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SCCO rules that ATE premium was validly incurred and declines to interfere with premium

Allan Coleman v. Medtronic Limited
[2016] EWHC B27 (Costs)

Article by David Bowden

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Executive Summary

Master Leonard in the SCCO has ruled on the recoverability and amount of an ATE premium in a contested product liability case where limitation was an issue. He ruled that it was reasonable for a claimant to take out an ATE policy to protect himself against costs especially bearing in mind the defendant's robust and combative approach to denying liability pre-issue. The chief risk officer of the ATE insurer provided evidence as to risk assessment and in the light of this the costs judge declined, even on a broad brush basis, to interfere with the ATE premium. The ATE premium was reduced by £24,537.57 to reflect the fact that exposure to opponent's costs had been overstated. Finally as the bill of costs was served over 2 year's late, interest on costs was disallowed for a period of 22 months.

Allan Coleman v. Medtronic Limited
[2016] EWHC B27 (Costs) 24 October 2016
High Court of Justice, Queen's Bench Division, Senior Courts Costs Office (Master Leonard)

What had the underlying dispute been about?
Medtronic Limited ('the paying party') was the UK distributor of 'Sprint Fidelis' cardiac leads designed to be used with an implantable cardioverter defibrillator. These products were recalled. Mr Coleman ('the receiving party') instructed Leigh Day to pursue a claim for damages on the basis that his lead had fractures causing electric shocks and personal injury. Limitation remained an issue. A nuisance value offer was made pre-issue to settle for £5,703 which was rejected – as was the receiving party's counter-offer of £85. A claim was issued, defence served, disclosure was completed, witness statements were exchanged and the case was set down for trial. The paying party's party 36 offer of £37,500 was rejected. The receiving party then accepted the paying party's offer to pay him £60k without admission of liability with costs to be assessed if not agreed.

What was the position in relation to costs in the SCCO?
A bill of costs had been drawn up and points of dispute served. The profit costs and applicable success fee had been agreed between the 2 sides. The only issue remained in relation to the 'after the event' ('ATE') insurance policy.

What were the issues the costs judge was asked to address?
There were these 3 issues for the judge:

- Should an ATE premium have been incurred at all?
- Was the claimed ATE premium of £144,785.65 with First Assist reasonable? And
- Should interest on costs be disallowed?

What did the paying party say?
The paying party said no ATE premium should have been incurred at all. It referred to a lengthy exchanged of correspondence pre-issue. It claimed the effect of this, including a proposed standstill agreement in relation to the claim, and a proposal in relation to unqualified costs shifting meant it was wholly unnecessary for the receiving party to have incurred any liability at all for an ATE policy premium.

What did the receiving party say?
The receiving party disagreed with this saying its sensible proposal for unqualified one way costs shifting had never been agreed to. It said the offer pre-issue was derisory and that the only way forward was to issue a claim. The receiving party required the protection that an ATE policy gave. This was moreover the case in a claim in which limitation was in issue. The costs judge's attention was specifically drawn to a 7 page letter sent by the paying party pre-issue with a 'Counter schedule and rationale for settlement offer' settled by Mr Toby Riley-Smith QC. It was clear from this that the paying party was not going to roll over on this case, that another case which had settled on compassionate grounds was not intended to set a precedent and that the only option was to take out at ATE policy.

What evidence was before the costs judge?
The costs judge had evidence by way of witness statements before him from the following witnesses. No witness was required to attend for cross-examination at the detailed assessment hearing.

- Mrs Jill Paterson, partner in Leigh Day, solicitors
- Mr Ross Clark, Chief Risk Office of Burford Capital.

Mrs Paterson's evidence dealt with the costs amnesty, the proposals in relation to unqualified one-way costs shifting and her reasons for selecting First Assist to provide ATE cover.

Was there any expert evidence on the ATE premium?
No. However Mr Clark gave evidence as to how and why Burford had set the ATE premium in the manner it had. Although this is lay evidence as such it carried considerable weight in view of his position and seniority within the ATE insurer. There was no expert evidence from the paying party from a qualified actuary as to the level of comparable ATE premiums in the market.
What did the costs judge rule as to whether the ATE premium was reasonably incurred?
On reviewing the history of the case pre-issue, the costs judge ruled that the paying party's points of dispute were not 'entirely accurate'. He noted the pre-issue offer of less than £6000 and said this left the receiving party with 'the choice of accepting …a massively discounted offer, bearing the disbursements he had incurred in the meantime of proceeding to litigation'. For this reason he concluded that he did 'not believe that there is any proper basis…for concluding that it was unreasonable for the claimant to take out ATE insurance when he did'. He rejected the paying party's contentions to the contrary saying that 'he found no substance' in their arguments 'that it was unreasonable for the claimant to treat this claim' as a 'lead case'.

What had the High Court ruled previously in *Kai Surrey*?
Mr Justice Foskett sitting in the High Court with Senior Costs Judge Master Gordon-Saker as an assessor allowed appeals from decisions of costs judges in 3 different cases. These cases were *Kai Surrey v Barnet & Chase Farm Hospital* and *AH v Lewisham Hospital NHS Trust* **[2016] EWHC 1598 (QB)**. Foskett J upheld the decisions of 2 different costs judges who reduced the amount of ATE insurance premium allowable on an assessment from £50,681 to £31,800 and from £18,881.78 to £15,000 respectively.

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.*'

What did the costs judge rule on the calculation of the ATE premium?
He agreed with the approach given by Foskett J in *Kai Surrey* especially at paragraphs 115-118 of his judgment. He emphasized however that 'sufficient caution is exercised' when a costs judge seeks to adjust an ATE premium on this 'broad brush' basis. As to the paying party's arguments, the costs judge said this '*confused exposure with risk*'.

The costs judge refused to draw any adverse inference from the receiving party having failed to answer a request seeking '*all material passing between themselves and the ATE insurers which concern the inception of the ATE insurance and the rating of the premium'*. The costs judge ruled there was '*no procedural provision for disclosure of the kind sought much less any requirement'*.

The costs judge said he should assess the risk of the ATE premium as the ATE insurer had done by focusing '*upon the prospect of success of this particular claim'*. For this reason he was unable to accept the paying party's submission that the risk of failure (bearing in mind limitation was always an issue) was 15%. Rather the costs judge said the paying party '*could marshall cogent and closely argued reasons to assess the claimant's prospects of success at 20%*' and that for this reason it was '*difficult to see how Burford's 60% assessment can be characterised as unreasonable*'.

Concluding the costs judge ruled that '*it seems to me that an assessment of the prospects of success at 60%, for the purposes of this ATE policy, did not fall outside a reasonable range. It follows that my conclusion is that there is no proper basis for reducing the claimed ATE premium'.*

What adjustments did the costs judge make to the ATE premium? How was this justified?
The costs judge did rule that the ATE premium should be adjusted downwards slightly. This was because it had over-estimated the amount of opponent's costs. The ATE premium that the paying party had to pay was therefore assessed at £120,248.08.

What does CPR part 47.7 and 47.8(3) say about interest on costs?
CPR states that detailed assessment proceedings shall be commenced '3 months after the date of the judgment etc'. CPR 47.8(3) deals with 'Sanction for delay in commencing detailed assessment proceedings' and provides that:

> *'(3) If –*
> *(a) the paying party has not made an application in accordance with paragraph (1); and*
> *(b) the receiving party commences the proceedings later than the period specified in rule 47.7,*
> *the court may disallow all or part of the interest otherwise payable to the receiving party under –*
> *(i) section 17 of the Judgments Act 18381; or*
> *(ii) section 74 of the County Courts Act 19842,*
> *but will not impose any other sanction except in accordance with rule 44.11 (powers in relation to misconduct).*'

What ruling did the costs judge make about interest on costs?
The order requiring the paying party to pay the receiving party's costs was dated 3 April 2013. Notice of commencement under CPR part 47.7 should have been served within 3 months of that date. The bill was served on 29 October 2015 – more than 2 years late. The costs judge ruled that '*interest is disallowed from 1 January 2014 to 28 October 2015 inclusive*'.

What lessons can be learned from this case?
This related to an individually rated (rather than a block rated) ATE policy. This means that the amount of the ATE premium could have been attacked successfully without the need for expert evidence applying the approach of Master Hurst in *Kelly v. Black Horse* as endorsed by Foskett J in *Kai Surrey*. Here though there was cogent evidence from the chief risk officer of the ATE insurer as to how the risk had been determined and the ATE premium correspondingly set.

From the claimant's and the ATE insurer's point of view this was a risky case because of limitation and the defendant's stance pre-issue. Correspondingly this meant that a premium would be high and the insurer had set a 60%+ chance of success for other similar claims to be joined to this claim. Finally, the cost judge agreed here that the fact that similar cases had been settled in the USA was irrelevant because of the different product liability laws that applied there.

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