

PROPORTIONALITY IN COSTS

This article examines the principle of proportionality in the context of the recent amendments to the Rules of Court by the Rules of Court (Amendment No 3) Rules 2010. It will be suggested that proportionality is a fundamental concern of civil proceedings and that the principle has a particularly important bearing on access to justice.

Jeffrey **PINSLER** SC
*LLB (Liverpool), LLM (Cambridge), LLD (Liverpool);
Barrister (Middle Temple), Advocate & Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.*

I. Introduction

1 If there was any doubt that a court is required to take into account the principle of proportionality¹ in exercising its discretion to award costs, such uncertainty has been unequivocally removed by the Rules of Court (Amendment No 3) Rules 2010² (“the 2010 Amendment Rules”). Much of this article will focus on para 1(2) of Appendix 1 of O 59, which has been amended to incorporate “the principle of proportionality”. Other related developments to be covered include a new emphasis on the parties’ conduct in attempting to resolve their dispute by mediation or other form of dispute resolution, and the broadening of the court’s discretion to award costs against the plaintiff on his application for summary judgment where the defendant has obtained unconditional leave to defend the action.³

II. Principle of proportionality

2 The principle of proportionality raises the question of whether the process engaged to achieve a particular objective is justified by that objective’s potential benefits. Put more literally, is the cost or effort necessary to achieve the desired result proportionate to the benefit to be gained? Although the principle has long been established in European civil law, it became a primary element in the reform of England’s Civil Procedure Rules (“CPR”) in the late 1990s. Rule 1.1(2) of the CPR

1 Proportionality is defined in the following paragraphs.

2 S 504/2010. The amendment rules came into force on 15 September 2010.

3 The Rules of Court (Amendment No 3) Rules 2010 (S 504/2010) also affect O 59 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (costs for more than two solicitors) and introduce a new O 101 (concerning “referrals on issues of law”).

formulates proportionality as an “overriding objective”. It provides that: “Dealing with a case justly includes, so far as is practicable ... (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party ...” In the specific context of assessment of costs, r 44.5(1) of the CPR provides that the court is to determine whether costs on the standard basis are proportionately and reasonably incurred and proportionate and reasonable in amount.⁴

3 Although the principle of proportionality was not expressly formulated as a consideration prior to the 2010 Amendment Rules,⁵ Singapore’s rules of civil procedure have increasingly reflected facets of proportionality. General case management including conferences with the court,⁶ differentiated case management, specialised management of certain cases, other judicial management schemes and court-related dispute resolution ensure that cases are allocated appropriate (proportionate) attention and resources according to their specific needs.⁷ Over the last ten years, various rules of court have been amended to emphasise that litigants can no longer assume that they will recover costs simply on the basis of success. For example, O 59 r 5 of the Rules of Court⁸ empowers a court to take into account the conduct of the litigants both before and in the course of proceedings, attempts at alternative dispute resolution⁹ and compliance with pre-action protocols and practice directions in determining the amount of costs to be awarded (irrespective of the outcome of the litigation). Order 59 r 6A penalises a party in costs (whether or not he is successful in the case) if he raises a claim or issue which he has failed to establish so that he “has consequently unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings”. In cases heard by a Magistrate’s Court and in motor accident actions where no injury has been caused (“NIMA” claims), there is a fixed scale of costs calibrated according to the sum “settled” or “awarded” or (in Magistrate Court cases, where the plaintiff has failed) “claimed”.¹⁰ The intention of these and other procedural measures is to encourage parties to assess the viability of litigation as well as the manner in which they pursue their cases in the context of costs recoverability or liability. What they do has

4 Also see r 44.5(3) of the Civil Procedure Rules (UK) concerning some of the prescribed factors which the court is to take into account.

5 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

6 Generally, under the Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 and O 34A.

7 For a detailed account of these processes, see James Leong (District Judge), “Proportionality – cost effective justice?” (a paper delivered at the 22nd AIJA Annual Conference, Sydney, Australia, 17–19 September 2004).

8 Cap 322, R 5, 2006 Rev Ed.

9 Introduced by the Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

10 See Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59, Appendix 2, Pts IV and V.

to be measured against (or must be proportionate to) what they will receive or pay.

III. Position under O 59, Appendix 1, para 1(2) prior to the amendments

4 Prior to the introduction of the 2010 Amendment Rules,¹¹ O 59, Appendix 1, para 1(1) and (2) (which appear under “Costs on Taxation”),¹² provided as follows:

(1) The amount of costs to be allowed shall (subject to any order of the Court) be in the discretion of the Registrar.

(2) In exercising his discretion the Registrar shall have regard to all the relevant circumstances, and in particular to —

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the urgency and importance of the cause or matter to the client; and

(f) where money or property is involved, its amount or value.

5 While the proportionality principle is not expressed here, facets of it are evident from the criteria. For example, with regard to sub-paras (a) and (b), higher costs may be justified by reason of the complexity or novelty of the issues and the additional skill and effort necessary for presenting the case. Similarly, time expended on obviously significant documents ordinarily justifies a higher sum than work on less important items of evidence (see sub-para (c)). Expenses may also be justified according to the location in which the issues arose and the circumstances of the dispute (see sub-para (d)). Again, the extent of the party’s need to pursue litigation and the amount of money or value of the property at stake should be a key consideration in determining whether the costs incurred were justified (see sub-paras (e) and (f)). Despite the implied significance of proportionality in these criteria, the

¹¹ Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

¹² See Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59 r 31(2).

rules do not expressly compel the taxing registrar to apply the proportionality principle.¹³ As the taxing registrar is required to exercise his discretion to award costs (on a standard basis) on the principle of reasonableness formulated in O 59 r 27(2),¹⁴ proportionality could only have operated to the extent that it was taken into account in determining reasonable costs. Order 59 r 27(2) states:

On a taxation of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party

6 According to this rule, the taxing registrar is required to consider whether the item of costs claimed has been reasonably incurred and, if so, what is a reasonable amount in respect of that item. Although proportionality is not mentioned, it is conceivable that a cost which is out of proportion to the issues in the case or the value of the claim may not have been reasonably incurred and/or not reasonable in amount. For example, assume that the plaintiff claims \$100,000. The case involves issues of complexity requiring expert evidence. The plaintiff arranges for three experts of international standing to give evidence. The cost of procuring this evidence is \$300,000, three times as much as the claim amount. The taxing registrar may determine that it would have been reasonable for the plaintiff to have engaged a single expert for this purpose and that the costs for doing so should not have exceeded \$50,000. Such a decision involves proportionality to the extent that the engagement of additional experts was not strictly necessary and therefore could not justify an award of costs greatly in excess of the claim amount. *Ie*, the claim for \$300,000 in costs was not reasonably incurred and not reasonable in amount.

7 However, the concepts of reasonableness and proportionality may not be consistent where the scope of reasonableness is limited to the needs of litigation. Taking the above example, assume that all three experts were necessary because they gave evidence on highly specific issues requiring their individual expertise (*ie*, the costs of engaging these three experts were reasonably incurred). Assume also that the costs claimed (\$300,000) are reasonable in amount as they fairly reflect the expenses of procuring, preparing and presenting the expert evidence. As the costs are reasonably incurred and reasonable in amount, they might be allowed by the taxing registrar even though they greatly exceed the claim amount. In contradistinction, the principle of proportionality would require a substantial reduction in the amount of costs (despite

13 This was acknowledged by Judith Prakash J in *VV v VW* [2008] 2 SLR(R) 929 at [28].

14 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

their reasonableness) because they are disproportionate to the claim amount. Although the taxing registrar has the discretion to reduce the sum of \$300,000 pursuant to the criteria in O 59, Appendix 1, para 1(2)(f) (which requires him to take the value of the claim into account),¹⁵ he would be entitled (in the absence of any provision declaring proportionality to be a paramount principle) not to do so or to deduct an insignificant amount.¹⁶

8 Interestingly, the principle of proportionality in the context of litigation costs was only recently addressed by the High Court in *VV v VW*.¹⁷ Although this case involved arbitration proceedings, its general observations on litigation costs highlighted the difficulties prior to the introduction of the 2010 Amendment Rules.¹⁸ The plaintiffs claimed \$927,000 in respect of a contractual dispute. The defendant raised two defences and ten counterclaims for an amount of \$20m. In the course of the proceedings, the arbitrator ruled that as he did not have the jurisdiction to treat the defendant's counterclaims as independent claims, they could only diminish the amount (if any) to be awarded to the plaintiffs. Accordingly, the defendant would not be paid any sums in any event.¹⁹ Ultimately, the plaintiffs' claim was dismissed and the defendant was awarded costs of the arbitration in the amount of \$2.8m (\$2.25m in legal fees) plus disbursements. (The arbitrator had found that although the defendant's counterclaims had not been determined in the arbitration, they had been relied upon to establish an equitable set-off. Accordingly, the counterclaims "had not been unreasonably raised".²⁰) The plaintiffs applied to the High Court to set aside the order of costs on various grounds, one of which being that the amount of costs conflicted with public policy in that the award was "wholly disproportionate to the amount at stake in the arbitration".²¹ Judith Prakash J disagreed with this proposition and declared: "[I]t is not part of the public policy of Singapore to ensure that the costs incurred by parties to private litigation outside the court system, *eg*, arbitration ... are assessed on the basis of any particular principle including the proportionality principle."²² Therefore, the plaintiffs could not challenge the costs award on the basis that public policy entailed a principle of proportionality.²³

15 Rules of Court (Cap 322, R 5, 2006 Rev Ed). See para 4 of this article.

16 Of course, there are other rules which enable the taxing registrar to deduct costs for specific reasons. See, *eg*, O 59 rr 5 and 6A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (which are addressed in para 3 of this article).

17 [2008] 2 SLR(R) 929.

18 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

19 *VV v VW* [2008] 2 SLR(R) 929 at [7].

20 *VV v VW* [2008] 2 SLR(R) 929 at [13].

21 *VV v VW* [2008] 2 SLR(R) 929 at [16].

22 *VV v VW* [2008] 2 SLR(R) 929 at [31].

23 *VV v VW* [2008] 2 SLR(R) 929 at [32].

9 More pertinent to this article were the learned judge's observations concerning proportionality in litigation before the courts. Her Honour pointed out that while the proportionality principle has been "reflected in a more general way" by case management, specific rules and other measures to control the costs of litigation,²⁴ "the costs provisions of the Rules of Court do not make any reference to proportionality".²⁵ "Whilst [the proportionality principle] may influence a taxing officer when he is considering whether the conduct of litigation has been reasonable, there is nothing in Singapore law, unlike the position in England, which compels the taxing officer to give regard to the principle."²⁶ Interestingly, the learned judge pointed out that had she been adjudicating the taxation, she "would have opened it up to determine whether it was reasonable for one party to have to pay such a high quantum in costs".²⁷ Concerning proportionality, her Honour stated in *VV v VW*:²⁸

What is truly meant by [the proportionality principle] is that when legal costs have to be assessed, all circumstances of the legal proceedings concerned have to be looked into, not only the amount of the dispute though that is an important factor, especially when assessing whether the amount of the work done was reasonable, but also everything else that occurred.

IV. Introduction of the principle of proportionality to O 59, Appendix 1, para 1(2)

10 The 2010 Amendment Rules²⁹ para 3(c) amends para 1(2) of Appendix 1 of O 59³⁰ by deleting the words "all the relevant circumstances, and in particular to ..." and substituting the words "the principle of proportionality and all the relevant circumstances and, in particular, to the following matters:" Accordingly, the preamble to para 1(2) now reads:

In exercising his discretion the Registrar shall have regard to the principle of proportionality and all the relevant circumstances and, in particular, to the following matters:

11 As the criteria in para 1(2)(a) to (f)³¹ are not affected, they (as well as other relevant circumstances) may continue to be taken into

24 This is discussed in para 3 of this article.

25 *VV v VW* [2008] 2 SLR(R) 929 at [28].

26 *VV v VW* [2008] 2 SLR(R) 929 at [28].

27 *VV v VW* [2008] 2 SLR(R) 929 at [29].

28 [2008] 2 SLR(R) 929 at [33].

29 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

30 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

31 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59, Appendix 1. See para 4 of this article.

account by the taxing registrar. However, as the principle of proportionality is now a *primary* element of his discretion, the relationship between the value of the claim and the costs incurred can no longer be classified simply as a particular criteria (such as in para 1(2)(f)) to be considered among the many other relevant circumstances. There is also the issue of how the courts will construe the requirements of O 59 r 27(2) of the Rules of Court³² – that costs must be reasonably incurred and reasonable in amount – in the context of the newly expressed proportionality principle. Does reasonableness include proportionality or are they separate concepts? If they are separate concepts, are they consistent with each other? The answers to these questions depend on how reasonableness is construed. As discussed above, reasonableness may be interpreted solely in the context of costs which need to be incurred for the purpose of litigation regardless of their proportion to the value of the claim. To the extent that proportionality may be regarded as a reasonable concept (*ie*, that it is reasonable that the costs of litigation should be measured against its ultimate objective), it may be characterised as an element of reasonableness: reasonableness subsumes proportionality.

12 It is submitted that the Singapore courts should endorse this proposed construction for at least two reasons. First, O 59 r 27(2) of the Rules of Court³³ states that reasonableness is the sole basis for the recovery of costs. The position under this rule is not affected by the 2010 Amendment Rules,³⁴ which introduce the principle of proportionality to para 1(2) of Appendix 1 of O 59 (the purpose of which is to give effect to the reasonableness principle). Compare this position to that under the r 44.5(1)(a) of the CPR, which treats proportionality and reasonableness as distinct principles.³⁵ Secondly, concerning r 44.5(1)(a), certain questions have to be asked. How do proportionality and reasonableness operate in the process of reducing costs? For example, if the taxing registrar decides that the costs are disproportionate to the claim, does he automatically reduce the costs by an appropriate proportion or does he first consider whether they have been reasonably incurred and are of a reasonable amount before deciding to make any deduction? Is the proportionality principle to be applied to costs claimed as a whole or to individual items or both? Should proportionality be considered before or after determining whether costs have been reasonably incurred or are reasonable in amount?

32 See para 5 of this article.

33 Cap 322, R 5, 2006 Rev Ed.

34 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

35 Which provides in respect of costs awarded on a standard basis that they were proportionately and reasonably incurred and proportionate and reasonable in amount.

13 In *Lownds v Home Office*³⁶ (“*Lownds*”), Lord Woolf MR, in delivering the judgment of the Court of Appeal, advocated a two-stage approach:³⁷

There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is [*sic*] turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.

14 It is clear here that Lord Woolf was considering proportionality and reasonableness as separate concepts. Furthermore, proportionality is qualified by reasonableness in the sense that costs which are reasonably incurred and of reasonable amount are recoverable even if they are disproportionate. Assume, for example, that a complex case justified payment of legal fees by the successful plaintiff in excess of the amount claimed. The legal fees are reasonably incurred and reasonable in amount in the circumstances. According to *Lownds*,³⁸ the full amount of the fees may be recoverable on the basis of necessity and reasonableness. However, the issue of whether the defendant should, as a matter of principle, have to pay the plaintiff party and party costs based on the disproportionate amount claimed is not addressed. Should the defendant have to carry the financial burden of compensating a plaintiff who has decided to use disproportionate (even if necessary) means to resolve the dispute? The *Lownds* approach has been criticised, most recently by Lord Justice Jackson in *Review of Civil Litigation Costs (Final Report)*³⁹ (“*Jackson Report*”). Lord Jackson recommended the abandonment of this practice for a system which prioritises proportionality:

36 [2002] EWCA Civ 365; [2002] 1 WLR 2450.

37 [2002] 1 WLR 2450, at [31].

38 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450.

39 December 2009.

If a judge assessing costs concludes that the total figure, alternatively some element within that total figure, was disproportionate, the judge should say so. It then follows from the provisions of CPR rule 44.4(3) that the disproportionate element of costs should be disallowed in any assessment on the standard basis. In my view, that disproportionate element of the costs cannot be saved, even if the individual items within it were both reasonable and necessary.⁴⁰ [footnote added]

I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction.⁴¹ [footnote added]

15 *VV v VW*,⁴² which has already been addressed,⁴³ is the only case to have referred to *Lownds*.⁴⁴ It will be recalled that Prakash J determined that public policy did not require the costs of arbitration to be assessed on any specific principle including proportionality.⁴⁵ While acknowledging that proportionality was not an element of the system of assessing costs in court proceedings,⁴⁶ her Honour considered the position if r 44.5(1) of the CPR and *Lownds* applied in Singapore. In *VV v VW*, the defendant had pursued ten counterclaims in the arbitration proceedings even though the arbitrator had ruled that he only had the jurisdiction to hear the counterclaims as equitable set-offs. As the counterclaims did not have independent standing, the defendant would not be entitled to a separate award and could at best only extinguish the plaintiffs' claim of \$927,000.⁴⁷ Ultimately, the plaintiffs' claim was dismissed and the defendant was given the costs of the arbitration. Although the arbitrator considered all the counterclaims to have been reasonably raised (as they had "some merit"),⁴⁸ Prakash J took the view that as two or three counterclaims would have been more than sufficient to extinguish the plaintiffs' claim, the remaining claims were

40 Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at para 5.12.

41 Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at para 5.13. The test of proportionality does not, however, replace the requirement for the court to consider the bill in detail on an item by item basis. The application of any reduction for proportionality should only take place when each item on the bill has been assessed individually.

42 [2008] 2 SLR(R) 929.

43 See para 8 of this article.

44 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450.

45 *VV v VW* [2008] 2 SLR(R) 929 at [31]. See para 8 of this article.

46 See para 9 of this article.

47 See para 8 of this article.

48 *VV v VW* [2008] 2 SLR(R) 929 at [13].

unnecessary. Applying Lord Woolf's pronouncement that a claimant should not be entitled to recover costs increased or incurred by putting forward an exaggerated claim,⁴⁹ her Honour stated that she would not have allowed the defendant to recover the costs of the unnecessary counterclaims.⁵⁰ The learned judge also indicated that the principle of proportionality would have entitled the plaintiffs to challenge the rates charged by the defendant's lawyers.⁵¹

V. Proposed approach for Singapore

16 As *VV v VW*⁵² was decided prior to the introduction of the 2010 Amendment Rules,⁵³ the observations on proportionality in that case will have to be considered in the light of these new statutory developments. The 2010 Amendment Rules provide a more flexible system for the assessment of costs as compared to the English CPR. Proportionality is treated as a key component of reasonableness rather than as the separate and distinct concept of the CPR scheme. It may be convenient to examine the amendments in the following step-by-step account.

(a) Order 59 r 27(2) of the Rules of Court⁵⁴ governs the recoverability of costs on a standard basis.⁵⁵ The bases of recoverability are that the costs were reasonably incurred and are reasonable in amount. Appendix 1(1) states that the registrar has complete discretion in awarding costs. Appendix 1(2) requires the registrar to "have regard to the principle of proportionality and all the relevant circumstances and, in particular, to the criteria in (a)–(f)".⁵⁶ As the principle of proportionality is now a key element in the taxation of costs, the expression "reasonably incurred" should no longer be limited to those costs which the party reasonably needed to incur in pursuing or defending the claim.

(b) As the principle of proportionality requires the registrar to consider the relationship between the costs claimed and the circumstances of the litigation (including the amount of the claim or the value of non-monetary relief, the nature of the

49 *VV v VW* [2008] 2 SLR(R) 929 at [34] (applying *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450).

50 *VV v VW* [2008] 2 SLR(R) 929 at [35]–[38].

51 *VV v VW* [2008] 2 SLR(R) 929 at [35].

52 [2008] 2 SLR(R) 929.

53 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

54 Cap 322, R 5, 2006 Rev Ed.

55 Indemnity costs (O 59 r 27(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) are considered at paras 22 and 23 of this article.

56 Also see *VV v VW* [2008] 2 SLR(R) 929 at [33].

issues in dispute, the conduct of the parties, and other relevant matters or incidents),⁵⁷ he should make an initial determination as to whether the costs satisfy the principle of proportionality. There would be no deduction at this stage, although he would keep his preliminary finding on the issue of proportionality in mind.

(c) The registrar will then consider whether the costs claimed were reasonably incurred and reasonable in amount in the context of the conduct of the litigation (costs which a party reasonably needed to incur to pursue or defend the claim). Costs which were unreasonably incurred would not be allowed. If the costs were reasonably incurred but unreasonable in amount, appropriate deductions would have to be made.

(d) If the registrar decides that the costs were reasonably incurred (subject to any deduction in respect of an unreasonable amount) in the context of what reasonably needed to be done in the litigation, he would determine whether they are proportionate. If the costs are disproportionate, he would make the necessary deduction to ensure they are proportionate.

(e) Costs which are reasonably incurred and reasonable in amount in the context of what needed to be reasonably done by the party in the litigation, and which are proportionate, would be allowed.

17 The approach in paras (a)–(e) is different to that adopted by the CPR as interpreted in *Lownds*⁵⁸ but is consistent with the 2010 Amendment Rules.⁵⁹ In this scheme, proportionality is accentuated as an integral component of a broader reasonableness test rather than as a separate principle. Taking the above example of the three experts,⁶⁰ the cost of procuring them (\$300,000) would appear to be disproportionate to the \$100,000 claim. The taxing registrar would bear this in mind under para (b) above. He would then (under para (c)) consider whether the costs of procuring these experts were reasonably incurred and reasonable in amount in the context of the conduct of the litigation (costs which a party reasonably needed to incur to pursue or defend the claim). If not reasonably incurred or reasonable in amount, the costs would be reduced. For example, if the taxing registrar concludes that only one expert was necessary, and a reasonable amount would be \$50,000, the appropriate reduction will be made. If he determines that the costs of procuring the three experts were reasonably incurred and reasonable in amount (or he makes an adjustment to bring them to a

57 These will be elaborated upon below.

58 *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450.

59 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

60 See para 6 of this article.

reasonable amount), he will go on to consider (under para (d)) whether a further reduction should be made to make them proportionate. Similarly, if the facts of *VV v VW*⁶¹ were to arise in court proceedings, the court would have to determine whether the costs of including all ten counterclaims were reasonably incurred and reasonable in amount. If not, the costs would have to be adjusted. If reasonably incurred and reasonable in amount, the court would go on to consider the issue of proportionality.

18 The critical issue raised by proportionality is whether the paying party should have to bear disproportionate costs even though they were reasonably incurred. This begs the question of whether the claimant made, or could have made, an attempt to resolve the dispute otherwise than by litigation. In this connection, the 2010 Amendment Rules⁶² have also added a new provision to O 59 r 5 (which concerns matters to be considered in exercising the discretion to award costs). Order 59 r 5(c) states that the court is to take into account:

... the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution
...

19 Clearly, where the party seeking to be paid costs made no attempt to resolve the case amicably when the circumstances are such that he could have been reasonably expected to do so, this will be a significant factor against allowing disproportionate costs. However, where he has made such efforts but the defendant failed to reciprocate, the latter may be penalised. The court needs to be vigilant so that insincere attempts at settlement with the ulterior motive of securing a costs advantage at taxation can be identified. Other pre-existing provisions in O 59 r 5 of the Rules of Court⁶³ are also significant. Order 59 r 5(a) requires a court to take into account any payment of money into court (including the amount paid in). The fact that the plaintiff has unreasonably ignored the defendant's payment into court should count against him if his costs are disproportionate or otherwise unreasonable.

20 Order 59 r 5(b) of the Rules of Court⁶⁴ provides that the conduct of a party (including conduct before or during the proceedings) is to be taken into account. The conduct of either party may justify, or militate against, the recovery of disproportionate costs. The paying party who has conducted himself in a manner which compelled the claimant to incur disproportionate costs may have incurred responsibility for them. Taking again the example of the three experts, the plaintiff may have

61 [2008] 2 SLR(R) 929.

62 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

63 Cap 322, R 5, 2006 Rev Ed.

64 Cap 322, R 5, 2006 Rev Ed.

only intended to call two experts in the hope that certain issues (which would ordinarily require an additional expert) could be agreed or limited or resolved in the form of a joint statement under O 40A.⁶⁵ However, the defendant unreasonably refused to co-operate (by ignoring the plaintiff's request for a meeting and discussion between their respective experts), thereby forcing the plaintiff to call the third expert. In these circumstances, it may be just to require the defendant to pay the disproportionate costs of the third expert.⁶⁶ Pursuant to O 59 r 5(d), parties may also be penalised in costs for failing to comply with pre-action protocols and practice directions. Other provisions may also affect the taxing registrar's discretion concerning proportionality.⁶⁷

21 In certain circumstances, the proportionality principle may have to be adapted. For example, assume that the claimant is awarded a judgment for a much smaller sum than what he originally claimed. The issue of whether the costs are proportionate should be considered with regard to what the claimant could reasonably have expected to recover when he filed his claim. This necessarily means that the claimant will not receive any costs benefit for exaggerated claims but his reasonable expectations will be taken into account. Similarly, proportionality in the context of the defendant's costs is to be determined by reference to the amount that it was reasonable for the defendant to believe that the claimant might recover, should his claim succeed. Normally, this would be the actual amount claimed by the plaintiff as the defendant would be reasonably entitled to regard this as *prima facie* valid. Accordingly, the defendant is not prejudiced by the proportionality principle if he assumes that the claim was reasonable and accordingly incurs costs in defending it.⁶⁸

VI. Proportionality and indemnity costs

22 Thus far, this article has been concerned with the normal costs or costs awarded on a standard basis pursuant to O 59 r 27(2) of the Rules of Court.⁶⁹ The question arises whether the proportionality principle applies to costs recoverable on an indemnity basis. Order 59 r 27(3) states:

65 See, in particular, Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A rr 4 and 5.

66 In *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 at [38], Lord Woolf stated: "If [the paying party] is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable."

67 See, eg, Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59 r 6A. Also see O 59 r 3 generally.

68 See *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 at [39]–[40]. These views were also cited in *VV v VW* [2008] 2 SLR(R) 929 at [34].

69 Cap 322, R 5, 2006 Rev Ed.

On a taxation on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party

23 If, as has been proposed, proportionality is subsumed by reasonableness in O 59 r 27(2) of the Rules of Court,⁷⁰ it also operates in the context of indemnity costs which is rooted in the same concept. The 2010 Amendment Rules⁷¹ include the proportionality principle in O 59, Appendix 1, para 1(2), which applies to both the standard and indemnity bases of costs in rr 27(2) and (3) respectively.⁷² Therefore, to the extent that disproportionate costs are unreasonably incurred or unreasonable in amount, they will not be recoverable on an indemnity basis. The position is different under the CPR which expressly applies the proportionality principle to standard costs but not to indemnity costs.⁷³ Lord Justice Jackson has recommended that the English rules should be amended to incorporate proportionality in the assessment of indemnity costs.⁷⁴

VII. Proportionality and solicitor and client costs

24 A primary reason for the high cost of litigation in many common law jurisdictions is the price of legal services.⁷⁵ While lawyers often argue they should not be treated differently to other professionals who charge according to market demand, there are certain critical considerations to bear in mind. First, the market for legal services tends to be set by the wealthier individuals and organisations who constitute a minority of those who seek legal representation. Secondly, lawyers have a statutory responsibility to facilitate access to justice by members of the public.⁷⁶ While this duty certainly does not oblige lawyers to ensure the affordability of their legal services to all persons, it surely does require a serious consideration of whether fee limits should be imposed generally or at least in respect of financially handicapped clients. Although

70 Cap 322, R 5, 2006 Rev Ed.

71 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

72 For the most recent affirmation of this principle, see *Lim Eng Hock Peter v Lin Jian Wei* [2010] SGHC 254.

73 See Civil Procedure Rules (UK) r 44.5(1)(a) and (b).

74 See Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at para 5.14.

75 In *Willis v Nicolson* [2007] EWCA Civ 199 at [18], the Court of Appeal (Buxton LJ delivering the judgment of the court) commented that: "One element in the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it."

76 The Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 2(2)(d).

pro bono work is on the rise, a clear culture of social responsibility right across the legal profession has yet to develop. It is probably true to say that a significant proportion of individuals in Singapore are unable to pursue or defend their legal rights because they do not qualify for legal aid and cannot afford legal representation.⁷⁷ Thirdly, the failure of the system of costs to expressly incorporate a proportionality principle prior to the 2010 Amendment Rules⁷⁸ may well have fed the belief that if enough lawyers charged high fees and incurred specific expenditures, they would be regarded as reasonable on the basis of a common trend.⁷⁹ While the official regulation of legal fees may not be a viable option,⁸⁰ the proportionality principle now included in O 59, Appendix 1, para 1(2) of the Rules of Court⁸¹ may present a new opportunity for setting costs in context.

25 As Appendix 1, para 1(2) of O 59⁸² applies to solicitor and client costs under O 59 r 28,⁸³ and such costs are calculated on an indemnity basis⁸⁴ (which attracts the proportionality principle)⁸⁵ subject to certain presumptions in r 28(2)(a)–(c), proportionality is now also a critical element in determining the costs which a lawyer hopes to recover on a taxation of his bill. For example, the requirement that costs be expressly or impliedly approved by the client may not be satisfied if that approval was given without proper advice or sufficient information so that the client was not in a position to weigh the costs against the expected benefit. At the taxation, lawyers should now be required to show the extent of any evaluation which they conducted with their clients before seeking approval for specific steps in the proceedings.⁸⁶ The requirement of proportionality will also mean that the presumptions that costs were reasonably incurred and reasonable in amount pursuant to r 28(2)(a) and (b) respectively would be rebutted if costs are disproportionate. It should be remembered that in *Wong Foong Chai v Lin Kuo Hao*⁸⁷ (decided five years before the introduction of the proportionality principle to Appendix 1, para 1(2)), Andrew Phang JC, as his Honour

77 In Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at para 4.4(i) (p 8), it is stated that “36% of the adult population of England and Wales have unresolved legal problems”.

78 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

79 See *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 at [2].

80 Because of difficulties in implementation and the real possibility that legal enterprise would be stifled to the detriment of the client. See Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at paras 5.1–5.3 (p 51).

81 Cap 322, R 5, 2006 Rev Ed.

82 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

83 See *Phua Lay Chay v Chai Kuan Way* [1988] SGHC 97.

84 See the first line of O 59 r 28(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

85 See paras 22–23 of this article.

86 See paras 27–28 of this article.

87 [2005] 3 SLR(R) 74 at [32].

then was, had no hesitation in ruling that the presumption in (b) had been rebutted as the costs agreed upon by the client and his lawyer were “jarringly out of all proportion to that which would be awarded under any normal circumstances for similar work”. Hopefully, the strict application of the principle of proportionality to solicitor and client costs under r 28 will result in an instinctive shift on the part of lawyers to a new benchmark for legal fees.

VIII. Fairer financial balance in litigation

26 The application of the proportionality principle to the standard, indemnity and solicitor and client bases should promote a fairer financial balance in litigation. The party ordered to pay costs on a standard basis would have to pay no more than the expenses the successful party reasonably incurred in order to conduct his case effectively. If the successful party only has to pay proportionate costs to his lawyer, the difference between the costs he has to pay the latter and the costs he recovers from the other party would (ideally) not be unduly burdensome in the overall context of litigation. There was a time when it was generally understood that the successful party would normally recover (on the standard basis) approximately two-thirds of his solicitor and client costs from his opponent. This can no longer be said to be the victor’s normal expectation. If solicitor and client costs are not to be regulated, *then at the very least the client must be informed in writing from the outset that he is entitled to object to his lawyer’s bill and apply to the court for an assessment of the solicitor and client costs through the taxation process. Currently, there is no such requirement in Singapore.*⁸⁸ Many clients are not aware of this right or are too apprehensive to assert it. The client cannot be expected to research the law on his own or to incur the expense of appointing another lawyer for this purpose. The obligation of the lawyer to give notice that his charges may be challenged should instil a more acute sense of proportionality in the preparation of his bill of costs.

IX. Proportionality and evaluation

27 Apart from its impact on the mechanics of the taxation process, the proportionality principle emphasises the importance of evaluating the cost consequences of litigation so that the client may make an informed decision having taken into account all possible options (including, in particular, the possibility of amicable settlement). If the conclusion is that litigation is justified, a further determination has to be

88 This is the English practice: see the Law Society’s “Client care letters practice note – 16 September 2010” at para 3.7 (England and Wales).

made to validate each and every step to be taken in the proceedings on the basis of proportionality. Unfortunately, the tendency of litigation practice has been to forge ahead in the proceedings with little regard for cost consequences until the time for payment arises. The following pronouncement is apposite in the context of the introduction of the proportionality principle to Singapore:⁸⁹

In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.

28 It goes without saying that proper evaluation with a client is an ethical imperative, as recently emphasised by the Court of Appeal in the strongest terms.⁹⁰ Furthermore, lawyers are duty bound to respond to the client's particular needs for advice, information and explanation.⁹¹ Proportionality is not limited to a comparison of the costs to the amount claimed. The proceedings may involve non-monetary claims and independent legal rights and public interest issues, in which case the whole value of what is being sought must be considered against those costs. A suit which involves complex issues (as in the above example involving three experts)⁹² is likely to generate costs out of proportion to the amount of the claim. However, the complexity criterion does not mean that costs which are much lower than a large claim amount in straightforward litigation will necessarily be proportionate. In evaluating the option of litigation, lawyers, like the taxing registrars, have to consider all aspects of the case in deciding whether the costs can be justified. As already suggested, in applying the proportionality principle, taxing registrars are likely to consider whether the parties and their lawyers properly evaluated their options throughout the case. Although lawyers are obliged by rules of ethics to provide their clients

89 See Lord Justice Jackson, *Review of Civil Litigation Costs (Final Report)* (December 2009) at para 4.1.

90 See Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 40 and *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* [2008] 2 SLR(R) 455 (and see the appendix to the judgment for the Court of Appeal's preceding brief grounds of decision). For further discussion of the issues, see J Pinsler, "Litigation and the client's right to make an informed choice" (2008) 20 SAclJ 21.

91 See, in particular, *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308; *Law Society of Singapore v Vardan Vasantha Lakshmi* [2007] 1 SLR(R) 240.

92 See para 6 of this article.

with information concerning fees, expenses and potential cost liabilities,⁹³ questions must arise as to whether these critical requirements are always complied with. In the interest of demystifying the financial complexities and cost pitfalls of the litigation process, and in accordance with the paramount duty to meet the needs of clients requiring particular attention in order to understand their position,⁹⁴ it seems only reasonable that such information should be provided in the clearest terms in *writing at the very outset of the retainer*.⁹⁵

X. Impact of proportionality on civil procedure generally

29 The manner in which para 1(2) of Appendix 1 of O 59 of the Rules of Court⁹⁶ has been amended by the 2010 Amendment Rules⁹⁷ is significant. The paragraph could have been modified so as to merely state that costs would have to be proportionate for the purpose of taxation. By referring to “the principle of proportionality”, the amendment acknowledges a pre-established doctrine of proportionate action in civil procedure. As already shown, this is evident from successive amendments to the Rules of Court and the judicial practice of controlling the flow of litigation through case management in the interest of efficiency, the saving of costs and resources.⁹⁸

30 The 2010 Amendment Rules⁹⁹ continue the trend not only through the specific inclusion of the proportionality principle in para 1(2) of Appendix 1 of O 59 of the Rules of Court.¹⁰⁰ The amendment of O 59 r 5 concerning the parties’ conduct in attempting to resolve their dispute through alternative means such as mediation now has a particularly important bearing on costs.¹⁰¹ In the future, parties who fail to reasonably attempt to resolve their dispute otherwise than by litigation take the very real risk of not recovering disproportionate

93 See, in particular, Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) rr 35 and 36.

94 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308.

95 Some law practices may provide information, for example, in their letter of engagement. A sample letter of engagement is available from the Law Society. However, the transmission of information in *writing* is not yet a mandatory requirement in Singapore. In England, the concept of a “client care letter” has been introduced and it requires lawyers to provide extensive written information on many issues including, in particular, costs. See the Law Society’s “Client care letters practice note – 16 September 2010” at paras 3.5, 3.5.1–3.5.4 for the position in England.

96 Cap 322, R 5, 2006 Rev Ed.

97 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

98 See para 3 of this article.

99 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

100 Cap 322, R 5, 2006 Rev Ed.

101 See para 18 of this article.

costs.¹⁰² The 2010 Amendment Rules also introduce a new costs provision pertaining to applications for summary judgment which is very likely to cause claimants to think carefully before engaging this process. Hitherto, the claimant could safely assume that if the defendant was granted unconditional leave to defend, the court would ordinarily order costs in the cause. Accordingly, the claimant had little to lose in making the application as he would only bear the costs if he lost at trial. Although O 14 r 7(1) of the Rules of Court provided (and continues to provide) that an application may be dismissed with costs if the court is satisfied that the claimant knew that the respondent would be able to rely on an issue which would justify unconditional leave to defend, this provision was very rarely applied by the courts.¹⁰³ The 2010 Amendment Rules have introduced a new para (3) to r 7 which reads as follows:

If the Court dismisses an application under Rule 1 or gives a defendant against whom such an application is made unconditional leave to defend the action with respect to the claim or any part thereof to which the application relates, the Court may make such order as to costs against the plaintiff as it considers fit.

31 Apart from the circumstances set out in O 14 r 7(1) of the Rules of Court,¹⁰⁴ the new r 7(3) invites the court to award costs in favour of the respondent against the applicant when the former has obtained unconditional leave to defend. A further amendment has been made to sub-para (c) of para 1(1) of Pt 1 of Appendix 2 of O 59 by providing for costs to be granted according to the existing scale. The amendment is a specific application of the proportionality principle. The claimant will now have to assess the merits of his claim and the likelihood of obtaining summary judgment against the real risk of being penalised for failing in his application.

32 Ultimately, the full expression of the proportionality principle depends on the willingness of lawyers to properly advise their clients on the viability of their options in the context of the benefits to be obtained and the cost (monetarily and otherwise) of achieving them. The courts have recently stressed the ethical imperative of proper evaluation so that the client may make an informed choice on how to proceed.¹⁰⁵ Common law practitioners have tended to only fully address the cost liabilities of clients during the final phase of court proceedings. Hopefully, through the proper application of the proportionality principle, costs will

102 See para 19 of this article.

103 See J Pinsler, "Ethics in chamber hearings: observations on certain practices" (2008) 20 SAclJ 746 at 760–761, para 27–30 for a fuller account of the difficulties raised by O 14 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

104 Cap 322, R 5, 2006 Rev Ed.

105 See paras 27–28 of this article.

become a vital consideration in the series of processes which constitute civil litigation.
