Determining recovery of disputed ATE premiums

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Dispute Resolution analysis: When will an after the event (ATE) premium be considered reasonable and proportionate? Alex Bagnall, associate and costs advocate of Just Costs Solicitors, comments on a recent decision where the defendant in a personal injury claim, as the paying party, disputed the amount of an ATE policy the claimant sought to recover in costs.

Original news

Nokes v Heart of England Foundation NHS Trust [2015] Lexis Citation 81

In a relatively straightforward clinical negligence claim, liability was admitted before a claim was issued. The defendant's Pt 36 offer to settle the case for £40,000 was accepted. The claimant sought total costs of £19,228.12. This included a claim for an ATE premium of £6,020.80 including insurance premium tax (IPT). This was a post-April 2013 ATE premium. This ATE premium provided cover of £10,000 in relation to experts' reports. The claimant obtained one such report costing £2,109 + VAT. In detailed assessment proceedings, the defendant submitted that the ATE premium was not recoverable being unreasonable in amount and disproportionate to the amount of cover.

The Senior Courts Costs Office (SCCO) had evidence before it from both an underwriter from the ATE insurer and an experienced costs lawyer which included the costs of comparable ATE policies that were available both before and after 1 April 2013. The costs judge found the ATE premium to be reasonable and proportionate. The cost of the ATE policy was accordingly recoverable in full from the defendant.

What were the key issues in the case?

This was a reasonably straightforward clinical negligence case. The claimant alleged that the defendant failed to adequately assess the results of blood tests during her pregnancy. She said she had a traumatic birth and this led her to develop obsessive compulsive disorder. This was to be treated by individual psychological treatment.

The claimant's solicitors issued a pre action protocol letter of claim. Those solicitors had a delegated authority scheme from Temple Legal Protection. This scheme enabled those solicitors to issue an ATE policy without reference to Temple Legal as long as it met the scheme criteria. The ATE policy was in two parts. Part A provided a limit of indemnity of £10,000 and for this the premium was £6,020.80 including IPT. This provided cover for the claimant to obtain expert evidence. The claimant obtained one expert report costing £2,109 + VAT. The case settled before proceedings were issued.

While this was a post-April 2013 case (in which the usual rule is that ATE premiums are not recoverable from an opponent), the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013, SI 2013/739 still allow the recovery of ATE premiums from an unsuccessful opponent by way of costs where the amount of the premium does 'not exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation'.

The defendant said it defied any commercial logic that someone would pay an insurance premium of £6,020.80 to cover the cost of obtaining an expert report that only costed £2,109. The defendant submitted that the costs judge should and could find the ATE policy cost to be unreasonable and disproportionate. The defendant submitted that it should have been obvious to the claimant's solicitors that liability was likely to be admitted and applying its risk calculations that the appropriate figure in this case for an ATE policy was £347.99 + IPT.

What did the SCCO decide?

As a preliminary issue the SCCO had to decide if the wording of the ATE policy itself complied with the Courts and Legal Services Act 1990, s 58C (CLSA 1990). The ATE policy was in two parts. Part A had a limit of indemnity of £10,000 (for a premium of £6,020.80) while Part B had a limit of indemnity of £100,000 for 3% of the damages recovered. CLSA 1990, s 58C requires an ATE premium to state how much of the premium relates to the liability to pay for an expert's report. The

defendant submitted that the Part A figure did not just represent the cost of insuring against the liability for expert's reports but also the costs of insuring such premiums.

On this preliminary issue the SCCO applied *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 and held that a contract is to be read as a whole. The SCCO found that nothing turned on whether the ATE policy was described as incorporating one premium in two parts or two premiums. The SCCO ruled that the defendant's submissions were artificial and wrong. Accordingly, the ATE policy was held to be compliant with CLSA 1990, s 58C and the defendant failed on this preliminary issue.

What insights are provided as to the interaction between reasonableness and proportionality of costs incurred?

The Civil Procedure Rules 1998, SI 1998/3132, CPR 44.3(1) provides that on a standard basis assessment a receiving party's costs will be disallowed insofar as they have been unreasonably incurred or are unreasonable in amount. Further, CPR 44.3(2)(a) provides that costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.

In its points of dispute, the defendant said it defied logic and common sense to incur an ATE premium of £6,020.80 for an indemnity of £10,000--more so when the expert report cost only £2,109. The costs judge disagreed with this.

In the leading case of *Callery v Gray* [2002] UKHL 28, [2002] 3 All ER 417 Lord Hoffman said:

> 'District judges and costs judges do not, 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 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.'

Since that time judges, especially in the SCCO, have a lot more experience of ATE premiums. There have been at least two successful reported challenges to the level of ATE premiums:

- *Redwing Construction Limited v Wishart* [2011] EWHC 19 (TCC), [2011] All ER (D) 101 (Jan)--ATE premium reduced from £20,000 to £4,000, and
- *Kelly v Black Horse Limited* [2013] Lexis Citation 138--ATE premium reduced from £15,000 to £3,750 (where clear that prospects of success were misrepresented to insurer)

Here Master Leonard found there was no evidence that the premiums produced by Temple's block rated scheme were unreasonable. The Master doubted whether it was right to single out a single item of expenditure in applying the post 2013 proportionality test. He said the intention of the Jackson reforms was that:

> 'proportionality of costs as a whole would be considered after costs have been assessed by reference to reasonableness, at which point the court might take the view that the remaining total is still disproportionate and reduce it to a proportionate sum.'

However, on the assumption that a costs judge could single out one particular item in a bill, the Master found having regard to the sums in issue and complexity of this piece of litigation (noting that the defendant had to seek the advice of four different experts before making its Pt 36 offer) that the ATE premium cannot be said to be disproportionate.

When seeking to recover or challenge ATE premiums which are disputed, what is the key evidence that needs to be addressed?

The SCCO had before it a witness statement from David Pipkin who is an underwriter at Temple Legal Protection which provided the ATE policy. That statement explained how the delegated authority scheme worked. Mr Pipkin made these main points:

- Temple's pre-April 2013 loss ratio across its clinical negligence book was 81%
- Temple's underwriting profits were marginal, and
- Temple had to wait two to three years to recover ATE premiums (while paying out significant sums on claims

meanwhile)

This witness statement also explained that Temple had a great deal of historic information about settlement trends, success rates and the costs of clinical negligence cases. This data was used by Temple to set ATE premiums which would still allow a competitive product to be offered after 1 April 2013. It said that the delegated authority scheme also saved money (and reduced premiums) because fewer individual cases needed to be referred to an underwriter to be assessed if they fell within the parameters of the scheme. Temple said its precise calculations were 'commercially sensitive' and were not produced to the SCCO.

The SCCO also considered a witness statement from Ken Corness-- technical director at Acumension the firm which acted for the defendant in the SCCO. He has over 25 years' experience in costs law work. This witness evidence dealt with the cost of comparable ATE policies from other providers. These are divided into two groups--with the first group covering ATE costs before April 2013 and the second group after April 2013.

Pre-April 2013 comparables

- Temple Legal--£1,855 for £100,000 of cover, and
- LAMP--£1,802 for £9,000 of cover

Post-April 2013 comparables

- DAS Law Assist--200% of the actual cost of clinical negligence expert's reports (so £5,060 + IPT)
- ARAG--£5,088 including IPT (limit of indemnity unclear), and
- LAMP--£5,091 + IPT for £10,000 of cover

The ATE market has changed since April 2013 when on the whole ATE premiums (and success fees) can no longer be recovered as additional liabilities from an unsuccessful opponent but instead have to be deducted from any damages recovered. It is therefore doubtful whether any pre-April 2013 comparables are of any assistance to a costs judge on a post-April 2013 case (and vice versa).

Mr Corness's evidence was also that the claimant's solicitors had failed to explain what they had done to shop around for the best value policy for her. This contention along with the other post-April 2013 comparables failed to persuade the judge in this case. The judge noted that the comparables were figures for ATE policies from other providers that had been individually assessed. He said this was not a valid comparison because the Temple Legal ATE premium was produced under a block-rated scheme. The defendant conceded that the use of a block rated scheme was not of itself objectionable.

However, the judge did note that he had no expert evidence in this case on one aspect. This is whether a premium produced by a block-rated scheme is in some way wrong or unreasonable. He said he found general observations about costs in clinical negligence cases not to be helpful. It is clear that a costs judge will need to have evidence before him comparing like with like. For a challenge to a premium on a block rated scheme to have a chance of getting off the ground, that will need evidence that the premiums such a scheme produces are wrong. Obtaining such evidence may not be straightforward and then finding an expert to testify on this may be even more problematic.

How does this judgment potentially impact other cases?

Given Master Leonard's findings in this case, it is unlikely that evidence of this nature from an ATE underwriter will be required in every contested case.

What are the implications for costs recovery in litigation? Are there any grey areas remaining?

The courts are yet to deal with a case in which expert underwriting evidence has been adduced by a paying party. Such evidence, if it is ever obtained, may pave the way for a raft of new challenges to the cost of premiums.

What should lawyers do next?

An enlarged panel of the Supreme Court heard arguments in February 2015 in the case of *David Coventry t/a RDC Promotions v Lawrence & Shields and others* UKSC 2012/0076.

Judgment in that case has been reserved and may appear before the end of Trinity term. This concerns a pre April 2013 claim. One of the issues in that case is whether the ATE premium (which together with the success fee totalled £1.3m of the £1.5m total costs) is recoverable. It may be that the Supreme Court carves out an exception for 'ordinary non-rich' litigants or even rule that the pre-2013 system is not compliant with the Human Rights Act 1998.

It has been suggested in some quarters that lawyers acting for paying parties on pre-2013 claims should seek a stay of costs proceedings where the amount of ATE premium is in issue pending the final determination of *Coventry v Lawrence*. In practice, courts are resistant to such stays.

For post-2013 claims, lawyers seeking to challenge ATE premiums should attempt to gather comparables about other post-2013 ATE premiums. Where a challenge is made to a block rated scheme then any comparables must relate to other such schemes rather than individually assessed premiums. Any comparables must, however, be truly comparable. For a challenge in such a case to succeed, it is likely that expert evidence probably from an underwriter or consultant actuary will be needed.

Interviewed by David Bowden.

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