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Don’t bank on ATE recovery when the horse has already bolted

Kai Surrey v Barnet & Chase Farm Hospital
AH v Lewisham Hospital NHS Trust
[2016] EWHC 1598 (QB)

Article by David Bowden

Mr Justice Foskett sitting in the High Court with Senior Costs Judge Master Gordon-Saker as an assessor has allowed appeals from decisions of costs judges in 3 different cases. Foskett J has upheld the decisions of 2 different costs judges who reduced the amount of 'after the event' ('ATE') insurance premium allowable on an assessment from £50,681 to £31,800 and from £18,881.78 to £15,000 respectively.

Kai Surrey v Barnet & Chase Farm Hospital
AH v Lewisham Hospital NHS Trust
[2016] EWHC 1598 (QB) *1 July 2016*
High Court of Justice, QBD (Foskett J and Master Gordon-Saker)

What is the real issue in dispute about the ATE premium?
This is one of a number of cases in which paying parties have contested the amount of the ATE premium. Paying parties say that an ATE premium must bear a relationship to the amount of risk insured. It cannot make sense for someone to incur a liability for an ATE premium where that premium itself is far in excess of the adverse costs liability sought to be insured.

What calculation do paying parties say is the correct one?
Paying parties say that in setting an ATE premium an insurer needs to know what the potential adverse costs are. If these costs are say £10k, then the premium should be set according to risk. If it is a case where the insurer calculates has only a 50% chance of success, then the base premium should be £5k. To this should be added insurance premium tax ('IPT') and a mark up to cover the insurer's operating expenses and profit. So on an actuarial basis, in this example, an ATE premium should cost around £6k. This is a maximum figure because ATE policies contain many exclusions and limitations in common with many insurance contracts which prevent the making of a successful claim and this reduces the risk of an insurer paying out even more. This is called a '*burn rate'*.

Who pays for ATE and when?
The recent cases have also shone a light into some dark corners. ATE insurance is not like car or house insurance - no money changes hands when the policy is taken out. If a case is lost, then no ATE premium is due at all. Only if an insured party wins the case is the liability to pay ATE triggered. Judicial eyebrows have been raised about this funding arrangement. In *Graham Barnes v Black Horse Limited*, **[2012] EW Misc 11 (CC)** HHJ Gregory had this to say about a Temple Legal ATE policy:

> *'25. …. But, what is most startling and what I find deeply disturbing, is the fact that this schedule includes a claim for payment of an "after the event" insurance premium of £9,187.50. I struggle to conceive of the circumstances in which a solicitor or counsel, properly advising a client with a claim for £1,500, would advise that client to incur a liability of in excess of £9,000 when the claim might fail.*
>
> *26. I find the whole arrangement extremely shady because what Miss O'Brien on behalf of the Claimant is effectively telling me is "If we win, we want an after the event insurance premium of over £9,000 but, if we lose, the client will not have to pay it" and the certificate on the bottom of this statement of costs is as follows:*
>
> > *"***The costs estimated do not exceed the costs which the Claimant is liable to pay in respect of the work which this estimate covers***."*
>
> *So, in reality, I would have been asked had the claim succeeded to order payment of over £9,000, which is not going to be required I am told because the claim has failed. It begs the question of for whose benefit this litigation has been run. It has seemingly not been for the benefit of Mr Barnes ….. It is, quite frankly, outrageous that a claim of £1,500 should produce a bill of costs of nearly £30,000, howsoever it might be justified.'*

What are the facts relevant to the ATE premium?
Kai Surrey is a clinical negligence case concerning an infant with birth defects. From 2006 it was funded by legal aid but the funding was swapped over to a 'no win, no fee' one with ATE (provided by an Allianz Insurance PLC LitigATE policy) just before LASPO came into force in April 2013. The case settled with the NHS Trust agreeing to pay £2.4million and annual payments initially of £74,400 rising to £154,236 for life after the age of 19. An ATE premium of £50,681.78 was claimed even though this case was ultra low risk because liability had been agreed by the NHS Trust over a year before the CFA was entered into.

AH was also a clinical negligence case again initially funded by legal aid and then the funding was changed to CFA/ATE. The ATE was again a LitigATE policy from Allianz Insurance PLC. The NHS Trust made a Part 36 offer of £325,000 (with an extra £26,409 for the DWP's Compensation Recovery Unit) which was accepted. An ATE premium of £18,881.78 was claimed even though this case was also low risk because the part 36 offer was made by the NHS Trust 9 months after the CFA was entered into. Most of the legal work had also be done by *AH*'s lawyers in the 3 years before the CFA was taken out under her legal aid certificate funding.

What did the costs judge decide about ATE in *Kai Surrey*?
On 10 August 2015, Master Rowley in the SCCO **[2015] EWHC B16 (Costs)** ruled that ATE block cover of £500k was excessive and a more appropriate amount was £250k. Applying a ruling of RCJ Ian Besford in *Finney v Department of Health* (unreported – 4 February 2015) which was on all fours on this point, he reduced the amount of ATE premium recoverable by 37% to £31,800.

What did the costs judge decide about ATE in *AH*?
On 12 January 2016, Deputy Master Campbell in the SCCO **[2016] EWHC B3 (Costs)** ruled that no ATE premium was recoverable because it was not an objectively reasonable choice for the receiving party to switch to legal aid funding as she would be giving up her right to a £17,500 *Simmons v Castle* uplift. However the Master noted that the receiving party had legal aid protection for 3 years and that the ATE premium should be reduced to reflect that. He ruled that an ATE limit of cover of £500,000 was too high. On this basis he ruled that even if the ATE premium was recoverable he would have reduced it by 20% to £15,000.

What grounds did the receiving parties advance for appealing the ATE rulings?
They sought to uphold the ATE premiums by reference to the well-known 2006 Court of Appeal ruling in *Rogers v Merthyr Tydfil CBC* **[2006] EWCA Civ 1134** where Lord Justice Brooke said this in relation to a DAS 80e policy:

> *'117…..District judges and costs judges do not, as Lord Hoffmann observed in* Callery v Gray (Nos 1 and 2) **[2002] UKHL 28** *para 44, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperiled 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.'*

What do the paying parties say to support the rulings about ATE insurance?
They say that the *Rogers* guidance is 10 years old and is based on the 14 year old guidance in *Callery* when CFA funding with ATE were in relative infancy. Things have moved on and costs judges now have over 10 years of experience of ATE premiums. Neither *Callery* nor *Rogers* says that a costs judge cannot adjust an ATE premium on a 'broad brush' basis but if they do then those appellate courts have urged caution when such an adjustment is made. They rely on *Kelly* and *Redwing* Construction Ltd v. Wishart **[2011] EWHC 19 (TCC)** where such an ATE adjustment was made on that broad brush basis.

What was the ruling of Senior Costs Judge Hurst on ATE in *Kelly v Black Horse*?
This judgement being a rare authority on ATE premiums was handed down by Master Hurst in the SCCO on 27 September 2013 **[2013] EWHC B17 (Costs).** The receiving party sought costs of nearly £47k which included a claimed ATE premium of £15,900 including IPT. The paying party's own costs were less than £6k. No expert evidence as to actuarial calculations or setting of ATE premiums were before Master Hurst.

He ruled that '*there is no doubt that the ATE premium sought in this case is wholly disproportionate.*' He found the base costs and success fee to be '*disproportionate*' too. Whilst he noted that he had no evidence as to the information which was given to the ATE insurers to enable them to rate the policy, he ruled that the receiving party's solicitor's risk assessment '*was entirely meaningless'* and concluded that '*the insurers were not given accurate information*'.

Master Hurst ruled that it was reasonable to expect the paying party to pay only 25% of the claimed ATE premium of £15,000. This produced a figure of £3,750 to which IPT was added and which was subject to the order of the trial court that the paying party had to only pay 70% of the receiving party's costs. As a cross-check, Master Hurst said this calculation stood up well to the burn rate calculation figure of £3677.

Are there any other prior authorities on ATE recoverability?
Redwing Construction Ltd v. Wishart **[2011] EWHC 19 (TCC)** Akenhead J in the Technology & Construction Court carried out a summary costs assessment at the end of a trial. Redwing had taken out ATE insurance with an off-shore insurer, Templeton (based in the Isle of Man), with a premium of £20k of which £5k was to cover its own disbursements. He ruled that the basic costs rules and practice about reasonableness and proportionality apply to ATE and to the extent that an ATE premium is unreasonable or disproportionate, it should be disallowed on a standard assessment. It must be a reasonable

presumption that ATE premiums are linked to an assessment of risks and the prospects of success in the litigation. The ATE premium which can be allowed can be adjusted downwards to reflect the fact that at the time when the insurance was entered into the prospects of success were good or high. The ATE premium here was very high for a case which when arranged Redwing was always likely to be the substantial winner. An ATE premium of £8,480 for cover of £20,000 appears substantially excessive judged at the time of arrangement. Redwing was awarded only 20% of the ATE premium. Again no expert evidence as to actuarial calculations or setting of ATE premiums was before the judge.

Kris Motor Spares Ltd v Fox Williams LLP **[2010] EWHC 1008 (QB)** Simon J (sitting with Master Campbell and Simon Veysey as assessors) considered and ATE premium of £95,550 which provided cover of £130,00. The ATE was provided by Temple Legal Protection Limited. There is no presumption that an ATE premium is reasonable, unless the contrary is shown. Where issue is raised as to the size of the ATE premium there is an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable. Such challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion.

What did the Foskett J rule on the ATE issue?
Foskett J started by observing (in relation to *Kelly*) that:

> '117…..*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.*'

Accepting that costs judges do have the necessary experience of ATE premiums and things have moved on in the 10 years since *Rogers*, he ruled:

> '118…*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.*'

He labelled the £500k of ATE cover in *Kai Surrey* as 'disproportionate' and agreed that:

> '119. … *There was ample scope for an adjustment and Master Rowley used his own experience and that offered in the case of* Finney *to arrive at what he considered an appropriate recovery. I would not interfere with that assessment.'*

Foskett J accordingly upheld the 37% ATE premium reduction in *Kai Surrey*.

As to *AH,* Foskett J said:

> '120…. *On that basis it is arguable that there was less justification for intervention than in* Surrey*, but it would not be right for me to interfere simply because others might have reached a different conclusion. The decision was made by an experienced Costs Judge who will have a much better "feel" for this matters than a judge who deals with this kind of issue intermittently*.'

Whilst Foskett J over-ruled the judge below on the ATE recoverability issue, he did agree with him that the ATE premium must be reduced by 20% in *AH*.

How have the courts treated ATE premiums relating to appeals?
In *Ultimate Products v Woolley (unreported)* there was a challenge to the ATE premium in an IP case that went on appeal to the Court of Appeal: **[2012] EWCA Civ 1038**. At the assessment the paying party tried to leverage a reduction relying on *Kelly*. However such a challenge failed because the cost judge found that the risk profile for an appeal (where an outcome was more difficult to predict) was different to first instance cases. For this reason, the costs judge declined to interfere with the ATE premium at all.

There were some attempts by ATE insurers or receiving parties to aggrandize this decision but this is misplaced. The costs decision was one made by a SCCO judge and whilst it related to a case which went to the Court of Appeal, the costs decision was not a Court of Appeal one. Further there is a well-trodden path for personal injury cases where often liability will not really be in doubt (especially in the clinical negligence context), and it is easy to price up the various steps and for an underwriter to calculate an ATE premium on a proper actuarial basis.

What have other costs judges done when assessing ATE premiums recently?
In *BNM v MGN Limited* **[2016] EWHC B13 (Costs)** Senior Costs Judge Master Gordon-Saker on 3 June 2016 dealt with what costs were properly due in a phone hacking case. He ruled that whilst a £58k ATE premium was '*disproportionate*' he '*could not conclude that the premium was unreasonable'* and he

accepted that its purchase was '*necessary'*. However he said that '*costs may be disproportionate even though they were necessary*: **CPR 44.3(2)(a).**'

He ruled that Temple Legal Protection's ATE premium must be reduced by 50% because:

> '53. *The premium has added significantly to the costs that were reasonably incurred, broadly matching the aggregate of base profit costs and counsel's fees. I concluded in the course of the detailed assessment that, at the outset, the Claimant's prospects of success were "significantly in excess of 50/50". Those prospects did not reduce. The Defendant made substantial admissions in its Defence. A premium of £58,000 at the stage that the claim settled, potentially doubling to £112,500, cannot be said to bear a reasonable relationship to a claim which settles for £20,000, where there was no substantial claim for non-monetary relief, which was not particularly complex, where no significant additional work was generated by the conduct of the paying party and where there were no wider factors involved*.'

Where does the decision in *Banks v Hillingdon LBC* fit in?

This is an unreported decision that is out of kilter with all these other decisions. Judgement was handed down at the beginning of July 2016. An ATE policy was taken out with DAS Legal Expenses with a premium of £24,694.25 in a very routine 'tripping and slipping' case. The most the adverse costs could be was £17k. The case went to a 1day fast track trial and damages of only £6890 were awarded. The paying party rightly challenged the ATE premium as disproportionate. On a paper assessment Master Gordon-Saker (sitting as a deputy district judge of the county court) reduced the ATE premium by 60% to £9,375. This figure was upheld at an oral hearing before him with evidence from the ATE insurer on premium calculation not persuading him to change his mind.

This case went on appeal and was heard by HHJ Karen Walden-Smith in Central London County Court with DJ Lethem as assessor. Unfortunately she swept aside (as she should not have) the guidance in the judgements in *Kelly*, *Redwing* and *Finney* where costs judges had intervened when faced with outrageous ATE premiums which bore no resemblance to the risk they purported to insure. In a brave decision she over-ruled the Senior Costs judge and said it was not for him to re-calculate the premium as he was without access to the whole basket of risk. She does also say:

> '*The fact that a party has the benefit of a staged ATE insurance premium does not mean that the court is prohibited from intervening and determining the reasonableness of the costs of such instances however, as is clear from the judgment of Simon J …… it is necessary for there to be some evidence upon which the District Judge or Master can rely*.'

Which decisions will costs judges be bound to follow and which are merely persuasive?

At the end of his judgement Foskett J stresses the following:

> '122. *I should record my indebtedness to all Counsel for their assistance and to Master Gordon-Saker for his most helpful advice. As to the latter, I emphasise, of course, that the decisions reached are mine and mine alone.'*

The *Banks* decision is merely a county court decision even though it was given on appeal. It is unfortunate that its handing down appeared to have crossed with that of *Kai Surrey* and *AH*. The ATE insurance industry as a whole must have been aware of both appeals and it no doubt suited their purposes to try and ride both horses at once. However that is not the duty of lawyers when acting in litigation. *Kai Surrey* and *AH* is a High Court decision given on appeal and costs judges in the county court must follow it. As *Banks* was decided without reference to *Kai Surrey* and *AH* it is a decision *per incuriam* and other courts accordingly do not need to follow it.

How can this conflict be resolved?

Only a decision of the Court of Appeal can put this matter beyond doubt once and for all. It would be sensible for it to take a case so that it can re-examine *Rogers* in the light of not just 10 years' experience of the ATE market but also the new post-Jackson version of CPR part 44 and the corresponding practice direction which make significant changes to costs assessments. In *May and Dobson* **[2016] EWHC B16 (Costs)** Master Rowley considered the new test of proportionality and reduced costs assessed as reasonable yet further because they were not proportionate.

3rd August 2016