IN THE HIGH COURT OF JUSTICE **Claim No. B10YJ831/BM60045A**
BIRMINGHAM DISTRICT REGISTRY

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Thursday, 7th July 2016

Before:

THE HONOURABLE MR JUSTICE LANGSTAFF

Between:

MS LISA POLLARD

Claimant/Appellant

-v-

UNIVERSITY HOSPITALS OF NORTH MIDLANDS NHS TRUST

Defendant/Respondent

Counsel for the Claimant/Appellant: MR WASZAK

Counsel for the Defendant/Respondent: MR MALLALIEU

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

THE HONOURABLE MR JUSTICE LANGSTAFF:

1. On 7th February 2012 Lisa Pollard slipped in the car park of the City General Hospital, Stoke-on-Trent. It had been snowing. The car park had not been gritted, nor cleared, in accordance with the policy of the occupier. She claimed in respect of injuries which she said she had suffered. Liability was defended. At some stage during the course of her claim, damages were agreed in the total sum of £3,000.

2. To litigate the question of liability, and no doubt at that stage quantum, she reasonably needed the support of a conditional fee agreement. It would be necessary for a litigant in her position to insure against the costs and disbursements which were to be incurred by the other side for which she would be responsible should the defendant succeed. To cover those costs and the premium itself, her solicitors entered into a policy with DAS ATE Insurance.

3. The claim came before Recorder Maxwell QC sitting in the Leicester County Court on 1st February 2016. The success of the claim depended both upon Miss Pollard's credibility on the one hand and the acceptability of the defendant's evidence as to the system it had and whether it operated it properly. She succeeded in her claim, as she well might not have done if the judge had taken a different view of either her credibility or a more favourable view of the defendant's system than he did.

4. At the conclusion of the trial, which was necessarily a fast track trial given the amount involved, she asked for costs. This was by way of summary assessment as appropriate to a fast track hearing. It included, therefore, the cost of the premium of the policy which had been taken out. That was in a sum just over £18,000. The cost of the policy seemed high to Recorder Maxwell; no doubt he was influenced by a comparison between the cost of the policy and the amount which Miss Pollard stood to recover. In particular, at the conclusion of the case he was told by the representative for the defendant that the policy provided cover for £100,000 of costs and expenses. His view was that the maximum that the costs to be covered by the policy would come to would be somewhere in the region of £15,000. That suggested to him that the premium was too high and that there should be a proportionate pro rata reduction in the amount of premium which he should permit within the rules.

5. He expressed this view briefly as appropriate to a summary assessment. At paragraph 28 of his judgment he said:

> "I accept the approach that the insurer might have been dealing with a case that had only a 50-50 chance of success and I accept that the premium must cover at least 100 percent of the costs in issue. Where I think that the insurers have gone wrong is in applying £100,000 as a standard limit of indemnity. The appropriate limit of indemnity should be what is judged to be 100 percent of the costs in issue. I can understand why Mr Clothier says that £100,000 is more than sufficient in most cases. It is much more than sufficient for the 100 percent of the costs that would have been in issue in this case which, being as realistic as I can be but nevertheless adopting a fairly robust approach, in my judgment would not have exceeded £15,000. The conclusion that I

reach is that applying a pro rata approach to the premium that was applicable to £100,000, a figure of £15,000 as the limit of the indemnity would have been in the region of £2,400 which I am going to round up to £2,500 as the recoverable ATE premium."

6. In reaching that conclusion the judge was applying, though he did not make specific reference to it, the law as set out in the Civil Procedure Rules, in particular Part 44. Part 44.3 and Part 44.4 at the time, this being a case before the introduction of the current provisions under the LASPO, read as follows:

> "44.3(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> 44.4(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) 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.
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will—
>
> (a) only allow costs which are proportionate to the matters in issue; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party."

7. There is a costs practice direction to which the court must have regard in exercising its discretion in respect of costs. That provides materially so far as follows:

> "11.4 Where a party has entered into a funding arrangement the costs claimed may, subject to rule 44.3B include an additional liability."

I interpose to say that an additional liability is such as an ATE premium:

> "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 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…
>
> 11.10 In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account may include:
>
> (1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost 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 representatives or agents."

8. The claimant appealed against the judgment insofar as the summary assessment in respect of costs did not award her the full extent of the premium which she had paid for the insurance which she had taken out. Sadly, though the judgment was delivered on 1st February 2016 and time for appealing expired 21 days later, the appeal was not put in until 9th March. The reasons for that are set out in a witness statement of Miss Jessica Tebbs of A&M Bacon Limited on the claimant's behalf. The question of costs was not to be dealt with by the solicitors who had acted for Miss Pollard in her claim; rather, solicitors specialising in costs were instructed to appeal. Instructions were given to them on 11th February.

9. For which reasons which are not fully explained, the file was not allocated to Miss Tebbs until 25th February. The reason advanced was that there was an internal administrative error in that the matter was not marked as urgent and it was therefore not immediately allocated to a case-handler. The 25th was a Thursday. She noted that the time period had expired, prepared the appellant's notice and by Monday it had been sent to the Leicester County Court where the decision had been made. That was, of course, the wrong court because the appeal needed to be filed at the local high court hearing centre which is Birmingham. Instead, when it was returned by Leicester the appellant's notice was then sent to where the case records were currently held - at the County Court at Telford. They finally came, however, to the high court in Birmingham on 9th March.

10. The defendant knew that the appeal was on its way by 29th February, coincident with its lodgement in Leicester at the first attempt to lodge it.

11. It follows that this hearing, by virtue of earlier case directions, is a rolled up hearing to consider permission to appeal and if permission is granted, whether I should allow the appeal or not.

12. As to permission to appeal, there are two aspects to it. One is the merits, which I shall consider separately below. The second is whether I should extend time for the appeal.

Counsel are agreed that the approach to be taken as to extension is that identified in the case of *Denton*, (being shorthand for the case of *Denton v White & Ors [2014] EWCA Civ 906).* That case considered relief from sanction in respect of cost budgeting. It set out three considerations which are relevant to the question of relief from sanction. The first is whether there was a substantial and serious default, the second was whether there was a good reason for the delay or error and, thirdly, all the circumstances of the case.

13. Mr Mallalieu, who appears for the defendant to resist the application to appeal, argues that the delay, short though it was in many respects being some seven days before 29th February, if that is the appropriate date to take, otherwise the number of days until 9th March, had to be seen in context. The context was one which places an emphasis upon speed and robustness. This was a summary assessment of costs: that is of necessity robust. It followed a fast track trial: that emphasises the desirability of speed.

14. He added that the appeal concerned only one aspect of a costs decision. It is conventional that any appeal in respect of costs is one in which the appellate court will accord the judge at first instance a very wide margin of discretion. In *Contractreal Ltd v Davies and Davies [2001] EWCA Civ 928* Lady Justice Arden at paragraph 50 noted that on any assessment of costs a court of appeal would be very reluctant indeed to entertain any challenge to the trial judge's assessment. She emphasised that summary assessment was a relatively rough and ready process, there because - as Voltaire said - the best can be the enemy of the good. It is a rough and ready process. The margin within which disagreement is possible must, she said in her judgment, be large since the trial judge was in the best position to know the details of the action and could not be expected to explain those at length in a judgment simply dealing with costs.

15. The parties, submitted Mr Mallalieu, should be able to treat the matter as settled. Neither counsel referred as a matter of principle to me that the approach in *Denton* was an approach effectively to whether or not a case should be heard at all at first instance. This is an appeal. There is a substantial case for supposing that on an appeal time limits may be dealt with rather more strictly than they might below, for the application of a strict approach does not preclude there being a judicial decision by a competent court, as such an approach before there had been any hearing at all would do.

16. I accept the principle, now enshrined clearly within the Civil Procedure Rules, to the effect that time limits are limits and not merely targets to be aimed at. There must be a discretion to extend time but it needs to be exercised judicially, that is with regard to reason, relevance, justice and fairness.

17. It is argued by Mr Waszak for the claimant that here the default was not significant in context, that there has been an honest reason advanced, the delay was relatively short, in all the circumstances of the case this is one of those cases in which I should exercise my discretion to permit the appeal.

18. I have concluded that the default, though in many respects serious and having an element of farce about it when it came to identifying the appropriate court, was a simple case of a simple error which was fairly quickly spotted.

19. I do not think that in context, even allowing for Mr Mallalieu's points, I would hold that the default was particularly substantial or particularly serious. The reason has

been explained. It is not a good reason but it does explain why matters were overlooked, though I do take account of Mr Mallalieu's point that the claimant chose to instruct new solicitors who might therefore be supposed to take a little bit longer to file an appeal than might otherwise have been the case - but they were, after all, experts in the very area in respect of which the appeal was to be raised.

20. However, having had regard to the circumstances of the case and the way in which the matter was dealt with by the recorder, I have come to the conclusion that I should entertain the arguments and give permission for an extension of time to permit this case to be heard and I do so.

21. The question of costs, then turning to the merits, is something which is within the discretion of the court. Part 44 makes that clear. However, that discretion too, even though it leads to an assessment of figures in respect of which there is a wide ambit within which disagreement is possible, has to be approached by applying the applicable principles and just as a discretion in respect of time must be one which satisfies reason, relevance, logic and fairness.

22. The recorder was in the position, as Mr Mallalieu submits, that he could, and it is submitted should, have asked whether he was entitled to consider the reasonableness of the premium which had been charged. If he did so applying the rules set out in the CPR as augmented by the practice direction, the assessment he came to was one with which this court should not interfere. If his logic was that the premium looked unreasonably high, as intuitively it might, then he had a basis for examining further whether the claimant, upon whom the burden of proof lies to establish costs on a standard basis assessment, which this was, to satisfy him that the premium was reasonable. If he had a doubt about that, then he would have to resolve that in favour of the paying party.

23. In effect, submits Mr Mallalieu, that is what this recorder did. He took the view that the case was, as he described it, a "bog-standard slipper", thought that he had never seen a premium as high as the one here on a fast track case, and referred to whiplash injury cases. He thought that £100,000 worth of cover was excessive to cover £15,000 worth of costs. Not being satisfied that the claimant had shown him that the premium was reasonable, he was entitled to approach the matter as he did at paragraph 28.

24. I acknowledge that that might very well have been an approach which in many cases would be appropriate. The difficulty for Mr Mallalieu's arguments is that nowhere does any expression of this approach appear from the judge's judgment, making all due allowance for the fact that on a summary assessment on the spur of the moment at the end of a day in court, no doubt, it is not always easy to express the reasons felicitously for a decision. It is simply not the way he approached it. What he did do at paragraph 28 was say in the third line where he thought the insurers had gone wrong. It is curious, though this may be in danger of over-reading what is a summary judgment, that he was there referring to "insurers", rather than "claimant" when the question is whether the claimant had acted reasonably or unreasonably. But, on the face of it, he was criticising the standard product of an insurer.

25. He had evidence from Frances Clothier, whom he called Mr Clothier (counsel think it may well be Mrs or Ms) which was put before him by the claimant. There was no evidence put before the judge by the defendant. The evidence of Ms Clothier

explained why it was that the premium was calculated as it was. I shall return to this. The judge acknowledged that £100,000 of cover was more than sufficient in most cases but appears to have taken the approach in paragraph 28 that an appropriate premium applicable to £100,000 could be pro-rated down so that the appropriate level of premium for £15,000 was 15 percent of that sum. The question is whether he was entitled to take that approach on the basis of the material before him.

26. He was referred to some case law. Mr McMaster, who then appeared for the claimant, had at his fingertips the reference to the Court of Appeal decision in *Rogers v Merthyr Tydfil CBC [2007] 1 WLR 808* and a decision of Mr Justice Simon sitting with assessors in the Queen's Bench Division in *Kris Motor Spares Ltd v Fox Williams LLP [2010] EWHC 1008* but it is unclear that either of those cases was made available in copy form to the judge and it is a pity, perhaps, that they were not.

27. The argument advanced before me, during which I have had the benefit of a much more detailed exposition of the applicable law than was put before the judge, necessarily since he was conducting a summary assessment only, begins as it must with the rules. I have set those out. In the case of *Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134*, Lord Justice Brooke and Lord Justice Laws and Lady Justice Smith gave a collective judgment which considered in detail the recoverability of an ATE legal expenses policy underwritten or provided by DAS Legal Expenses Insurance Company. In the conclusion, it restored a decision of a district judge which had been overturned on appeal to the circuit judge by which the district judge had allowed the premium charged in the case before the court in full. The case was plainly one of great significance given that intervenors on behalf of the Law Society, legal expenses insurers, as well as the claimant and defendant appeared.

28. The principles which emerge from the decision first of all considered the question of proportionality in respect of a staged premium. The DAS policy in question there appears to have the same features as the policy in question before me. It involved three stages: a pre-issue stage where the premium is low, a second stage where the premium is a bit higher and additional to stage one, and stage three (again additional) which applies shortly before the case is due to be heard, at the time with which this case is concerned some 14 days before. At that stage it might be supposed, because the case is proceeding to trial, that the risks of success and failure are evenly matched and, indeed, the judge here in paragraph 28 accepted that was so in this case.

29. The judgment contains at paragraph 105 as follows:

> "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 staged premium – but not its proportionality: precisely because they have nothing to do with the quantum of the claim. But we do not think that is right. If the court concludes that it was *necessary* to incur the staged premium, then as this court's judgment in *Lownds [that is a reference to Lownds v Home Office (Practice Note) [2002] EWCA Civ 365]* 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 called the post-legal aid world.

106. It is important to recognise that this conclusion runs with, not across, the grain of the procedural reforms expressed in the CPR. The very recognition that justice requires a use of resources that is proportionate to what is at stake implies the rightness of a strategic approach. There can be no touchstone of a proportionate use of resources so understood, without an eye to the context in which any such resources are expended. 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 staged premium was necessarily incurred."

30. The court went on at paragraph 117 to deal with the evidence justifying the ATE premium claimed. He said this:

> "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 and 2) [2002] UKHL 28 at 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 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."

31. The case of *Kris Motor Spares Ltd v Fox Williams* concerned, in part, the basis upon which a judge might query within the scope of *Rogers* whether a premium was reasonable or unreasonable. At paragraph 44, Mr Justice Simon said:

> "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 at least some 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."

He went on to say that in the case before him no evidence had been deployed by the paying party and on that material it could not be said that the conclusion on the level of the premium was wrong. Then at paragraph 46:

> "The recoverability of ATE premiums under a costs order is the subject of vigorous debate… and this judgment should not be seen as discouraging challenges to ATE premiums on the basis of unreasonableness, for so long as such premiums may be recoverable in principle. However such challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion. The issue should be identified promptly and, where necessary, there should be directions for the proper determination of specific issues. This may involve the costs judge looking at the proposal; and in the receiving party providing a note for a one-off ATE premium and not just for a staged premium."

32. Had the judge in the case before me had the benefit of reading the case of *Rogers*, he would have appreciated that a product such as that to which the evidence before him from Ms Clothier related was that it was part of a block policy. The premium was calculated across the insurer's book. The premiums were set by reference to a general appreciation of the risk. In general, "slippers and trippers" are cases in which, at a trial to which a stage three premium relates, there will be around a 50 percent risk of success or failure. For the system to operate as a whole it is thus necessary for the premium in one case at stage three to cover not only the costs likely to be incurred in that case but also the same in respect of the next case on the basis that the insurer will win one and lose one. There must then be an allowance for the insurer's profit. Without that, there could be no insurance market for a product of this sort.

33. The decision in *Rogers* has fallen for consideration since the decision of Mr Justice Simon. He had left it open, as indeed did the Court of Appeal as I read it in *Rogers*, for there to be a challenge to the reasonableness of a premium. It cannot simply be the case that the premium once asserted by an insurer as a cost could not be challenged on an appropriate basis as appropriate for the paying party to pay in the particular circumstances of a particular case. I did not understand either counsel to submit otherwise.

34. Thus, in the case of *Redwing Construction Ltd v Charles Wishart [2011] EWHC 19 (TCC)*, a premium which was assessed upon the basis of an unrealistically high degree of risk, and therefore was too high for that reason in the view of Mr Justice Akenhead, was reduced; see his observations at paragraph 2, paragraph 15(d) and paragraph 21(b):

> "Whilst one can understand why a claimant might well want the safety net of such insurance, the risk of losing, judged at the time when it was

> entered into, was sufficiently low to undermine the reasonableness of imposing anything near 100% of it on the paying party in this case."

35. In a decision by Senior Costs Judge Hurst, PTH1300060 in *Kelly v Black Horse Ltd* the senior judge considered a case in which the insurers had not been given the accurate information as to the costs which were likely to be incurred (see paragraph 26). The costs estimated as those which might need to be covered by the bespoke premium in that case were overstated. It was for that reason he was safely able to conclude that the premium was too high.

36. Neither of those cases is identical to the facts before me. They are exemplars of the proposition that it is open to a paying party to challenge the reasonableness of a premium on appropriate grounds (in those cases either an under assessment of the risk or an over assessment of the costs that might be payable if the risk eventuated).

37. It was argued additionally, and in my view with force by Mr Waszak, that so far as *Redwing* was concerned it was a single stage premium rather than a staged premium policy which was there considered, and in *Rogers* the court had recognised that they were two different beasts; that the premium was bespoke; and there was no specific evidence as to its calculation. As to *Kelly* he argued that, again, the policy was not a staged one and there was no relevant evidence as to calculation in the case now before me though there had been such a calculation in *Kelly*.

38. Both of those cases were used as examples when appeals came before Mr Justice Foskett who sat with an assessor, Senior Costs Judge Mr Gordon-Saker, the decision in which was reported only a matter of a few days ago on 1st July 2016 (see the report at *[2016] EWHC 1598 QB*). He was considering issues which do not arise here for direct consideration, but in two of the three appeals before him the costs judge, whose judgments were under review, had said that if the ATE premium claimed in those cases had been allowed as recoverable in principle the judge would have reduced the amount which should be paid. In each case there had been a particularly high level of cover of £500,000. It was a block rated policy, in which the premium was self-insuring.

39. The judge referred with approval, as I infer, to the views expressed by Master Rowley in the case of *Kai Surrey v Barnet and Chase Farm Hospitals NHS Trust* in which the Master had said at paragraph 105 of his judgment, as reported at paragraph 113 of the judgment of Mr Justice Foskett, that he had no doubt that he could take a contrary view to the underwriter if the risk assessment or the level of cover had manifestly resulted in an overly high premium being claimed. I note that those are the two elements: risk assessment on the one hand - that is the chances of success or failure; level of the cover - that is the amount of costs likely to be incurred, which were highlighted by the decisions of Mr Justice Akenhead and the Senior Master in *Kelly*. Foskett J. went on to say:

> "But *Rogers* is very clear authority that the court should be slow to adjust block rate premiums in particular. There are inevitably swings and roundabouts with such premiums and it is not appropriate in my view to be trying to deconstruct the premium here in the way that Mr Hutton sought to persuade me to do."

40. The conclusion to which Mr Justice Foskett came was that the guidance in *Rogers* was given in 2006 based upon observations of Lord Hoffmann in *Callery v Gray* in 2002 when new arrangements concerning CFAs were in their infancy, and thought that neither expressly held that the adjustment of a premium by a costs judge should not be made on a broad brush basis, though each urged caution in doing so. He referred to *Redwing* and *Kelly* as two cases where a broad brush had been adopted and was particularly influenced by the latter given the particular experience of Master Hurst. Then, paragraph 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."

I have reservations about this approach. It endorses the experience of costs judges but it provides no principled reasoning of its own before reaching the conclusion it does. In my view, however, reading the cases as a whole, there is nothing inconsistent between them, nor is there inconsistency between them and a decision made by Her Honour Judge Walden-Smith in the Central London County Court to which I shall turn in a moment.

41. If the principle is that in dealing with the assessment of a premium when determining costs, especially where the policy is known to be block rated and is not a bespoke policy, a judge should be very hesitant before concluding that the premium is in error, and should have good reasons for doing so. Those good reasons are likely to include, though I do not suggest they are necessarily limited to, situations in which it is clear that the risk of failure has been overstated and the chance of success understated, those where the insurer has not been given proper information about the level of costs so that they have been overstated, or it may be where there is proper material to show that the product which has been chosen is a particularly and inappropriately expensive product. As Mr Mallalieu submitted, if someone invites an agent to purchase a motor vehicle for him and he returns from the showroom with a Rolls Royce, it might be thought that that he had bought a very expensive car, and that it was unnecessary to go to that expense if the purpose were ordinary motoring around the city.

42. The selection of the appropriate policy is a matter for the solicitor and it is in that context that *Rogers* suggests at paragraph 117, as I have cited, that the solicitor concerned should make some note, or be prepared to give some evidence, as to why the particular product was chosen. I suspect that it may well be in the case of a policy such as the DAS policy that it is necessary for the viability of that insurer and the availability of that product that all the solicitor's cases, or most of them in a particular area, are to be insured by that insurer, bulk purchase insuring the applicability of decent rates, but I do not know that that is the case and it would be wrong for me to speculate. I did not understand Mr Waszak to disagree that it is open, therefore, to a judge in an appropriate case and for good reason to assess whether a premium is reasonable. He does not have to accept whatever the insurance company charges is to be recovered as proportionate, necessary and reasonable.

43. As I said I would, I turn now to review briefly the Walden-Smith decision in the case of *Banks v London Borough of Hillingdon*, claim B40CL020, a case reported itself only a matter of a few days ago but preceding the decision of Mr Justice Foskett and a decision to which he was not referred, albeit it would be of persuasive significance only. In that case there was a DAS legal expenses policy in respect of a slipping accident on compacted snow and ice in Uxbridge town centre. The costs judge assessed an insurance premium of £24,694.25 as being disproportionate in a case in which £6,890 was recovered. He allowed a sum of £9,375 plus insurance premium tax.

44. The judge took the view that the costs judge was wrong to do so: he could not have recalculated the premium as he did without access to the whole basket of risk, and she referred to *Rogers* and held that he had misdirected himself in determining that *Rogers* permitted him to judge the reasonableness of the premium in very broad brush terms; see in particular paragraph 22 of the judgment noting that the Master had considered the prospects of success as being considerably better than 50 percent when that was not the basis upon which the premium was being calculated. The ultimate point, however, was at paragraph 26:

> "The defendant as the paying party failed to adduce any evidence to support a challenge to the size of the premium despite being challenged to do so by the claimant. In the absence of that evidence, the costs master did not have evidence upon which he could resolve the challenge in the defendant's favour."

45. Where the judgment deals with the question of whether a broad brush approach is permissible or not, it can only be reconciled with the view of Mr Justice Foskett by a careful consideration of what either meant by the expression "broad brush assessment". As I have pointed out, the broad brush assessment which Mr Justice Foskett thought was being undertaken in the case of *Redwing* and that of *Kelly* was actually an assessment of the amount of the premium once it had been established on the evidence that the premium was necessarily going to be too high because of a failure to assess the risk appropriately and a failure to properly inform the insurer as to the amount of exposure should the risk eventuate. If the broad brush assessment relates to the assessment of the quantum of the premium, having the evidential material to begin such an assessment, I would entirely agree and regard the principle as not being in the least exceptional. If it is, as it could be read to suggest, that a judge is simply entitled to look at the premium, to feel instinctively that it is too high and therefore to take a broad brush approach to reducing it, then I would, with respect, disagree.

46. The law I have set out was, as I have indicated, only put to some extent before the judge. The case of *Rogers*, the central case as it seems to me, being Court of Appeal authority and undiminished as such authority in principle despite the passage of time to which Mr Justice Foskett referred, was it seems not placed before the judge to be read. The suggestion by the appellant is that in saying what he did in paragraph 28, the judge did not properly apply the decision in *Rogers*, he did not take a proper approach to proportionality and what was reasonable. The approach he took to proportionality was, he submitted, heterodox given the decision of the Supreme Court in *Coventry v Lawrence [2015] UKSC 50*. In the course of the judgment of the majority at paragraph 39 of that case, the correctness of *Rogers v Merthyr Tydfil* was considered. There is

nothing there to suggest that *Rogers* is a child of its own particular time as it appears was submitted to Mr Justice Foskett. At paragraph 40 the majority said (in respect of Rogers):

> "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."

The judgment then went on to deal with success fees.

47. The case draws a clear distinction between proportionality in the judicial review sense and the way in which that word is used in the context of costs (see the discussion beginning at paragraph 29) and points out that, paragraph 36:

> "Where costs were incurred which are necessary they will be *treated* as being proportionate even if, in fact, they were not proportionate to the matters in issue, ie even if the total necessary costs were disproportionate to the value of the claim. It applied that approach to additional costs such as ATE premiums."

The judicial review approach to proportionality was that, submitted Mr Waszak, that the judge had instinctively adopted in paragraph 28. He had failed to bear in mind the necessary caution in looking at the premium.

48. For his part, Mr Mallalieu submits that what was in issue here was a summary assessment of costs at the end of a fast track trial. The judge raised his eyebrows at the level of the premium in what was, after all, a "bog-standard" case. The exposure to cost was less than the premium which would be charged. The judge was, thus, entitled not to be satisfied that the solicitor acting for the claimant had acted reasonably and the cost was reasonable. The judge did consider the evidence of Ms Clothier but was left in a position where he was not satisfied why a policy had been chosen with such a high level of indemnity and why no other policies were considered. There was no answer to the question why this policy had been adopted. There must have been a doubt as to the reasonableness which, given the rules, had to be resolved in favour of the paying party. The claimant had simply not done what *Rogers* said at paragraph 117 should be done. The judge was therefore entitled to intervene in the assessment of the premium and once one gets to that stage, the figure he hit upon was within the broad range within which reasonable disagreement is possible and therefore this court, applying standard principles, should not interfere. He submitted that the judgment of Mr Justice Foskett demonstrated that a broad brush approach could be taken.

Discussion and conclusion

49. I cannot accept the logic which the judge adopted at paragraph 28, because of the implicit assumption which it contains for which there was no evidence before him. He

assumed in the approach he took to the calculation of the sum that there was a straight line relationship pro rata between the level of cover and the premium. This assumed necessarily that the higher the level of cover, necessarily the higher the level of premium. He could not legitimately have done this given the evidence of Ms Clothier as to how the premium was calculated. The first two stages of the premium were set at block levels as to which, given *Rogers*, no exception could be taken. As to the third stage, that involved information being given to the insurer as to the likely costs which would be incurred should the claimant lose her claim.

50. The basis of calculation was carefully set out. There is no doubt that that calculation, in common with any other case in which, as here, the base costs were broadly accepted by the judge, would be no different. In short, there the evidence here was that this was not an exceptional case despite the initial reaction that the judge had to the level of premium. The evidence was not that the extent of the limit of indemnity affected the premium charged. In any event, it is, as Mr Justice Foskett observed in the case before him, known to be the case that the first tranche of cover of risk is more heavily rated than the higher tranches which are more rarely reached. The approach which the judge took, therefore, ignored the nature of the insurance product, it assumed an approach to premium calculation which was simply wrong and for which there was no evidence before him and where, indeed, the evidence was to the contrary.

51. The limit of indemnity was explained in *Rogers*. It was not suggested before the judge here that the risk of loss or failure as assessed when approaching trial at the time that the third stage premium had to be paid and calculated was wrongly calculated at 50-50. It was not suggested that the insurer was misinformed. The basis for calculation appears to have been that which was standard. Critically, as it seems to me, there was no material put before the judge by either party as to the availability of any other product which it might have been reasonable for the claimant to have adopted.

52. I am concerned with the point that Mr Mallalieu made that the solicitor acting for the claimant should have made a note in accordance with the procedure in *Rogers* saying why it was that the claimant had chosen the particular policy she did. It seems to me that that should have been done, but nonetheless in the absence of any material other than assertion by the respondent in this case, as the transcript shows, there was no particular reason or evidence or material from which the judge could properly take the approach he did to this particular premium. Since I have come to the conclusion, as I do, that the judgment was in error in principle, and this is not a question in which I am called upon to reassess an assessment by taking my own decision on the figures, as to which there would be a wide margin of discretion, I must uphold the appeal.

53. The next question that I have to deal with is the consequence of that. I do not think that this is a matter which, for two reasons, I should resolve myself. One I am afraid is the hour, but the second and central reason is that it seems to me that there is potentially here an argument, which neither side was properly prepared to argue below but which emerges in the changed circumstance of this successful appeal, that there might be another product which it would have been reasonable for the claimant to have chosen. Evidence of such product ought regularly to be available to defendants who regularly face such claims, as undoubtedly this insurer of the hospital here would be likely to do, and could be presented.

54. I have concluded that the matters raised may well benefit from further exploration and explanation as to which, bearing in mind the observations in *Rogers* that a judge in my position may not have experience which easily fits him to determine the appropriate level of premium where block funding operating of this nature is involved, and that it is appropriate for a judge experienced in dealing with issues of costs to do so, quite apart from the fact that I leave it open to the respondent in this case to challenge the premium if there is good ground for doing so and, for that matter, to the claimant for explaining so as to put the matter beyond doubt (if the claimant can) whether there is or was a good reason for choosing this particular policy and, if so, what it was, that the matter will be referred to detailed assessment. It seems to me that is the proportionate course to take, even though it will necessitate further expense, though that, of course, may be resolved if the parties come to an agreement. That is a matter for them and not for me.

MR MALLALIEU: My lord, thank you. In terms of directions in light of the last part of your judgment, may I suggest it would be sensible to direct that that detailed assessment be dealt with by one of the regional costs judges?

THE JUDGE: Yes.

MR WASZAK: My lord, I have no objection to that unless—

THE JUDGE: That seems absolutely sensible.

MR WASZAK: For it to be listed to the SCCO.

MR MALLALIEU: My lord, there are regional costs judges that sit in this court so—

THE JUDGE: I gather they are very experienced with what they do, so that seems sensible.

MR MALLALIEU: And unless anything is suggested to the contrary, my lord—

MR WASZAK: It is a very sensible suggestion, my lord. My lord, the only last issue before you is, I hope, a short one and it is the issue of summary costs of today.

THE JUDGE: Yes.

MR WASZAK: A costs schedule—

THE JUDGE: I do have a schedule somewhere which I have not really looked at. Have you had a chance to look at that?

MR MALLALIEU: My lord, I have and I have got three short points. I cannot oppose the principle. I have got three short points in relation to the schedule. The sums themselves are not huge but three points. The first is that the bulk of the fee, the bulk of the costs on the third page—

THE JUDGE: Let me just see if I can—

MR MALLALIEU: Apologies. Sorry, my lord.

THE JUDGE: I have got it. I am just trying to find out where I have put it.

MR MALLALIEU: I was jumping ahead, apologies.

THE JUDGE: Just wait for a moment. You do not have a spare copy, do you?

MR MALLALIEU: I will press Mr Waszak, my lord, to share—

MR WASZAK: My lord, would you like mine?

THE JUDGE: Yes please. Thanks. Sorry about this.

MR MALLALIEU: My lord, not at all.

THE JUDGE: Thank you. Yes?

MR MALLALIEU: Apologies, my lord. As I say, the final total is not a great sum on the last page, 3,864, but three points. The first is on page 3. Your lordship will see that the bulk of the profit costs a third of the way down the page, just short of £1,400—

THE JUDGE: Yes.

MR MALLALIEU: Relates to work done on documents. The form should have a schedule attached telling us what that work is. Mine does not. I understand Mr Waszak's does not and nor does the court's, so we do not know what that £1,400 relates to. It is a breach of the practice direction in terms of the provision of summary assessment schedule.

THE JUDGE: So what is the consequence?

MR MALLALIEU: My lord, I say two things: (1) is it must leave some doubt as to what that work is and therefore it is just *[inaudible]* and; (2) the court is entitled to take into account the breach of the practice direction in terms of the provision of the schedule in terms of what sum it ultimately chooses to allow on summary assessment.

THE JUDGE: And these are *[inaudible]* costs solicitors.

MR MALLALIEU: Indeed so, my lord, and also a third point which is your lordship granted relief from sanctions, I take no objection to that but it seems to me that inevitably some of the cost of Miss Tebbs must relate to that witness statement.

THE JUDGE: Yes.

MR MALLALIEU: Which we have not incurred those costs. The claimants would always have had to explain why they sought relief and therefore for that reason as well it would seem likely that some of those costs of the document schedule should be disallowed.

THE JUDGE: Yes.

MR MALLALIEU: And so for all those reasons there must be a significant doubt about that £1,400, just short of, element. Beyond that, my lord—

THE JUDGE: Are you suggesting I disallow it in its entirety?

MR MALLALIEU: My lord, that would seem to me to be the sensible, given all three of those points that would seem to me to be the appropriate course.

THE JUDGE: Is it open to me, do you submit, on principle to find some lesser sum?

MR MALLALIEU: My lord, I accept it is open to you in principle to do so. This is a summary assessment, it is a robust and broad brush procedure.

THE JUDGE: Yes.

MR MALLALIEU: My lord, one final point is that the claim below was conducted on the basis of a conditional fee agreement. It is not entirely clear to us whether this appeal is said to be conducted on the same basis or not and, if so, whether that is—

THE JUDGE: Is there any evidence that a CFA covers this appeal?

MR MALLALIEU: My lord, we do not know the position and it may be that Mr Waszak has it available to him, in which case he can clarify that. If not, my lord, what I would invite your lordship to do is to assess the figure for summary assessment subject to the claimant either by way of correspondence satisfying the defendant that the CFA covers the appeal, or alternatively to that matter being resolved by the regional costs judge on the detailed assessment that will flow because of the after-the-event insurance point. My lord, those are my points.

MR WASZAK: My lord, I agree entirely with the second and third points Mr Mallalieu makes in terms of relief from sanctions and also resolving the doubt about whether the CFA does cover this appeal cost. Just in terms of the failure to provide a document schedule, my lord, I would invite you to exercise a sensible and proportionate approach in this case. Obviously one has not been provided but I would invite you nevertheless to consider an assessment.

THE JUDGE: And what documents do you say—

MR WASZAK: My lord, certainly there must it seems be a bit of a reduction for the witness statement of Miss Tebbs. Certainly there must be a reduction for the witness statement of Miss Tebbs because that is a cost which we would have had to incur anyway for the relief from sanctions but in respect of the other documents, my lord, an appeal bundle has had to be put together along with authorities and that is a process which is obviously a time consuming one and one that justifies the recovery of that money. So, my lord, to the extent that a reduction is made, I would invite you to make a small reduction.

THE JUDGE: Thank you.

55. In this case it is a disappointment since it is a case about costs that there is no schedule for the work done on documents as there should be in accordance with the rules. The sum claimed is large at £1,390. It would involve necessarily putting together the bundles which are themselves large. It will include, however, material which is not and should not be the responsibility of the defendant to pay given that some of the hearing related to an application for extension of time for which the claimant should take sole responsibility.

56. Exercising a broad brush assessment, as both counsel agree I am entitled to do, I conclude that some payment is appropriate. I reject the basis that £1,390 is appropriate. In the circumstances, I should resolve such doubts as I have in favour of the paying party and I have concluded that the appropriate sum to award is one of £700 in respect of documents.

57. The case may be subject to a conditional fee agreement. That is not known but it may be raised before the regional costs judge on the assessment which will follow given the terms of my judgment on the appeal. Is there anything else?

MR MALLALIEU: My lord, no. My lord, just for the record, by my maths that gives a figure of £3,174.

THE JUDGE: Yes.

MR MALLALIEU: As the summary assessed figure. My lord, an order will have to be drafted anyway. Mr Waszak and I can sort the figure—

THE JUDGE: If you can agree the figure, it is all the better. There is one final thing which I have to say. I have been treated to Rolls Royce services by the two of you, on both sides I think the arguments have been remarkably well presented and I think you should both be proud. I thank you for your patience given the demands of my time today.

MR MALLALIEU: My lord, looking at the clock, it was entirely to do the opposite and thank the court for its patience in sitting.

THE JUDGE: And, in particular, the associate.

MR WASZAK: Thank you very much.

MR MALLALIEU: Thank you.

[Hearing ends]