IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

01/11/2017

B e f o r e :

MR JUSTICE MARTIN SPENCER

Between:

LISA MARIE PERCY
(a protected party by her father and Litigation Friend, Richard Percy)

Claimant

- and –

MICHAEL ANDERSON-YOUNG **Defendant**

Mr Greg Cox, Solicitor for the Claimant
Mr Andrew Lyons (instructed by DAC Beachcroft Claims Ltd, Solicitors) for the Defendant
Hearing date: 12 October 2017

HTML VERSION OF JUDGMENT

Mr Justice Martin Spencer:

INTRODUCTION

1. On 19 October 2005, the Claimant, then aged 16 having been born on 5 August 1989, sustained a severe head injury in a road traffic accident when she was the passenger in a car being driven by the Defendant. Liability for the accident and the injuries sustained by the Claimant was not in dispute.

2. The parties reached terms of settlement at a mediation on 27 September 2013 and, the Claimant lacking capacity within the Mental Capacity Act, the settlement was approved by Mr Justice Haddon-Cave on 21 October 2013. The agreed Order included a provision that "the Defendant shall pay the Claimant's costs of the action to be the subject of detailed assessment on a standard basis in default of agreement."

3. The parties were able to agree all the costs save for one item, namely the liability of the Defendant to pay the premium for 'After The Event' ("ATE") insurance. The amount claimed was £533,017.13 inclusive of Insurance Premium Tax ("IPT"). This dispute accordingly came before a Regional Costs Judge, District Judge Moss, on 13 December 2016. By his Order dated 3 February 2017, DJ Moss ordered the Defendant to pay to the Claimant £82,513.07 for the assessed ATE premium. The Claimant appealed against that Order and permission to appeal was granted by Mrs Justice Andrews DBE on 7 March 2017. The appeal came before me on 12 October 2017.

SITTING WITH AN ASSESSOR

4. One of the issues that arose in the course of the hearing, which started at 10:30 am, was whether I should hear the appeal sitting with an Assessor as, for example, was done by Mr Justice Foskett in *Kai Surrey v Barnet & Chase Farm Hospitals NHS Trust* [2016] EWHC 1589. However, that was not raised until 3.30pm. I was encouraged to adjourn in order to do so by Mr Lyons, Counsel for the Defendant, but Mr Cox, who represented the Claimant, opposed that course. I informed the parties that I would consider that suggestion when considering my judgment in the matter and if I decided that I should sit with an Assessor, I would inform the parties and make the necessary arrangements including obtaining a transcript of the hearing on 12 October.

5. On the Defendant's case, one of the possible courses of action I could take if I were to allow the Claimant's appeal would be to substitute my own assessment of a reasonable premium for that of DJ Moss and, had that commended itself to me, I would have asked for the assistance of an Assessor as I certainly do not have the knowledge, experience or expertise to make such an assessment. However, for the reasons which will become apparent in this judgment, I do not consider such a course to be open in this case and I take the view that the question for me to decide is a pure question of law, for which I do not require the assistance of an Assessor. Nor does the Appeal raise questions of practice and procedure in respect of which an Assessor's knowledge and experience would equally have been very useful.

THE RELEVANT FACTS

6. The Appellant's claim was a serious and high value personal injury action arising from the road traffic accident on 19 October 2005. In the accident her friend had been killed. The Claimant suffered a severe head injury, with a period of post-traumatic amnesia of some four weeks. Upon discharge from hospital, the Claimant went to live with her father and stepmother (who happened to be a brain injury case manager). Initially there were physical effects including a right-sided hemiparesis, bilateral ataxia and diplopia but eventually she had made a good physical recovery. However, there were alleged ongoing cognitive problems affecting her ability to work and her mental capacity, causing a need for care, although these were all matters of dispute.

7. Solicitors, Messrs Arnison Heelis, were instructed in November 2005. They notified the Defendant's insurers of the claim and it was indicated in correspondence that liability would not be in dispute. The solicitors began the process of obtaining suitable expert evidence. Interim funding was obtained and a Case Manager was appointed in August 2006. It appears that, initially at any rate, the Defendant's insurers agreed to fund the Claimant's case management. Consultations with Leading Counsel occurred in March 2008 and again in October 2008 and draft Particulars of Claim and a draft schedule of loss were prepared in November 2008.

8. Proceedings were issued in January 2009, and the Defence, served on 3 February 2009, admitted liability, as expected. Judgment for damages to be assessed was entered on 30 April 2009 when the Defendant was also ordered to make a further interim payment of £100,000.

9. The Claimant moved into her own flat in July 2009 with day and night support.

10. In the meantime, at about the same time that the Claimant moved into her flat, she changed solicitors and instructed Mr Andrew Duff, a solicitor of Scott Duff & Co, Keswick, to represent her which he agreed to do pursuant to a Conditional Fee Agreement ("CFA") which was entered into on 8 July 2009. In September 2009, Mr Duff recognised the need to take out ATE insurance and he approached brokers, "The Judge", who on 3 November 2009 sent to Mr Duff quotations for ATE insurance from three different providers. LAMP Services Ltd ("LAMP") were selected and an ATE policy was entered into on 4 November. The total aggregate limit of indemnity was £50,000 and the premium was £1,114.87, rising to £2,675.67 45 days before trial.

11. On 10 November 2009, Mr Duff sent to the Defendant's solicitors, Messrs Lyons Davidson, a letter including notice that they had entered into the CFA together with details of the ATE insurance:

> *"We have also entered into an insurance policy to which Section 29 of the Access to Justice Act 1999 applies. The name of the insurers is LAMP Services Ltd of Chester House, Harlands Road, Haywards Heath, West Sussex RH16 1LR.*
>
> *The policy number is: FS 91 11921 and is dated 6 November 2009.*
>
> *It relates to the same claim as identified above.*
>
> *The limit of the indemnity under the policy is £50,000.*
>
> *The premium for the policy is staged.*
>
> *The stages are as follows:-*
>
> *£1,114.87 (post proceedings)*
>
> *£2,675.57 (from 45 days to trial) – all deferred.*
>
> *We enclose a copy of the Notice of Funding which we are today filing at Court for sealing purposes."*

12. In my judgment, the sending of this information with this level of detail was good practice.

13. A further consultation, with Leading and Junior Counsel, took place on 22 June 2010. Shortly thereafter, in July 2010, the Claimant, by then almost 21 years old, met one Adam Ingleby and they began a relationship which has led to the birth of two children. At the time that the case was settled in 2013, they were living as a family in a 3-bedroomed two storey house without adaptation. The Claimant was not working or seeking employment, her main occupation being the care and upbringing of her young children. I expect that this change in the Claimant's circumstances had implications for the valuation of the claim.

14. In September 2010, the court made an Order (by consent) ordering, among other things, that the Defendant make a further interim payment in the sum of £75,000 and that the parties attend a Joint Settlement Meeting ("JSM") by 30 September 2010. A Pre-trial review was ordered to take place on the first available date after 14 October 2010.

15. On 14 September 2010, the Defendant made a Part 36 offer of settlement in the total sum of £755,355.23. A further consultation, presumably to consider the Part 36 offer, took place on 8 October 2010 which was followed by a rejection letter on 3 November, drafted by Junior Counsel.

16. It is not clear whether the JSM ordered by the court took place in 2010. However, the parties did proceed to a JSM on 24 November 2011. It soon became clear that the respective valuations of the claim by the parties were a long way apart. The Defendant had served a counter-schedule valuing the case at £566,066 and was indicating that as a result of a reconsideration by the Defendant's care expert, Mrs Gillian Conradie, a new counter-schedule would reduce the value of the claim to £428,167. In fact, the eventual valuation of the case in the counter-schedule was £351,720 – see paragraph 30 below. The best offer made on behalf of the Defendant was to allow the Claimant to accept the sum which had been offered in the Part 36 offer (£755,355.23) whereupon the Defendant would agree to pay the Claimant's costs including those incurred since the making of the Part 36 offer.

17. For the Claimant, an offer in the form of mixed lump sum and periodical payments was made (and rejected by the Defendant) as follows:

    Lump sum: £1.1m

    PPO for case and case management: £37,500 pa

    PPO for deputyship fees: £5,000 pa

    On the basis that the Claimant's multiplier at that time was 29.33, this was equivalent to a pure lump sum of approximately £2,356,000.

18. Following the failed JSM, Leading and Junior Counsel for the Claimant produced a joint Advice setting out their opinion as to the realistic valuation of the claim. This Advice forms part of a bundle of privileged documents which was before DJ Moss (and before me) but which have not been disclosed to the Defendant. Given the significance attached to it by DJ Moss, it seems to me that I must refer to it for the purposes of this judgment in considering the conclusion to which I come. It concluded that a realistic valuation of the claim on a lump sum basis was in the region £1.3m and no less than £1.06m. Accordingly, the parties proceeded to prepare for trial.

19. Counsel's Advice was sent to LAMP to whom Mr Duff wrote in the following terms:

> "You will see from the enclosed Counsel's Advice that the Defendants had no real intention on settling this matter.
>
> The only offer they would come up with [was] the same as the original Part 36 offer which had been rejected on Counsel's advice."

20. The matter came back before the court on 16 January 2012 when various applications and cross-applications were heard. Directions were given for the future conduct of the matter which was to be listed for trial before a High Court Judge in Manchester on the first available date after 7 September 2012, with a PTR before the Designated Civil Judge on the first available date after 23 July 2012. The Defendant was ordered to make a further interim payment to the Claimant in the sum of £100,000, the court dismissed the Defendant's application for trial of a preliminary issue in relation to the Claimant's capacity and the Claimant was refused permission to rely on neuro-rehabilitation evidence. The Directions were subsequently varied by the court on 23 July 2012 and further Directions were given at a Case Management hearing on 27 September 2012. These Directions were varied yet again on 10 April 2013 when it was ordered that there be a PTR on the first available date after 5 July 2013 and it was recorded that the parties had agreed to attend mediation. The trial was listed for 2 weeks beginning on 21 October 2013 before a High Court Judge.

21. The PTR was important from the point of view of the Claimant because it gave some insight into the Defendant's approach to the claim.

22. Both sides lodged separate case summaries and were represented by leading counsel. The Defendant's case summary for the purposes of the PTR included the following:

> *"**Issue in relation to quantum and capacity***
>
> *4. She has given birth since the accident to two healthy children, in June 2011 and December 2012 by her partner Adam with whom she has been with for three years. She has maintained she would like to have up to six children.*
>
> *5. It is agreed that she made a very good physical and functional recovery from the injury (for example she has returned to wall climbing) and needs no future physical therapy. Her life expectancy has not been affected.*
>
> *6. The debate is over the extent of her non-physical injuries, the extent of cognitive damage and residual problems with*

executive functioning that she has been left with. This in turn leads to considerable debate over (amongst general quantum issues) how much if any of her previous ability to work she has lost, how much support/care she has needed in the past and will need in the future and whether she in fact has (and has had) the capacity to conduct her own litigation and manage her own property and affairs for the purposes of the Act.

Estimated value

Claimant £178,500 general damages

£4,157,370.000 special damages

Defendant £47,750 general damages

TBA- special general damages (but substantially less than the claimants value)

The important issues of facts and law

The parties are in dispute in relation to almost every head of claim. In particular there is a dispute in relation to the severity of the claimants brain injury and its long term impact. Particularly in relation to the need for support/ care and case management. The parties are also in dispute in relation to the issue of capacity, the reasonableness of past care and case management and the claimants employment prospects. …

Costs

27. Total claimants costs to date = £428,329.90. total estimated future costs = £303,673.96 (excluding mediators fees because these are not yet available). The costs to date figure includes the costs incurred by both Arneson (?) and Co and Scott Duff and Co. the figures for both costs to date and future costs are inclusive of VAT but exclusive of additional liabilities (i.e. success fee and insurance premium).

28. The defendants total costs to date = £290.000 approximately. Total estimated future costs= £290.000 (excluding the Mediator's fees because these are not available yet). The estimate of costs to date in future costs excludes the uplift to the Court approved hourly rate where the defendant is seeking to cover its costs from the claimant. The figures for both costs to date and future costs are inclusive of VAT.

Likelihood of settlement prior to trial

29. As stated above, a date has been agreed for mediation of 27th September 2013. there have been two failed attempts at negotiated settlement thus far. There can be no assumption

that the case will settle. Parties are significantly apart in their respective variations."

23. Following the PTR, the Claimant's solicitor, Mr Duff, appreciated not only that it appeared likely that the matter would go to trial but also that the limit of indemnity of the existing cover of £50,000 was inadequate. He therefore contacted LAMP immediately and set out the following:

> (a) that there had been two unsuccessful attempts to settle the matter by JSM;
>
> (b) that there was a mediation on the 27th September but that he was "not expecting much from the mediation";
>
> (c) that the Claimant's and Defendant's case summaries for the PTR set out the position better than he could that these should be read by the insurers on the basis that this gave them the present position;
>
> (d) that the case summaries included estimates for both costs;
>
> (e) that within the Claimant's costs, the Claimant's disbursements stood at £144,943.61;
>
> (f) that this (the case summary for the PTR) was the first time he had been notified of the Defendant's costs and that cover was now far too low;
>
> (g) that any increase in premium was to relate to continuing cover from the original policy of the 13th November 2009."

24. Mr Strange, who provided a witness statement on behalf of the Claimant for the purposes of the costs assessment, is Chief Information Officer at LAMP and he confirms what Mr Marsh says as to the information LAMP were provided with. He states:

> *"13. The Defendant's case summary gave immediate cause for concern. It was apparent that this was a complex, high value and hard fought case on almost all issues apart from liability and was heading for a ten day trial with a leading counsel and a battery of expensive experts.*
>
> *14. Although there was a mediation scheduled, the Defendant's case summary echoed the Claimant's solicitors pessimism as to settlement. I know from experience that just because there is to be a mediation, it is not uncommon for a party to seek to use the mediation as an opportunity to put forward or explain their own case in more detail and not to increase on any offers".*

He describes how LAMP were being asked to take on very significant risk that the Part 36 offer would not be bettered, a risk of more than £1m if the

premium (premium cover being included in the policy) is included. Mr Strange describes how LAMP were reluctant to take on the risk at all.

25. However, by 3rd September 2013 LAMP were prepared to provide a quotation for the top up premium, namely an additional £450,000 to the existing £50,000 making total cover of £500,000 in respect of the Defendant's costs. He said that this was the maximum risk which LAMP were prepared to take. The premium quoted was £319,315.07 up to 45 days before trial and £533,017.13 within 45 days of trial. 3rd September 2013 was in fact already within 45 days of the trial due to start on 21st October 2013 and therefore it was only ever the larger premium which was active.

26. Mr Strange then says this in his witness statement:

> *"20. As a general proposition, if a case is approaching trial it can be assumed by an underwriter that the risks are finely balanced (i.e. that both sides think they have a reasonable chance of success) so the risk to the insurer is significant. Where, as here, there is a Part 36 offer, the crucial risk is that the Part 36 offer is not bettered. That is the trigger event which would have led to payment by LAMP.*
>
> *21. Turning to the specific material available at the time, the Defendant's case summary was a key document. My assessment of the prospects was that they were marginally better than 50% but it was not a case which I was keen to top up. The matters set out were the complexity, hard fought issues and imminent ten day trial were significant risk factors."*

27. Mr Strange set out the costs exposure to LAMP were the Part 36 offer not bettered which included the Defendant's incurred costs (estimated at £290,000), the Defendant's estimated future costs at £290,000 (although this appeared to be an under-estimate), the uplift of hourly rate which the Defendant would seek should the Claimant have to pay its costs and the Claimant's own disbursements which were said to be £130,000. Mr Strange then says:

> *"23. Looking again at the premium remains, having regard to my experience, a reasonable if not over generous (i.e. too low) assessment. As I have noted, I was reluctant to take on the additional risk at all."*

28. Mr Duff decided to accept the quotation, and notice in Form N251 was given on 11th September 2013. On this occasion, the information given to the Defendant's solicitors was not as full as the information which had been given in relation to the previous ATE policy (see paragraph 11 above in this

judgment). The notice of funding (page 11 of the bundle) states that the level of cover is £500,000 plus premium and in response to the question

"Are the insurance premiums staged?"

the answer is "yes" with the notice stating as follows:

> "a 25% will apply to the "45 days to trial" premium if the matter settles more than six calendar days in advance of trial beginning and subject to the premium being paid within 21 days of settlement being agreed. 15% discount will apply to the "post proceedings" premium. The matter settles with more than 45 days to trial and the premium is paid within 21 days of settlement being agreed."

In particular, unlike in relation to the Notice of Funding for the £50,000 indemnity, the Defendant was not told of the premium up to 45 days before trial and within 45 days of trial, nor was the Defendant given any opportunity to settle the case before the premium was uplifted at 45 days before trial as the insurance was only taken out within 45 days of trial. The Defendant was not given an opportunity to settle the case before the additional insurance was taken out: a potential liability of over £500,000 in a case like this might have made a significant difference to the Defendant's approach to settlement. As, potentially, the knowledge that by settling the case at the mediation on the 27th September 2013 the Defendant would make himself liable to pay the £533,000 insurance premium, to have been told this might have affected his willingness to settle at the mediation.

29. In the event, contrary to the expectation of both parties at the PTR, the claim did settle at the mediation of 27th September 2013 when the Defendant agreed to pay to the Claimant a lump sum of £1.4m.

30. The matter came before Mr Justice Haddon-Cave on 23rd October 2013 when the settlement was approved. Prior to the mediation, Counsel for the Claimant had provided an advice setting out a target sum for settlement at the mediation. This document remains confidential and privileged but attached to it is a useful valuation table setting out the heads of loss and the amounts claimed in the schedule and allowed in the counter schedule in respect of each head of loss. The valuation table is as follows:

HEAD OF LOSS	CLAIMANT (£)	DEFENDANT (£)
PSLA	188,500	47,750
Interest	17,719	00
Past earnings	98,115	22,546

Care/case management	349,550	22,320
Rehabilitation	57,315	48,805
Accommodation	21,792	00
Travel	21,833	00
Court of Protection	32,825	00
Miscellaneous	3,288	6
Interest	67,538	00
Future earnings	399,420	80,000
Pension	81,755	00
Care/case management	1,927,250	129,933
Accommodation	187,367	00
Rehabilitation	128,070	00
Travel	61,464	360
Holidays	64,140	00
Court of Protection	360,409	00
Total	4,068,350	351,720

31. Subsequent to the approval of the settlement Mr Duff sent by e-mail to the Defendant's solicitors further information about the ATE insurance in the following terms:

> "So far as the ATE insurance is concerned I am now under an obligation to inform you of its terms.
>
> They are as follows
>
> "These terms will replace those already provided.
>
> The new premium is £319,315.07 (post proceedings) and £533,017.13 (from 45 days to Trial).
>
> A 25% discount will apply to the "45 days to Trial" premium if the matter settles more than six calendar days in advance of trial beginning and subject to the premium being paid within 21 days of settlement being agreed.
>
> A 15% discount will apply to the "post proceedings" premium if the matter settles with more than 45 days to trial and the premium is paid within 21 days of settlement being agreed."

The information about the discounts was already known to the Defendant's solicitors as that had been included in the notice of funding form. What

would have been new information to the Defendant was that the ATE insurance premium payable was £533,017.13.

32. By notice of commencement of assessment of bill of costs dated 15th September 2014, Mr Duff served his bill of costs in a total of £1,102,274.83. The costs claimed on behalf of the Claimant were in 8 parts, with Part 8 being the costs payable by the Defendant (additional liabilities). This included the ATE insurance premium of £533,017.13 which formed more than half of the total of the bill of costs. In the end all items in the bill of costs were agreed save for the ATE insurance premium.

The Decision of DJ Moss

33. The hearing before District Judge Moss took place on 13th December 2016. No oral evidence was called but he had the written statements of Mr Steven Marsh, the Claimant's solicitor (Mr Marsh took over conduct of the matter from Mr Duff in January 2015 when the latter fell seriously ill) and Mr Alan Strange, to which I have referred. He also had a statement from Kevin Hassey, a costs lawyer, dated 28th October 2016 and a statement from Peter Merry, who is employed by Resolute Management Limited which "dealt with the matter on behalf of the defendants insurers giving instructions to DAC Beachcroft as to the conduct of the action." These statements on behalf of the Defendant were only relevant to the issue whether the Defendant ought to have been given the opportunity to avoid taking out the "topping-up" insurance in September 2013. This point was decided in favour of the Claimant by the District Judge and there is no appeal against that decision which is set out at paragraph 48 of the judgment as follows:

> "**reasonableness of increasing cover in 2013**
>
> 48. It was reasonable for the Claimant to have increased the cover, even at the very late stage in the proceedings and without first notifying the Defendant, from £50,000 to £500,000. An increase in that amount does not seem to me to be properly described as a "top-up". Nevertheless, the Claimant is entitled to recover a reasonable premium for the additional cover."

34. It is important to note that the District Judge found that not only was it reasonable for the Claimant to increase the cover but also that the level of cover at £500,000 was reasonable. Thus, it forms no part of the Defendant's case that the level of cover was unreasonably high, only that the premium for this level of cover was unreasonably high. For what it is worth, it seems to me that the decision that the level of cover was reasonable must be right: with a potential liability for past costs in the sum of £290,000 and future costs exceeding £290,000 - possibly by some considerable margin - it was

arguable that the insurance limit of £500,000 represented under-insurance, but this was the maximum which LAMP was prepared to cover.

35. Having set out the facts and the arguments, District Judge Moss referred to CPR Part 44 (4) as being the starting point of the assessment of the premium. He characterised the decision he had to make as whether within rule 44.4 (3) it was reasonably incurred and proportionate and reasonable in amount. He said

> "I have to look at the amount of costs at risk and the size of the claim."

Having referred to the authorities of *Rogers v Merthyr Tydfil* [2006] EWCA Civ 1134, *Kris Motor Spares Ltd v Fox Williams LLP* [2010] EWHC 1008, *Redwing Construction v Wishart* [2011] EWHC 19 (TCC), *Kelly v Blackhorse Ltd* [2013] EWHC b17 and *Hahn v HHS England* [unreported], District Judge Moss reminded himself that, this being a standard basis assessment, the burden of proof is on the Receiving Party and any doubt about the reasonableness of the premium had to be resolved in favour of the Paying Party.

36. From paragraphs 49 onwards, District Judge Moss considered the reasonableness of the 2013 premium. He said:

> "49. The extent of the additional cover and the amount of the premium take this policy outside the scope of the ordinary kind of ATE policies with which the court was concerned in *Rogers*.
>
> 50. The late stage at which the cover was increased is another feature that takes the circumstances of this policy out of the ordinary. It is a relevant factor when considering the reasonableness of the amount of premium."

37. I interpose to ask, rhetorically, why or how the late stage at which the cover was increased was a relevant factor in considering the reasonableness of the amount of the premium. Having decided that it was reasonable for the Claimant to have increased the cover at the stage at which it was increased, it seems to me that the reasonableness of the amount of the premium was an independent and free-standing question and by taking the stage at which the premium was increased into account in relation to the amount of the premium, the District Judge was, as it seems to me, derogating from the decision he had made at paragraph 48 of his judgment.

38. The District Judge went onto consider that, had the Claimant's solicitors sought to increase the indemnity when they ought to have realised that £50,000 cover was insufficient then additional cover would have been

available on more favourable terms than those that were offered in 2013. He then went onto state as follows:

> "55… because of the way the policy was structured, the defendant had no opportunity to settle before the final stage was reached. Having left it so late, it would have been reasonable for the policy to be re-structured so that the defendant had notice of the increase before it was triggered. The defendant would then have had the opportunity to settle before the premium increased from £319,350 to over £533,000. The final stage should reasonably have been delayed until after the mediation which was just over a fortnight after notice of the increase was given. The effect of the late stage at which notice was given was to fix the defendant with an unreasonably high premium. It is not a satisfactory answer to the lateness point to say that the defendant must have known that £50,000 cover was too low or that the premium increased from 45 days to trial."

39. Here, even more than before, the District Judge was derogating or resiling from his previous decision that it was reasonable for the Claimant to have increased the cover when it was done. Furthermore, I cannot see that there was any evidential basis upon which the District Judge could find that the policy could have been restructured to give the Defendant notice of the increase before it was triggered. Mr Strange was not asked about this and, not having been ordered to give evidence before the District Judge, there was no opportunity for him to respond to this suggestion. If the District Judge, was, in reality, saying that it was unreasonable for the Claimant to have taken out the additional insurance until after the result of mediation was known, then this would be directly contrary to the finding made at paragraph 48 of the judgment. If, on the other hand, the District Judge was saying that it was reasonable to take out the cover when that was done, but that it should have been structured so that the increase only occurred after the mediation, then he had no information or basis to decide that such a restructuring would have been acceptable to LAMP or available as part of the offer of insurance. In fact, the only evidence available would suggest that any increase in the premium would be by reference to 45 days before trial and not what would, in effect, have been 24 days before trial, that is 28 September 2013. It seems to me that if the District Judge had it in mind to decide the issue of the reasonableness of the premium on that basis, he should at least have ordered Mr Strange to give oral evidence so that he could deal with the point. For all I know (and for all District Judge Moss knew) there could have been very good underwriting reasons why such a restructuring was not feasible at such a late stage before the trial and if this was to form the basis of a significant reduction in the premium (as it did), the Claimant should have been given an opportunity to deal with it, by at

least asking Mr Strange about it and by seeking permission from Mr Strange to be called to give evidence.

40. At paragraph 57, District Judge Moss continued:

> "However the insurer appears from the evidence before me not to have given proper weight to advice from counsel on the value of the claim".

He then referred to the opinion from counsel dated 30th November 2011 which followed the first JSM. This opinion was, of course, almost 2 years out of date. There had been no further opinion since then. The District Judge went onto say:

> "61. Whatever the conclusion the insurer reached about the exposure that it faced, informed by the pessimistic view that was taken by the solicitor the chances of settlement at mediation (which is put more neutrally in the case summaries), there appears to have been no reasoned assessment of the risk of failing to beat the Part 36 offer at trial. Based on leading counsel's opinion that risk was very substantially lower than identified by Mr Marsh and Mr Strange in their statements.
>
> 62. The evidence is that significant weight was placed on the case summaries, the failed JSMs and the length of trial. Far more important for the purpose of assessing the risk was counsel's reasoned opinion on the value of the claim and therefore the likelihood of beating the offer.
>
> 63. Failure to attach the appropriate weight to counsel's advice and therefore to properly assess the chances of beating the offer fundamentally undermines Mr Cox's submission that I should not go behind the risk assessment of the insurer.
>
> 64. The difficulty with Mr Cox's criticism about the absence of underwriting evidence from the paying party as to the risks in 2013, is that the defendants were not privy to the advice the claimant had received about the value of her claim. …
>
> 67. In all the circumstances I conclude that the premium of £533,000 was unreasonable and wholly disproportionate to the risk faced by the insurer. The premium in 2013 insured costs limited at £450,000 (plus the premium itself). The premium did not properly represent the risk that the Part 36 offer would not be beaten. I must therefore adjust it to a figure that better reflects the risks that the claimant actually faced of not doing better than the offer. There is no expert evidence. I do not have the expertise to assess a reasonable premium in other than broad brush terms. Doubt must be resolved in favour of the paying party.

> Having regard to the likely effect on the premium of the stage of which it was increased and the proximity to the mediation, I take as a starting point the premium before the final stage. In my judgment the risk faced by the insurer was a fraction of that reflected by a premium of more than the insurer amount (before the premium itself is taken into account). I allow the premium 25% of £319,350.17 which is £79,837.50 in addition to the full premium claimed for the first £50,000 of cover."

Legislative background

41. The background and legislative basis for the recovery of additional liabilities is set out in full in the judgment of Lord Neuberger in *Coventry and others v Lawrence* [2015] UK SC 50. Recoverability of ATE premiums is covered by section 29 of the Access to Justice Act 1999 which provided:

> "where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him, may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

42. Following a consultation as to how success fees and ATE premiums should be recoverable in practice, the Civil Procedure Rules were amended in 2000 to reflect the policy that then prevailed, expressed as follows (taken from the Government's response in January 2000 to the consultation, at paragraph 14:

> "The Government's policy on the recoverability is to ensure that the expense of shifting all or part of the risk of costs, whether to the solicitor under a conditional fee agreement or an insurer under an insurance policy, are usually met by the losing party and not out of the damages or the pocket of the winner…"

43. CPR rule 44.4 .3 sets out the basis of assessment of costs:

> "(1) Where the court is to assess the amount of costs…it will assess those costs-
>
> (a) on the standard basis or
>
> (b) on the indemnity basis,
>
> But the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount."

44. Rule 44.4 sets out the factors to be taken into account in deciding the amount of costs. It provides:

"(1) The court is to have regard to all the circumstances in deciding whether costs were-

(a) if it is assessing costs on the standard basis-

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount….

(3) The court will also have regard to-

…

(b) The amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

45. Also of relevance is the costs practice direction ("CPD") which was promulgated to supplement CPR parts 43-48. Paragraph 9.1 of the CPD stated that "under an order for payment of costs the costs payable would include an additional liability incurred under a funding arrangement". Paragraph 11 includes the following:

"11.1 in applying the test for proportionality the court will have regard to Rule 1.1 (2) (c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide…

11.2 In any proceedings there will be costs which will inevitably be incurred in which unnecessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute…

11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs.

11.7 subject to para 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably

appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement."

46. In my judgment, CPD 11.7 is of particular relevance and importance in the present context: it means that, in assessing the reasonableness of the ATE premium, it is necessary for the court to put itself into the shoes of, in this case, Mr Duff at the time that he entered into the additional insurance with LAMP in September 2013.

47. Finally, in relation to the CPD, the following is provided:

> "11.10 In deciding whether the costs of insurance cover is reasonable, relevant factors to be taken into account include:
>
> (1) where the insurance cover is not purchased in support of a conditional fee agreement with success fee, how its costs compare with the likely costs of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
>
> (2) the level and extent of the cover provided;
>
> (3) the availability of any pre-existing insurance cover;
>
> (4) whether any part of the premium would be rebated in the event of early settlement;
>
> (5) the amount of commission payable to the receiving party or his legal representative or other agents."

The argument on behalf of the Claimant

48. Mr Cox for the Appellant/Claimant submitted a full "skeleton" argument, supplemented by his oral submissions before me. The main thrust of his case was that the District Judge failed, in particular, to follow the guidance of the Court of Appeal in *Rogers v Merthyr Tydfil.* He also relied heavily on the decision of the Supreme Court in *Coventry v Lawrence.* He submitted that, at the time the additional insurance was taken out, there was a significant quantum risk, the parties were at daggers drawn and they were approaching a long, expensive trial with many experts. He submitted that this was perceived by the underwriter, correctly, as a high risk, high cost case. In relation to *Coventry v Lawrence*, he referred to the review by the Supreme Court of the cases that had arisen over the previous 13 years. He referred to the meaning of proportionality in this context as discussed from paragraph 29 of *Coventry*, and in particular the adoption by the court below of the formulation in *Home Office v Lownds* [2002] 1 WLR 2450. There, the Court of Appeal had said:

> "In modern litigation, with the emphasis on proportionality, there is a requirement for 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 to seek him to curb the amount of work done and the cost by reference to the need for proportionality."

Then at paragraph 28, they said:

> "The reference in 11.2 [Practice Direction] to costs "which are necessary" is the key to how judges in assessing costs should give effect to the requirement of proportionality. If the appropriate conduct of the proceedings makes costs necessary then the requirement of proportionality does not prevent all the costs being recovered either on an item by item approach or on a global approach."

49. Mr Cox pointed out that in *Coventry v Lawrence*, the Supreme Court had observed, at paragraph 37, that the introduction of additional liabilities made the proportionality issue more acute. The court referred to *Rogers v Merthyr Tydfil* and it endorsed the decision of the Court of Appeal that a premium is recoverable as a proportionate expense if it was "necessarily incurred" even if the amount was large in comparison with the amount of damages reasonably claimed. Reference was made to *Rogers* at paragraph 105 where it was stated:

> "105. In this case it might be thought that all the considerations urged on the court by Mr Bartlett which favour the course taken by Mr Cater, the appellant's solicitor, might go to demonstrate the reasonableness of his bill of costs - specifically, the ATE insurance stage premium - but not its proportionality: precisely because they have nothing to do with the quantum of the claim. But we did not think that is right. If the court concludes that it was *necessary* to incur the stage premium, then as this court's judgment in [Lownds] shows, it should be adjudged a proportionate expense. Necessity here is, we think not some absolute litmus test. It may be demonstrated by the application of strategic considerations which travel beyond the dictates of the particular case. Thus it may include, as we are persuaded it does, the unavoidable characteristics of the market in insurance of this kind. It does so because this very market is integral to the means of providing access to justice in civil disputes in what may be caused the post-legal aid world.

> 106… Once it is concluded that the ATE staged premium here was necessarily incurred, principle and pragmatism together compel the conclusion that it was a proportionate expense. We turn therefore to the question whether the ATE stage premium was necessarily incurred."

The Supreme Court in *Coventry v Lawrence* then continued:

> "40 In other words, the court did not ask whether the premium was proportionate to the importance of the case and what was at stake. Instead it adopted the *Lownds* approach. If the premium was necessarily incurred, it was proportionate. And it was proportionate even though it was disproportionately high when compared with the amount of damages reasonably claimed. ATE insurance was integral to the fundamental objective of improving access to justice in civil litigation. A premium that was reasonable in amount (having regard to the litigation risk) was necessary and therefore proportionate."

50. Thus it was argued by Mr Cox that, at the time the additional insurance was taken out by Mr Duff, it was necessary for him to do so in order to protect the Claimant's position so far as costs were concerned should the Claimant fail to exceed the amount of the Part 36 offer. To fail to beat the Part 36 offer would, ex hypothesi, result in an award of damages which was equal to or less than £755,355.23. If, in those circumstances, the claimant would be liable to pay costs in excess of £500,000 and probably closer to £600,000, and those costs were deductible from the damages, that would leave her with little or nothing (depending on the actual level of the award). Certainly, an award of damages anywhere near the Defendant's counter-schedule figure would be wholly extinguished by the costs order if there were no insurance cover. In those circumstances, I have no doubt that it was necessary for Mr Duff to take out such insurance cover. It follows that, assuming the premium was reasonable in amount (and this is a real question here), then no issue of proportionality arises.

51. Before considering the question of whether the additional insurance premium was reasonable, Mr Cox made a further point by reference to paragraph 89 of *Coventry v Lawrence*. That paragraph concerns success fees rather than ATE premiums, and was directly concerned with whether it was open to the Supreme Court to read down paragraph 11.9 as was being contended by counsel for the Respondent. However, the Supreme Court said this:

> "As the Bar Council points out, the Court of Appeal actively shaped the law relating to additional liabilities throughout the period from 2000 until 2013. It was implicit in all of the cases that success fees

(often substantial success fees) were recoverable. In none of the cases did the court disallow or reduce the amounts payable in success fees on the grounds that they were so high as to amount to a breach of the paying party's Convention rights. In these circumstances, litigants and their lawyers had a legitimate expectation that the court would not (at least without reasonable notice) decide that these fees were in principle incompatible with the Convention."

52. Relying on this Mr Cox used a parallel argument that the assessment should be made in the light of existing authority and a solicitor in the position of Mr Duff incurs additional liabilities accordingly. This is because, in the normal course of events, he would expect to recover the cost of the existing liability from the paying party. Mr Cox submitted that the District Judge's approach puts litigants in an impossible position. In other words, on the existing authorities, there was a legitimate expectation that, should the Claimant be successful (in the sense of achieving an award higher than the Part 36 offer) the additional liability would be recoverable.

53. In relation to the principal question, namely the reasonableness of the premium of £533,017.13, Mr Cox placed heavy reliance upon the decision of the Court of Appeal in *Rogers* at paragraph 117. There, the Court of Appeal said this:

> "Evidence justifying the ATE premium claimed
>
> 117. If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District judges and costs judges do not, as Lord Hoffmann observed in *Callery v Gray (Nos.1 & 2)* [2002] 1 WLR 2000, had the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges."

54. Mr Cox submitted that, in reaching the decision that he did and in relation to the way that he got to his figure, District Judge Moss did exactly that which the Court of Appeal said in *Rogers* he should not do. Mr Cox submitted that district judges should not regard themselves as better qualified in respect of

assessment of the underwriting risk. He submitted that District Judge Moss's approach was directly contrary to *Rogers*. He complained that District Judge Moss failed to start with the choice open to the Claimant's solicitor, Mr Duff. He said that in fact, in this case, by adducing the evidence from Mr Marsh and Mr Strange, the Claimant in this case went even further than the "brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated" and set out the full factors relating to the selection of the ATE policy and the topping up of the policy together with the factors which influenced the underwriting decision.

55. In passing, I should state that it is clear that it is wholly permissible to insure the premium so that it is not payable by the claimant in the event that the case is lost, as was decided in *Callery v Gray* (see *Rogers* at paragraph 118).

56. A further important point made by Mr Cox on behalf of the Claimant was that, on his submission, the analysis of the District Judge started at the wrong place, by looking at the position of the underwriter rather than the position of the Claimant. He submitted: "[the District Judge's] approach fails to recognise that the Appellant/Claimant and her litigation friend had a binary choice, i.e. to take out the additional cover or run the risk of proceeding to a ten day trial (with adverse costs accepted as being in excess of £500,000)".

57. In support of his contention that the District Judge erred in re-assessing a reasonable premium, Mr Cox further relied upon the decision of Mr Justice Simon (as he then was) in *Kris Motor Spares Ltd v Fox Williams LLP* [2010] EWHC 1008 (QB), where the learned judge stated as follows:

> "44. I have concluded that in a case where the issue is raised as to the size of the premium there is an evidential burden on the paying party to advance that the sum material in support of the contention that the premium is unreasonable. I have reached this conclusion in the light of the cases which I have cited, and in particular *Rogers v Merthyr*. Despite the doubts about the operation of the Market, the Court of Appeal was satisfied that it was not in the insurer's interest to fix a premium at a level which would attract frequent challenges; and that a master was not in a better position than the underwriter to rate the financial risk that the insurer faced. Where a real issue was raised the court envisaged the hearing of expert evidence as to the reasonableness of the charge. If an issue arises, it must be raised by the paying party. This is not to reverse the burden of proof. If, having heard the evidence and the argument, there is still a doubt about the reasonableness of the charge that doubt must be resolved in favour of

the paying party, see (for example) Lord Scott of Foscote in Callery v Gray at [126]."

58. Mr Cox submitted that, contrary to the guidance in *Kris*, no expert evidence was heard or adduced as to the reasonableness of the charge by District Judge Moss, and the need to do so does not fly in the face of the burden of proof.

The argument on behalf of the Defendant

59. On behalf of the Defendant/Respondent, Mr Andrew Lyons, counsel, also relied on written submissions, supported by oral argument. He relied on the principle that an appeal court should be reluctant to interfere with findings of fact and he submitted that, on review, the approach of the District Judge was unimpeachable. He pointed out that the District Judge had appropriately directed himself by giving careful consideration to *Coventry v Lawrence* and *Rogers v Merthyr Tydfil* as well as *Kris*, and he endorsed the District Judge's comment that the extent of the additional cover and the amount of the premium took the second premium outside the scope of the ordinary kind of ATE policies with which the court was concerned in *Rogers*. Thus, he submitted that the District Judge was fully entitled to depart from paragraph 117 of *Rogers* in this case. He submitted that the District Judge was entitled to find that, in considering the insurance risk, the underwriter had failed to give proper weight to the only advice from counsel which existed at the time that he made his decision, namely that of November 2011, and in any event nothing of any significance had happened since November 2011 to change the force of that advice. Mr Lyons submitted that the insurer should have appreciated that the risk of the Claimant actually having to pay the Defendant's costs was low, even at the time that the second premium was assessed, and given that the risk was low, the second premium was unreasonable and disproportionate, as assessed by the District Judge. He submitted that the District Judge had every right, and indeed duty, to exercise his discretion and reduce the premium in broad brush terms.

60. In his oral submissions Mr Lyons submitted that the District Judge was entitled to disagree with and reject the evidence of Mr Strange once he, the District Judge, had found that what the underwriter had done was incorrect. He said that the District Judge had a proper basis to reduce the premium both by reference to the timing of the taking out of insurance and also by reference to the "flawed underwriting decision in respect of the prospects of success". Mr Lyons submitted that there was nothing about paragraph 55 which derogated from the decision made at paragraph 48 of the District Judge's decision: whilst paragraph 48 is about the reasonableness of entering into the policy at all, paragraph 55 is about the timing. Although the District

Judge does not say in paragraph 55 that the additional insurance should have been taken out earlier, Mr Lyons submitted that that is what the District Judge in fact meant.

61. In relation to the underwriting decision, Mr Lyons submitted that the finding by the District Judge was a finding of fact and he submitted that District Judge Moss had been correct when, at paragraph 61 of his judgment, he stated that Mr Strange had only focussed on the likelihood of the case going to trial rather than on the prospects of success at trial.

62. Mr Lyons relied in particular upon the decision of Mr Justice Foskett in *Kai Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2016] EWHC 1598 (QB). That decision considered three separate cases where the ATE premium had been challenged before the costs judge. That decision concerned principally the question whether it was reasonable for solicitors to advise their clients to convert the funding of an action from legal aid to a conditional fee agreement, with particular reference to the potential loss to the claimant of the 10% uplift allowed in *Castle v Simmons* which applies only to cases which are not funded by an "old style" (ie pre-1st April 2013) CFA. The court held that the costs judges below had been wrong in principle to disallow the additional liabilities. However, a subsidiary issue arose in relation to the ATE premiums. In the case of *Surrey*, the costs judge had reduced the ATE premium from £50,681 to £31,800. In one of the other cases, *AH*, the reduction was from £18,881.78 to £15,000. In both cases the insurance policy was the same, a block-rated policy providing cover of £500,000 in respect of the legal costs of the other side and the disbursements on the Claimant's side. It was submitted on behalf of the Claimants that the premiums should be allowed in full by reference to paragraph 117 in *Rogers v Merthyr Tydfil* and by reference to the part of the judgment of Mr Justice Simon in *Kris Motor Spares* cited above.

63. Referring to the guidance at paragraph 117 of *Rogers*, Mr Justice Foskett said:

> "116. this guidance was, of course, itself given in 2006 and was based upon the observations of Lord Hoffman in *Callery v Gray* given in 2002 when the new arrangements concerning CFAs were in their relative infancy. That does not diminish the importance of the guidance, but it must be recalled that there is now some 10 years of experience gained by Costs Judges since *Rogers*. Neither *Callery v Gray* nor *Rogers* expressly holds as an adjustment of the premium by [a] Costs Judge should not be made on a broad brush basis, but each, in effect, urges caution in so doing.
>
> 117. There are two reported incidents where the broad brush has been applied in this context: *Redwing Construction v Wishart* [2011] 2

> Costs LO 212, a decision of Mr Justice Akenhead in the TCC and *Kelly v Blackhorse Ltd* (27 September 2013), a decision of then Senior Costs Judge, Master Hurst. I am particularly influenced by the fact that Master Hurst, whose experience in this field is unrivalled, should have felt entitled to intervene in this way.
>
> 118. Plainly the application of any broad brush must not be a capricious exercise, but the experience gained by Costs Judges over the years must, if they are to retain the ability to engage in a robust analysis of competing arguments at costs assessment hearings, be permitted to enter the arena. It follows that, in my judgment, each of the Costs Judges would have been entitled to intervene by reducing the amounts recovered in respect of the ATE premium.
>
> 119. The basis of the approach of Master Rowley in *Surrey* is clear from the quotation from his judgment set out above; he considered that cover for £500,000 in the circumstances was disproportionate. I agree. …
>
> 120. In *AH,* again the Costs Judge felt that cover of £500,000 was too much and made the reduction to £15,000 for this reason."

64. Referring to the case of *Kai Surrey* Mr Lyons submitted that if it is legitimate for costs judges to reduce the premium because the cover is assessed to be too high (as there), equally it was legitimate for the District Judge here to reduce the premium because the risk had been mis-assessed. Referring to paragraph 116 of the judgment of Mr Justice Foskett in *Kai Surrey,* Mr Lyons submitted that a District Judge has a discretion to adjust the premium on a broad brush basis and that is what District Judge Moss did here, namely adjust the premium within the "generous ambit of his discretion". Mr Lyons submitted that as long as the premium is flawed, it does not matter why it is flawed: once the District Judge is in the arena, he can take a broad brush decision as the District Judge did here.

65. Mr Lyons also referred me to decision of HHJ Wood QC, sitting at Liverpool County Court, in *Gareth Hahn v NHS England* a decision of 3rd August 2015 of which I was provided a transcript. In that case, HHJ Wood QC referred, at paragraph 29, to paragraph 7 of the judgment below where the Costs Judge had said:

> "It seems to me that on any view, the claimants have identified this as a low value fast track claim. The premium that is payable is pretty substantial for the post-issue level that is sought. Having determined that the costs generally are disproportionate in this claim in any event, it seems to me that it was not reasonable to take out a policy with a premium at such a level from what was, on any view, even 20 months earlier, a low value fast track claim"

HHJ Wood continued (at paragraph 29 of his judgment):

> "Has the judge misdirected himself, taking into account an irrelevant consideration and confusing proportionality and reasonableness, as the Claimant contends, or was he effectively making an assessment of reasonableness, as he was obliged to do, and considering as one of the factors the value of the claim as the Defendant/Respondent contends in this case?
>
> "30. It seems to me that the Judge's first sentence cannot be divorced from the second sentence, where he has firmly comes to the conclusion, as Mr Justice Akenhead did in the *Redwing* case, that this was a substantial and potentially excessive premium, and in coming to his broad brush assessment as to reasonableness, he is using the value of the claim as a significant factor without necessarily revisiting proportionality. Thus, I do not think that he has misdirected himself or confused proportionality with reasonableness, having given this careful consideration. Even if he had, on the state of the law that is relevant, I am not convinced that he would have been wrong to do so, because there is a difference between expenses that have been necessarily incurred and those which had been reasonably incurred. Even if I am wrong about that, in my judgment, in an assessment of this nature, broad brush applies simply that, namely, taking an overview of the claim and expense which is sought to be recovered, in the context of the risk exposure at the time."

66. For the sake of completeness, I should refer to the decision of Mr Justice Akenhead in *Redwing v Wishart* [2011] EWHC 19 (TCC) as this was referred to in oral submissions by both parties. At paragraph 15, the learned judge drew together the learning and at sub-paragraph (e) he said:

> "Having regard to the judgment of Mr Justice Simon in the Kris Motor case (which addressed a detailed assessment of costs), it may well be that somewhat different considerations apply on a summary assessment, particularly in a relatively low value claim, where it would be disproportionate to expect what would in effect be expert evidence to be adduced as to the unreasonableness of the premium. As he said at paragraph 35 of his judgment, there is no presumption that the premium is reasonable. On a summary assessment at least, one should be able to look at the amount of costs cover provided by the ATE insurance and compare it with the premium to form some realistic view as to the assessment risk which must have been taken by the insurer. One must bear in mind that on a standard, as opposed to an indemnity, basis of costs assessment, the burden of proof as to

> what is reasonable is on the party entitled to the costs to establish what is reasonable. …"

Mr Justice Akenhead then continued:

> "16. It is also necessary to consider whether and to what extent CFAs and ATE insurance have any part to play in adjudication enforcement cases, particularly in the TCC. There is no exemption, as such, in the rules for these cases. It must follow that the parties are entitled to enter into such funding arrangements in such types of case. However, it needs to be borne in mind that the large majority of reported cases on adjudication enforcement are successful and indeed almost in every case the claimants are sufficiently confident to pursue summary judgment applications on the basis that there is no realistic defence. It must follow that courts, particularly the TCC which deals with virtually all such cases, will think long and hard about allowing substantial CFA mark ups; particularly when there is a summary judgment application by the party with the CFA. It is important that claimants do not use CFAs and ATE insurance primarily as a commercial threat to defendants. It is legitimate for the court to ask itself whether, in any particular case, a CFA or ATE insurance was a reasonable and proportionate arrangement to make."

67. In my judgment the decision in *Redwing* has no bearing on the issue for me to decide in the present case. This was not a summary assessment, nor is it a case where anyone could doubt the propriety of the Claimant taking out ATE insurance. As I have stated, there is no suggestion that the level of cover was unreasonably high in this case and the issue of the underwriting decision and whether the premium was unreasonably high is not touched on or affected by anything said in the *Redwing Construction* case.

Discussion

68. In my judgment, there is an important distinction between a case where a Cost Judge decides whether the level of cover is too high and a case such as the present where the suggestion is that the underwriting decision is flawed. In the former kind of case which is the kind of case considered by Mr Justice Foskett in *Kai Surrey,* one can well see that, having decided that the Claimants had "over-insured", the premium could be reduced on a basis proportionate to the reduction in cover which was thought to be appropriate. This was the kind of "broad brush" approach which, it seems to me, the Court of Appeal had in mind in *Rogers v Merthyr Tydfil* where there was reference to Lord Hoffmans observation in *Callery v Gray* that costs judges do not have the expertise to judge the reasonableness of a premium "except in very broad brush terms". However, it seems to me that what the District

Judge did in this case was wholly different to what the Costs Judges did in the cases of *Kai Surrey* and *AH*. He purported to use his "broad brush" discretion to second-guess the underwriting decision made by the underwriter in the circumstances which the underwriter faced in being asked to give additional insurance at the level requested.

69. In my judgment, as submitted by Mr Cox, District Judge Moss did indeed fall plainly and directly into the trap identified by the Court of Appeal in *Rogers* at 117 and set himself up as better placed than the underwriter to identify the financial risk which the insurer faced. Furthermore, if the District Judge was to apply such a huge reduction to the premium, a reduction in excess of £400,000, I am very surprised that the District Judge did not give Directions for expert evidence and/or for Mr Strange to give oral evidence: in my judgment he should have done and his decision was flawed in the absence of having so done. No-one could suggest that this would have been disproportionate, given the sum at stake. The District Judge would then have had significantly more material and information about the underwriting risk and he would have been in a position, from the evidential point of view, to enter the arena, if this was appropriate at all. In my judgment, it was certainly inappropriate for him to do so without such evidence. Mr Strange could then have explained more fully his assessment of the risk.

70. It is said by the District Judge and by Mr Lyons on behalf of the Defendant that the underwriting decision was flawed because it looked only at the chance of the matter going to trial and looked insufficiently at the chance of the Claimant exceeding the Part 36 offer should the matter go to trial. However, in my judgment, an underwriter in the circumstances of Mr Strange would be entitled to equate these two matters. If an experienced Defendant, advised by experienced counsel, as here, takes a decision to contest the matter to trial, fighting behind a Part 36 offer, it must be assumed that the Defendant considers that he has a very good chance of securing an award within the Part 36 offer. It is true that counsel for the Claimant had advised rejection of the Part 36 offer and nothing had changed to alter that advice. In my judgment, though, an underwriter would be foolhardy to place excessive or exclusive reliance upon such advice when he does not know the terms in which leading counsel may be advising the Defendant and the possible factors being relied upon.

71. In addition, it seems to me that this was archetypically the kind of case which could have seriously unravelled for the Claimant at trial. As stated in the Defendant's case summary, the issues would have turned on the Claimant's non physical injuries - the extent of her cognitive damage and her residual problems with executive functioning. It was stated:

> "7.The Parties are in dispute in relation to almost every head of claim. In particular there is a dispute in relation to the severity of the Claimant's brain injury and its long term impact particularly in relation to the need for support/care and case management. The parties are also in dispute in relation to the issue of capacity, the reasonableness of past care and case management and the Claimant's employment prospects….
>
> 8. The issues of law in this case include Capacity, mitigation of loss and reasonableness of some of the expenditure and recovery of a loan made by the Claimant's solicitors to the claimant."

72. This meant that this was not the sort of case where the Claimant might lose badly in relation to one particular head of loss but still succeed in relation to others but rather, if the Claimant lost the issue in relation to the basic extent of her cognitive damage, then that would have a pervasive effect over all her heads of loss and the damages could easily have been found to disappear. In my judgment, a wholly reasonable attitude for the underwriter to have taken would have been to say: "Once the matter gets to trial, all bets are off." I expect that this was in fact Mr Strange's approach, and he would have explained this if he had been given the chance. The risk is indeed significant for any insurer, when the outcome is dependent upon the performance of lay witnesses, the performance of expert witnesses and the performance of counsel. In my judgment, it was quite wrong for the District Judge in this case to "enter the arena" and assume that his underwriting skill was better than that of the underwriter. Of course, the District Judge knew, by the time of his decision, that the case had in fact settled but the important question was how the matter appeared to the underwriter at the relevant time that he undertook the risk. At that time, all the indications were that the matter was going to trial, and that the mediation had as little prospect of success as the previous JSM, particularly given the approach of the Defendant on the previous occasion.

73. A further point is that, as it seems to me, the District Judge did not in fact apply a broad brush approach to his decision. Rather, he carried out a form of mathematical exercise. First, he started with the premium of £319,350.17 rather than the premium of £533.000. In my judgment this was itself an error as it proceeded upon an assumption that a staged premium with those figures was available even within the 45 day window, when he had no evidence to that effect. Effectively, the District Judge decided that it was unreasonable for the Claimant to take out insurance when she did at that level but that the lower level of £319.000 was and therefore should have been available instead. I can see no basis whatever for that decision. Then, in my judgment, the District Judge compounded the error by applying what appears to be an arbitrary or, in the words of Mr Justice Foskett

"capricious", deduction of 75% whereby he assessed the premium at 25% of the starting point. But where, I ask myself, is the foundation for the decision that 25% was an appropriate percentage? I can find nothing in the judgment of the District Judge which justifies that percentage by reference, for example, to the opinion of counsel to which the District Judge found the underwriter had given insufficient attention, nor by reference to the individual heads of loss or the evidence. This was not the kind of "broad brush" approach to premiums which had been adopted by the cost judges in *Kai Surrey* and *AH* but a wholly different exercise which, in my judgment, fell fairly and squarely within the prohibition set out by the court of appeal in *Rogers v Merthyr Tydfil.* Whilst I, of course, accept that, in the years since *Rogers* was decided, cost judges have become adept at looking at these matters and adopting a broad brush approach in the kind of way done in *Kai Surrey* and *AH*, what District Judge Moss did here was, in my judgment, qualitatively different.

74. Furthermore, in my judgment there is considerable force in the submission of Mr Cox that, if the decision of the District Judge is correct, Claimants' solicitors such as Mr Duff are put in an impossible position. I agree with Mr Cox that the Claimant, her Litigation Friend and Mr Duff had a "binary choice" i.e. to take out the additional cover or run the risk of proceeding to a 10 day trial with an adverse costs order in excess of £500,000. in my judgment it is fanciful to suggest that, had Mr Duff said to Mr Strange "I think your premium is too high" Mr Strange would have responded "Oh, very well then, I will reduce it by over £400,000". Mr Duff was entitled to assume that the premium he was being quoted was a bona fide and reasonable premium for the risk which the insurer was undertaking, not least because he, Mr Duff, also believed that the prospects of settlement at the mediation were small and that this was a case which was likely to go to trial. If he did not think that the Claimant could possibly take the risk of going to trial without this insurance, why should he have thought that the underwriter ought to have a different perception of the risk? In my judgment, the Claimant in this case had little choice but to accept the quotation from LAMP and the necessity of so doing makes the premium proportionate. In my judgment, the premium was in addition reasonable or at least within the reasonable band of premiums to be quoted at that stage of the litigation given the matters which Mr Strange took into account – in my judgment reasonably - as set out in his witness statement. I cannot see that there is any real evidence, or indeed any evidence at all, that the underwriting risk was misjudged in this case.

75. I reject the suggestion that the additional insurance cover should have been taken out earlier or later. If it had been taken out earlier, Mr Duff would have been open to the accusation that he should have waited until after the PTR when the approach of the Defendant, not to mention details of the

Defendant's costs, would be known. This does not seem to have formed any part of the argument before the District Judge or his decision. As for taking out the additional insurance later, there is no evidence that the Insurer would have been prepared to wait or adjust the premium in the interim. To have waited until after the mediation might have tipped the balance and caused the Insurer to say that it was not prepared to take on the additional risk at all.

76. Finally, I should mention the position of the Defendant. It could be said that the Defendant was treated unfairly in that he was given no opportunity to settle the case (as he did at the mediation) before the additional insurance liability was incurred. Thus, having taken a reasonable approach to the claim at the mediation, he finds himself penalised by an eye-watering premium as part of the costs. However, in my judgment, any sympathy for the Defendant here would be misplaced. The Defendant chose to fight this claim bullishly, indeed arguably aggressively, and gave every indication to the Claimant that he was going to fight the case to trial behind the Part 36 offer. The Defendant chose not to settle this case until a very short time before trial – he could have made an additional Part 36 offer at any time in the years following the abortive JSM in November 2011, but chose not to. Any Defendant who settles late, particularly this late before trial, must know that he thereby significantly increases the costs risk. An experienced Defendant will know that a reasonable Claimant will probably take out additional ATE insurance, and the Notice of Funding dated 10 September 2013 will surely have come as no surprise. Furthermore, the Defendant should have anticipated that the premium would be significant.

77. In the circumstances, the appeal will be allowed and the assessment of the ATE premium will be that sought in the bill of costs, namely £533,017.13.