the practices at the Defendant's newspapers. The costs of obtaining, considering and investigating that evidence form part of the common costs not the individual costs.

17. In respect of the sums in issue in the settled claims, Mr Carpenter submitted that the sum in issue was the sum agreed for damages. None of the settled Claimants had contended for or offered a higher figure. It was only shortly before the trial of the

representative claims that the methodology for the valuation of the claims contended for by the Claimants was made clear. The judgment of Mann J as to how these claims should be valued "created a new regime which was obviously much more generous to claimants than anything hitherto for privacy claims". That change, submits Mr Carpenter, did not affect the sums in issue in the settled claims which had by then settled. In the absence of any indication of what sums the Claimants were claiming, the best evidence of the sums in issue was the amounts of damages that were agreed. The value of the claims as stated on the claim forms was not an indication of the sums in issue, being in part required for the calculation of the court fee. In most of the settled claims it was stated that the claimant expects to recover an amount not exceeding £100,000.

18. In relation to the non-monetary relief claimed, Mr Carpenter submitted that the principal remedy sought was financial compensation. The undertakings given by the Defendant, as part of the settlements, not to intercept the Claimants' voicemail messages, not to republish particular articles and to delete any copies of those articles online were, he said, "of little real value". There was no prospect that the Defendant would repeat the behaviour which was the subject of the action. Further, he pointed out, no injunctive relief was sought in any of the particulars of claim. Rather the only non-monetary relief pleaded was an order for delivery up of all documents regarding the Claimant and the Claimant's phone and an order that the Defendant should provide information about the extent to which the Claimant's phone was hacked and the identities of those involved. (Injunctions were however pleaded in the claim forms. In the case of Mr Andre, for example, an injunction was sought to restrain phone hacking and the use of any private or confidential information.)

19. As to complexity Mr Carpenter submitted that none of the claims were legally complex. If the Claimants established the conduct complained of, they would be entitled to damages. Insofar as there was any forensic complexity, that related to work which was included in the common costs bill.

20. As to conduct Mr Carpenter suggested that the only real complaint made by the Claimants was that the Defendant did not admit liability or settle the claims sooner. If however the amount of work required was relevant to proportionality, then the stage at which the case settled was not relevant to conduct. The costs of a claim will inevitably be greater if it settles just before trial than if it settles before issue of proceedings. Taking the failure to settle earlier into account as conduct would be double-counting.

21. As to any wider factors, Mr Carpenter accepted that phone hacking by journalists was inherently of public importance. However whether a particular individual's phone was hacked was not. Nor, he submitted, were the reputations of the Claimants in issue. What was published about the Claimants as a result of the phone hacking was true. That their privacy was breached does not mean that their reputations were damaged.

22. In respect of the two representative claims, those of Mr Yentob and Mr Gascoigne, the trial costs were divided between the common costs bill and the individual bills. The costs of attendance by the solicitors acting for the individual Claimants have been claimed in the individual bills of the representative Claimants. The costs of attendance by the lead solicitors were claimed as common costs. Counsel's fees were divided 50:50 between the individual bills of the representative Claimants and the common

costs bill. Mr Carpenter submitted that the wider significance and complexity of the representative claims is reflected by the common costs.

23. Although disclosure was given in the representative claims, little disclosure was made in relation to the claims of any individual representative Claimant. The sums in issue, Mr Carpenter submitted, were the sums awarded by the court. The non-monetary relief awarded at trial was similar to that obtained by the settled Claimants and, Mr Carpenter submitted, of no real value to the Claimants.

24. Turning to the question of conduct and the list of matters raised in the Claimants' written submissions as having generated additional work, Mr Carpenter submitted that this all went to the generic case and therefore the common costs and that many of the matters complained of (for example the lack of specificity in the admissions made in the defences) had not in fact caused any additional work.

25. In respect of success fees Mr Carpenter contended that the court should allow the appropriate percentage of whatever base costs were allowed as reasonable and proportionate. Success fees exist only as a percentage of the base costs. If the success fee was reduced because the base costs were reduced by application of the post-2013 test of proportionality, that would not be to apply that test of proportionality to the success fee. Under the pre-2013 regime, which continues to apply to additional liabilities, the success fee allowed was always the appropriate percentage of the reasonable and proportionate base costs that were allowed.

The Claimants' submissions

26. Mr Browne QC pointed out that in most of the settled claims the figures agreed for individual base costs included the costs of the application for third party disclosure, court fees and the cost of drafting and checking the bills. He also pointed to a shift in the Defendant's stance. In the points of dispute relating to Mr Yentob's bill, the Defendant had conceded base costs of £60,218, but was now offering only £40,000.

27. Mr Browne QC stressed the importance of the non-monetary relief sought and obtained by the Claimants. Not only did they obtain undertakings that the Defendant would not hack their phones again but also undertakings that the Defendant would not republish the articles obtained from the phone hacking. The representative Claimants obtained a judgment which explained what had happened to them and the wrongs that they had suffered and the settled Claimants obtained statements in open court, the value of which, as explained in the notes in the White Book following paragraph 6.1 of Practice Direction 53, is essentially vindication.

28. Mr Browne QC also stressed that while the lead solicitor was pressing the generic case as to whether phone hacking had occurred, each individual Claimant still had to prove his or her case. Therefore, he submitted, the court should look only at the proportionality of the individual costs for the individual work done. While the costs of pursuing the generic case are separate, that the generic case was being dealt with separately will have caused increased costs for the individual claimants in relation to communications between the lead and individual solicitors.

29. In relation to the settled claims Mr Browne QC pointed out that the agreed reasonable base costs fell within a band of £17,500 to £30,000 with two exceptions: Mr Jackson

and Mr Eccleston. Mr Jackson was the personal assistant to Mr Jude Law, the actor, and was in a relationship with Miss Holly Davidson, the sister of Miss Sadie Frost, the actress, who had previously been married to Mr Law. The disclosure in Mr Jackson's case included private investigator invoices for phone hacking work and call data and work was done in relation to keyword searches for e-disclosure. Part of the work in Mr Jackson's bill includes work shared between him and Miss Davidson and work shared between Mr Jackson, Miss Davidson and Miss Frost. Mr Browne QC explained that it was the work done in relation to Mr Jackson which revealed that phones on the Orange platform could be hacked without a trace because the hacker did not actually have to phone the victim's number. In the case of Mr Eccleston, the actor, he was chosen as a representative Claimant in the summer of 2014, but became a settled claimant when he accepted the Defendant's offer in September 2014. Perhaps not surprisingly therefore, the agreed reasonable costs of his claim are the highest of the settled Claimants, but the lowest of the representative Claimants.

30. In respect of the sums in issue Mr Browne QC relied on the sums stated in the claim forms as the starting point. In every case, apart from that of Mrs Horlick, the claim was valued at "not exceeding £100,000". In the case of Mr Jackson it was put at over £50,000 but limited to £100,000. (I remind myself that in 2014, when these claims were issued, fees for starting proceedings were set by reference to the sum claimed and, where the sum was over £50,000, the fees were fixed by reference to bands of £50,000.) However, as the claims developed, higher figures were contended for and, by trial, about £2m was in issue in the representative claims.[3]

31. Mr Browne QC went on to stress that wave 1 was the vanguard of the phone hacking litigation. The wave 2 claims did not go to trial but, he told me, they settled for a total of about £18m. The wave 3 claims are still out there. The phone hacking claims against News Group Newspapers did not go to trial and Mr Browne QC submitted that they will no doubt have benefited from the judgment of Mann J on the representative claims.

32. In respect of the settled claims Mr Browne QC submitted that the damages that would have been awarded at trial would have been significantly higher. It was the large amount of disclosure given by the Defendant at the end of 2014 that indicated the extent of the articles published as a result of the phone hacking. At appendix 3 to the Claimants' written submissions are set out calculations of what the settled claims would have been worth using the methodology adopted by Mann J at trial. In the case of Mr Day, for example, it is submitted that the damages would have been £162,000, as against the offer of £85,000 which he accepted.

33. In relation to the value of the non-monetary relief in issue, Mr Browne QC relied on the vindication which the Claimants had obtained (although he did not use that word) by the judgment or the statements in open court, in addition to the Defendant's undertakings. That was exemplified in the case of Mr Yentob when in his judgment on costs dated 10th June 2015 Mann J said at paragraph 42:

> On the unusual facts of this case, it seems to me that Mr Yentob did have some form of justification for pursuing the matter to

[3] Listed on p.25 of the written submissions of Mr Browne QC.

> trial in the face of limited admissions as to what had happened to him, which in fact had been given against a prior background of clear denials on the part of Mirror Group Newspapers that anything had happened at all - a matter to which I have referred in my judgment.

34. In relation to complexity Mr Browne QC relied on the matters set out at paragraphs 106 to 108 of his written submissions, which I need not repeat. In short, the generic work built up the picture of phone hacking activities. Each Claimant (with the exception of Mr Yentob, of whom no articles were published) had then to show which articles were the consequences of those activities.

35. In respect of additional work caused by the Defendant's conduct, Mr Browne QC relied on three aspects. First, the Defendant's conduct in engaging in a criminal conspiracy over 12 years, secondly the denial of liability sustained until September 2014 and third the conduct of the litigation. These are particularised in paragraphs 121 to 154 of his written submissions. In relation to the first aspect, Mr Browne QC relied not only on the phone hacking itself, but on the covert nature of that activity and the subsequent lies to cover it up.

36. In relation to the wider factors Mr Browne QC pointed to the public importance identified by Vos J, as he then was, when he was managing the litigation:

> I take into account the fact that this is a matter of considerable public importance. This is not a case which concerns nobody else. It is a case which, as everyone knows, features frequently in newspapers and on websites and has great public interest attached to it. It not appropriate to ask the court to rush through an application which is of great concern not only to the parties but also to third parties and the public.

37. He also pointed to the effect on the reputation of the Claimants of the publication of stories relating to their private lives and to their belief, until they became aware that their phones had been hacked, that those stories could only have been the result of betrayal by their friends or family.

38. Finally, in relation to success fees, Mr Browne QC submitted that, were the base costs to be reduced under the post-2013 test of proportionality, the success fees should be calculated by reference to the reasonable base costs rather than the, lower, proportionate base costs. To do otherwise, he submitted, would be to apply the post-2013 test of proportionality to additional liabilities.

The relevance of the common base costs

39. I cannot accept the Claimants' submission that the court should consider the proportionality of the individual costs alone. It seems to me that when considering the proportionate base costs of the individual claims one must have regard to the sums agreed for common costs. The costs which are being assessed are the costs of the claims. In relation to any particular Claimant those costs have been divided between a common costs bill and an individual bill but the costs of that Claimant's claim is the

aggregate of that Claimant's share of the common costs and that Claimant's individual costs.

40. The common costs have been agreed between the parties as proportionate. In aggregating the appropriate share of the common costs with the agreed reasonable base costs, I have to bear in mind that the part representing common costs has been agreed as proportionate. It is not an irreducible minimum for the overall costs of the claim. It is the reasonable and proportionate figure for the work that was described in the common costs bill.

The sums in issue

41. In *May v Wavell Group Ltd* [2016] 3 Costs LO 455 His Honour Judge Dight concluded that "the sums in issue in the proceedings" meant "the range of figures realistically in dispute between the parties" (para 68). I respectfully agree. Had it been intended that, to be proportionate, costs should bear a reasonable relationship to the sum awarded or agreed, the rule could easily have stated that.

42. In *May* HHJ Dight decided that the costs judge should have concluded that "the range was £50,000 to £100,000" based on the likely impact of the nuisance on the annual rental value of the Claimants' house, rather than the figure of £25,000 for which the claim had settled. That bracket of £50,000 to £100,000 was also the value stated on the claim form. As with so much in relation to the assessment of costs, the court must take a broad view.

43. In part, a broad view is necessary because the sums in issue may change as the claim progresses. Of the seven representative Claimants, five were awarded damages in excess of the values stated on the claim forms. Two were awarded damages within the range of £50,000 - £100,000. Three were awarded damages within the range of £150,000 - £200,000. One was awarded damages within the range £200,000-£250,000 and one within the range £250,000-£300,000.

44. Although the sums in issue may change, at some point in the life of any claim the sums in issue must be at least the amount awarded or agreed. For at the point when that amount is awarded or agreed it must fall either within or below the figures realistically in dispute between the parties.

45. In the present case it is reasonable to assume that, had the settled claims proceeded to trial, the awards of damages would have been significantly greater than the sums that were agreed. Applying the methodology adopted by Mann J to the assessment of damages, the Claimants suggest that the figures which would have been awarded would have been (the figures agreed are in parentheses):

| | |
|---|---|
| Cilla Black | (£30,000) £85,000 |
| Robert Willis | (£15,000) £27,500 |
| Jessie Wallace | (£40,000) £234,500 |
| Ben Jackson | (£25,000) £68,000 |
| Christopher Eccleston | (£30,000) £46,500 |

| | |
|---|---|
| Peter Andre | (£15,000) £70,000 |
| Nicola Horlick | (£25,000) £36,000 |
| Darren Day | (£85,000) £162,000 |

46. These figures are not agreed by the Defendant. However it is reasonable to assume that the damages that would have been contended for at trial by the Claimants would have been at least these figures.

47. Taking a broad view of the sums in issue, it seems to me that in respect of Mr Jackson, Mr Eccleston, Mr Andre, Mrs Horlick and Mr Yentob, the sums in issue were of the order of £50,000 to £100,000. In respect of Miss Black and Mr Willis together the sums in issue were of the order of £100,000 to £150,000. In respect of Mr Day, Mr Gascoigne and Miss Wallace the sums in issue were of the order of £150,000 to £250,000.

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

48. Placing a value on an order for the transfer of property or shares should be straightforward. Placing a value on an injunction or an undertaking is rather more difficult. Therefore, it seems to me, again one has to take a broad view.

49. That no claim for an injunction was pleaded in the Particulars of Claim does not mean that this was not relief in issue in the proceedings. Injunctions were sought in the claim forms and it seems to me almost inevitable that, if the Claimants succeeded, some form of injunction would be granted in the absence of appropriate undertakings.

50. In the circumstances of these proceedings, there was probably little prospect that the Defendant would resume its phone hacking activities. The general revulsion that these activities provoked led not only to the Inquiry by Lord Justice Leveson but also to the closure of the *News of the World* after 168 years in print.

51. That is not to say that an injunction or undertaking not to intercept voicemail messages was of no value. It will have provided significant comfort to those whose privacy had been breached.

52. The undertakings not to republish articles identified as derived from information obtained by phone hacking and to delete all online copies of those articles will probably have been of more value. Many of these articles were unpleasant, disclosing highly private and personal information, and their publication, as Mann J found at trial, had caused the Claimants considerable distress. In relation to the representative Claimants, the articles that were published and the effects on the Claimants are described in the paragraphs following paragraph 234 in his judgment.

53. The Claimants also sought orders for delivery up of all documents relating to them or their phone numbers and an order that the Defendant disclose on oath the identities of those engaged in phone hacking, the number of hackings and the information obtained. At trial Mann J indicated that the court did have power to grant at least some of the relief sought in relation to disclosure but did not adjudicate finally on the

point. He indicated (para 709) that there may be difficulty in providing the information sought and that the process may be disproportionately expensive. Of significance for present purposes he also indicated that, if the information were not provided, that might lead to a further award of damages (para 711).

54. The statements in open court were also of value, recording not only what had happened to the Claimants and the impact on them but also an acknowledgement by the Defendant of its unlawful behaviour. Given the nature of these proceedings, the nature of the conduct complained of, and the denials by the Defendant until September 2014, these statements will have brought closure to the Claimants.

55. Of no less value will have been the judgment following trial, not only for the representative Claimants, but for all of the Claimants. The judgment contains a detailed account of what had happened, the unlawful activities of the Defendant, and the effects on the representative Claimants. (The representative Claimants were of course representative of the Claimants as a whole.) It seems to me that this must be as much a part of the non-monetary relief as the statements in open court.

56. Vindication is not in my view part of the non-monetary relief in issue in the proceedings. "Relief" can only mean remedies. Vindication may be a consequence of the remedies in issue, but it is not itself a remedy.

57. I have to disagree with Mr Carpenter's submission that these claims were really all about damages. By comparison with some my experience of phone hacking litigation is limited and, given the nature of costs proceedings, after the event. But the impression that I have gained from what I have read over the period that I have been involved is that the Claimants were not motivated principally by their claims for damages. They were motivated principally by the desire to hold the Defendant to account.

58. These claims were simply not just about damages. In my judgment the value of the non-monetary relief in issue in the proceedings, taken as a whole, was substantial and at least as great as the sums in issue.

The complexity of the litigation

59. By no stretch of the imagination could these claims be described as straightforward or run-of-the-mill by comparison either with civil litigation generally or privacy claims in particular. The Claimants had to piece together the evidence of wrongdoing, not only in relation to the general case of the Defendant's involvement in phone hacking, but also in relation to their individual cases. They faced a defence of limitation. They had the difficulty of running the case in parallel with the criminal proceedings. Some of the Claimants faced the difficulty of the disclosure proceedings against the Metropolitan Police.

60. A lazy, but arguably foolproof, way of determining the complexity of a case is to consider the amount of time which the court was willing to devote to it. The trial of the representative claims lasted 13 days in the High Court and resulted in a reserved judgment which runs for 712 paragraphs over 223 pages. Had liability not been admitted 6 months before the trial, the trial and the judgment would doubtless both have been longer.

61. In my judgment this was complex litigation in the High Court. The Defendant instructed leading and junior counsel at the trial. That complexity existed not only in the work set out in the common costs bill and the work done for trial, but also in the work done for the individual Claimants.

Any additional work generated by the conduct of the paying party

62. Contrary to the Claimants' submission, it seems to me that the conduct relied on must be conduct in the litigation rather than the conduct which gave rise to the cause of action. The conduct which caused the wrong will be compensated in damages or other relief. In my view the purpose of r.44.3(5)(d) is to enable the court to take into account that the costs may have been increased because work which would not ordinarily have been required has been required by the way in which the opponent has fought the claim.

63. It also seems to me that the conduct relied on does not need to be misconduct. Had that been intended misconduct could easily have been substituted in the rule for conduct.

64. In the event in my judgment there was no additional work caused by the conduct of the Defendant. That the Defendant chose to deny liability until 6 months before trial did not cause additional work. It caused the claim and the work involved in the claim. If a failure to concede by the party who eventually loses is considered of itself to cause additional work, this factor would apply in every case which did not settle within the relevant pre-action protocol period.

65. The Defendant fought these claims vigorously and did not concede liability at the earliest opportunity. As a consequence it will have to pay a greater sum in costs than if it had not fought the claims so vigorously or had conceded liability earlier. However I am not persuaded that this stance or the matters listed in the Claimant's written submissions caused *additional* work in relation to the individual claims.

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

66. It is clear from the words "such as" that reputation and public importance are examples rather than an exhaustive list of wider factors.

67. It seems to me that there were a number of wider factors involved in these proceedings.

68. First, they were undoubtedly of significant public importance. As Vos J (as he then was) recognised,[4] phone hacking claims attracted significant public interest. The representative claims in the Mirror Group litigation are the only phone hacking claims to have gone to trial.

69. Secondly the reputations of the Claimants were involved. As I have already commented, many of the articles that were published cast the Claimants in a negative light, disclosing matters which were extremely personal and of no business to

[4] Para 36 above

anybody else. It seems to me that reputation can be involved even if what was published was not defamatory or untrue.

70. Thirdly it seems to me that it is appropriate to take into account the vindication which the Claimants obtained by pursuing these proceedings as a wider factor involved in the proceedings. The Claimants alleged serious, and indeed criminal, misconduct by a national newspaper group. The Defendant denied that misconduct and maintained that denial until shortly before trial.

71. The Defendant's misconduct is exemplified in these passages in the judgments of Mann J following trial and Arden LJ on appeal. I referred to them in my judgment on hourly rates, but they are worth repeating.

> All this means that Mr Yentob's phone was hacked at least twice a day, and often several times a day, for a substantial part of a period of about 7 years, though perhaps for not the whole of that 7 years. I expect the intensity rose as more and more people got used to the technique and its usefulness. All aspects of his personal and business life were exposed because of the nature of his use of voicemail. This is an enormous intrusion. In those terms this is a serious case. To this one adds the possibility of "farming" his other contacts, the extent of which it is impossible to determine.
>
> - per Mann J [2015] EWHC 1482 (Ch) para 243
>
> Indeed, so far as I can see, there were no mitigating circumstances at all. The employees of MGN instead repeatedly engaged in disgraceful actions and ransacked the respondents' voicemail to produce in many cases demeaning articles about wholly innocent members of the public in order to create stories for MGN's newspapers. They appear to have been totally uncaring about the real distress and damage to relationships caused by their callous actions. There are numerous examples in the articles of the disclosure of private medical information, attendance at rehabilitation clinics, domestic violence, emotional calls to partners, details of plans for meeting friends and partners, finances and details of confidential employment negotiations, which the judge found could not have been made if the information had not been obtained by hacking or some other wrongful means. The disclosures were strikingly distressing to the respondents involved.
>
> - per Arden LJ [2015] EWCA Civ 1291 para 106

72. That distress was compounded in some cases by the belief that the articles published must have derived from information disclosed by friends or family members.

73. In the face of the Defendant's denial, the Claimants pursued difficult claims to bring the Defendant to account for its disgraceful behaviour. These claims were not about

claiming compensation for an injury. They were about seeking vindication for the Claimants' position that they were the victims of appalling breaches of privacy by a national newspaper group motivated only by commercial gain.

Are the individual costs proportionate?

74. Rule 44.3(5) does not identify any of the five factors as being more important than the others. Inevitably it is easier to consider whether one sum bears a reasonable relationship to another than whether a sum bears a reasonable relationship to an abstract concept. However I cannot accept the Defendant's submission that the sums in issue and the value of the non-monetary relief are the primary factors.

75. The rule does not prevent the recovery of costs in an amount greater than the sums in issue in the proceedings. Had that been intended it could easily have been stated. Financial value is but one of the five factors and so there will be cases where, by reason of the other four factors, the costs are proportionate even though they exceed the sums in issue.

76. In my judgment this is such a case. The value of the non-monetary relief and the wider factors I have sought to identify justify the conclusion that the costs can be proportionate even though they exceed the damages.

77. Taking the holistic approach suggested by HHJ Dight in *May*, but having regard in particular to the value of the non-monetary relief and the wider factors in these cases, I cannot conclude that the total costs of Mr Gascoigne of £220,590 (£61,976 agreed reasonable and proportionate common costs and £158,614 agreed reasonable individual costs) are disproportionate in a claim which proceeded to a 13 day trial and resulted in an award of damages of £188,250.

78. The costs of the other Claimants are lower and I would reach the same conclusion, even though for some the sums in issue were lower. For Mr Yentob, going to trial and seeking vindication was an important factor.

79. Of the settled Claimants, the costs of Mr Jackson and Mr Eccleston are the highest: £71,453 reasonable individual costs for Mr Eccleston and £60,191 reasonable individual costs for Mr Jackson, plus in each case £61,976 agreed reasonable and proportionate common costs. Even though I would put the sums in issue in each case at £50,000 to £100,000, and so less than the amount of costs, in my judgment the figures for costs bear a reasonable relationship to the five factors as a whole.

80. It follows that in my judgment none of the agreed reasonable individual costs are disproportionate, even when taking into account the appropriate share of the common costs:

| Claimant | Sums in issue (para 47) | Agreed reasonable base costs (ex VAT) | Agreed reasonable and proportionate common costs (ex VAT) | Total base costs (ex VAT) |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| Yentob | £50,000 to £100,000 | £85,651 | £33,740 | £119,391 |
| Gascoigne | £150,000 to £250,000 | £158,614 | £61,976 | £220,590 |
| Black/Willis | £100,000 to £150,000 | £27,680 | £123,951 | £151,631 |
| Wallace | £150,000 to £250,000 | £27,243 | £61,976 | £89,219 |
| Jackson | £50,000 to £100,000 | £60,191 | £61,976 | £122,167 |
| Eccleston | £50,000 to £100,000 | £71,453 | £61,976 | £133,429 |
| Andre | £50,000 to £100,000 | £18,504 | £61,976 | £80,480 |
| Horlick | £50,000 to £100,000 | £28,913 | £61,976 | £90,889 |
| Day | £150,000 to £250,000 | £30,565 | £61,976 | £92,541 |

Success fees

81. 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.

*BNM v MGN Ltd*

82. Neither the Claimants nor the Defendant relied on my decision in *BNM v MGN*[5] in relation to how the post-2013 test of proportionality should be applied. Insofar as may be necessary I repeat paragraphs 18 to 22 and 36 to 40 of that judgment. I remain of the view that the new test of proportionality is intended to bring about a real change in the assessment of costs.

[5] [2016] Costs LO 441

83. But *BNM* was very different to the present case. It was not itself a phone hacking case, although it was managed with the phone hacking litigation. The award of damages was always going to be modest. There had been no publication and there was no real risk of publication. It was not a claim for substantial non-monetary relief, it was not particularly complex and there were no wider factors involved. Indeed I was reminded by Mr Browne QC that in *BNM* Mr Carpenter had sought to contrast the disappearance of the Claimant's mobile phone in that case with the public interest in phone hacking.