Case No: B42YX010

IN THE LEEDS COUNTY COURT

The Combined Court Centre, Oxford Row, Leeds

Date: 12 April 2019

Before:

HIS HONOUR JUDGE GOSNELL

- -

Between:

Alexandra Kelly	**Claimant and Appellant**
- and –	
Bellway Plc	**Defendant and Respondent**

- -
- -

Mr Matthew Waszak (instructed by A and M Bacon Ltd) for the Appellant
Mr Ian Simpson (instructed by DAC Beachcroft Claims Ltd) for the Respondent

Hearing dates: 20th March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE GOSNELL

His Honour Judge Gosnell:

1. This appeal is brought against the decision of District Judge Shepherd dated 13th June 2018 when, in course of detailed assessment proceedings she reduced a claim for an additional liability, namely an After the Event ("ATE") Insurance Premium from £20,698.83 to £2,115.00 both figures including Insurance Premium Tax ("IPT"). The Appellant was represented in the appeal by Mr Waszak of counsel and the Respondent by Mr Simpson of counsel. I am grateful to them both for their helpful submissions both orally and in writing. At the end of the appeal hearing I indicated that I would prepare and deliver a reserved Judgment.

2. **The factual background**

   On 25th September 2012 the Appellant Alexandra Kelly was crossing a road and stepping onto the kerb when the kerbstone fell from under her causing her to fall and sustain a broken ankle. She alleged that the Respondent was negligent in failing to repair and maintain the kerb. She consulted a firm of Solicitors, Slater and Gordon and it would appear that she signed a conditional fee agreement with the firm on 28th September 2012. An ATE policy was incepted on 11th October 2012 with DAS Legal Expenses Insurance which was a block-rated, three stage policy. According to the Bill of Costs the first real attendance between the Appellant and her Solicitor to discuss the case was on 18th October 2012.

3. The Respondent admitted liability for the accident on 23rd July 2015 and the claim was issued on 3rd September 2015, served under cover of a letter of 17th December 2015. On 12th February 2016 the Appellant made an offer under Part 36 CPR of £6,500. The trial was listed to take place on 30th August 2016 but by letter of 26th August 2016 some four days before the trial the Respondent belatedly accepted the Appellant's Part 36 offer of £6,500 thereby incurring a liability to pay the Appellant's costs on the standard basis pursuant to CPR 36.13.

4. Detailed Assessment proceedings were commenced on 3rd January 2017 and as is usual, Points of Dispute and Replies were served. The detailed assessment hearing started before District Judge Shepherd on 20th April 2018 but was adjourned part-heard until 13th June 2018 when she dealt with the discrete issue of the ATE premium. Although she took many decisions in the course of the detailed assessment hearing only one decision has been appealed, namely the decision to reduce the ATE premium from £20,698.83 to £2,115.00.

5. **The evidence before the District Judge**

   In addition to the Bill of Costs and all the relevant papers filed in support of the same the District Judge had two statements on behalf of the Appellant and one statement on behalf of the Respondent. Although second in time it is more convenient to deal first with the witness statement of Philip Cooper who was the Appellant's solicitor in the original claim. It was a very brief statement and the only reference to the decision to take out the DAS ATE policy was in paragraph 7 which states as follows:

   > *"7. I can confirm that the Claimant was advised that the Claimant's solicitors had chosen to use the DAS 80e product because it was appropriate for the Claimant's needs; was*

> *necessary to protect the Claimant from risk; and the product offered the correct level of insurance"*

Paragraph 8 confirmed that there were no alternative sources of funding available.

6. The Appellant also relied on the witness statement of Francis Clothier who is a Team Leader employed by DAS Legal Expenses Company Limited. The purpose of her statement was to explain the general structure of the policy and how the premiums for each of the three stages were calculated based upon statistical information in the possession of DAS. Counsel for the Appellant provided a helpful summary in his skeleton argument which I reproduce below save for matters of submission or argument which I have excluded:

> *"An explanation of the structure of the premium and how it was calculated is set out in detail in the witness statement of Frances Clothier ("FC W/S"), dated 26 August 2016. The premium was block rated, meaning that it was calculated by reference to the total risk across the insurer's book of risk, its basket of cases. It was priced at a level which enabled the premiums recovered as costs in successful cases to cover the cost of the premiums lost, and the money paid out, in unsuccessful cases.*
>
> *The block rating of the Stage A and Stage B premiums was calculated by reference to the average costs risk the insurer would face in the event that the claim was discontinued or did not proceed at either stage of the litigation (FC W/S, paragraphs 9 to 14 of the witness statement). That costs risk was determined by (i) the historic risk of claims not proceeding or being discontinued at either stage; and (ii) the average costs the insurer would have to pay in the event of a claim not proceeding or being discontinued at either stage.*
>
> *The Stage C premium was calculated by reference to: (i) C's Estimated Maximum Liability (EML), the total costs she would have to pay, and thus the total costs the insurance would have to insure her against, in the event of losing at trial; and (ii) the insurer's historic experience of success at trial in these types of case.*
>
> *C's EML, comprising C's disbursements and D's costs, was £13,500.00. That figure comprised £3,500.00 for C's disbursements, which included an estimate for Counsel's fees under a private retainer, and an estimate of £10,000 for D's costs to trial.*
>
> *The insurer's historic experience of success at trial in these types of case was 50%, a historic win: loss ratio of 1:1 (FC W/S, paragraph 18). Based on that ratio, Stage C premiums*

> *had to be set (at the very least) at 100% of the costs in issue in the case in order for the recovery of the premiums in successful cases to pay for the losses incurred by the insurer in unsuccessful cases. The multiplier applied in this case by DAS to C's EML was 125%, with the additional 25% to cover its running costs."*

7. The Respondent relied on the evidence of Mr Prabal Purkayastha, their costs draughtsman. He contended that the ATE premium in this case is significantly more expensive than the expected range of ATE insurance premiums for low value, fast track public liability claims such as this. After making a number of legal submissions he attached to the witness statement copies of "comparator ATE insurance premiums" which he said reflected similar market policies. The comparators were as follows:

    a) An Abbey Legal Policy which was a staged public liability policy with a premium of £2,115 if the claim concluded after issue of proceedings without being allocated to the multi track;

    b) An Allianz policy which was a stand-alone Non-RTA fast track policy with an indemnity of £100,000 with a premium of £793.94;

    c) A Claimsafe policy which was a stand-alone Non-RTA policy with an indemnity of £35,000 and a premium of £795;

    d) An Allianz policy which was a stand-alone Non-RTA fast track policy with an indemnity of £100,000 for a premium of £1,848.36.

8. In addition, Mr Purkayastha relied on a publication from the University of Lincoln[1] which appeared to show that the average ATE premium for a public liability personal injury claim was £1385 (page 29).

9. **The Judgment below**

District Judge Shepherd delivered an *ex tempore* Judgment shortly after lunch after clearly taking a little time to consider the issues. The transcript of the Judgment runs to some three and a half pages and is clearly well-structured and comprehensive. The District Judge summarised the issues and made reference to several authorities and legal issues to which she had been referred by counsel during the hearing. It was clear that she was concerned by the chronology revealed from the Bill of Costs which showed that the Conditional Fee Agreement ("CFA") had been signed on 28th September 2012, the ATE policy had been incepted on 11th October 2012, yet the first meeting with the Appellant to discuss the circumstances surrounding her accident did not take place until 18th October 2012. The District Judge drew an inference from this chronology, together with the absence of a risk assessment, that the CFA with 100% uplift and the ATE insurance were entered into before full instructions about the case had been taken from the Appellant. She also relied on the relative paucity of the statement from Mr Cooper who, although he had been asked in the Points of Dispute whether the Claimant was advised about alternative insurance products on the market failed to deal with this issue at all in his statement which post-dated the Points of

[1] Excessive and Disproportionate Costs in Litigation (2011) Nurse, Peysner and Flynn

Dispute. This led the District Judge to the *ratio* of her decision which can be found in the extracts from the transcript set out below:

> "*18. In view of those circumstances, and bearing in mind the burden is on, (as is stated in Kris Motor) the paying party to advance at least some evidence in support of their contention that the premium is not unreasonable. I conclude that the claimants/receiving party have failed to show they acted reasonably. They have blindly indicated that they are relying on a block policy that they have but having the block policy does not take away from their obligations to act reasonably.*
>
> *19. In the circumstances, I am not satisfied that the claimant has done all that is reasonably required in selecting a policy and has not taken steps to ensure that the policy taken out matches the client's needs.*

10. There was some debate during the appeal about an error which appears to have been made by the Judge in paragraph 18 above. Counsel for the Appellant contended that the District Judge said the "paying party" where she meant to say "receiving party" thus reversing the burden of proof. Counsel for the Respondent submitted that the Judge used a double negative in "not unreasonable" where she meant to say "unreasonable". I prefer the latter interpretation as it would be completely consistent with the point she makes from the *Kris Motor* authority about on whom the burden lies to show that the premium is either reasonable or unreasonable.

11. Having made this decision, the District Judge had to decide whether the material provided by the Defendant was sufficient to persuade her to reduce the amount of the claimed premium to a lower figure. She found as follows:

> *"20. It appears to be reasonable to use such evidence and there is no reason why I cannot rely on such evidence. In the case of Nokes Master Leonard suggested it was possible for a District Judge to decide without having expert evidence…..*
>
> *21. In the circumstances, after considering the case of Bent (which enabled me to consider not exact comparisons) and also the case of Nokes (which enabled me to consider evidence without having any expert report) there is no reason why I cannot make a finding on the basis of the Defendant's evidence attached to the statement of Mr. Purkayastha.*

12. This led her to the following conclusion:

> *"24. I note what has been said by the Claimant that the settlement was very late. It was a very late settlement, but the issue is the appropriate steps were not taken at the inception of the ATE policy, and that is why it will be appropriate to reduce it. I have had regard to the fact that I have to allow costs that are reasonably incurred on a standard basis and any finding has to be in favour of the paying party. I have had regard under*

> *the costs pillars of wisdom to the value of the case and complexity.*
>
> 25. *In view of all the circumstances I have come to the conclusion that the appropriate award for the premium would be £2,115."*

13. **The parties' submissions on this appeal**

Firstly, the Appellant submits that the District Judge's approach to the reasonableness of the selection of the ATE policy was wrong in law. This is in part based upon the Appellant's interpretation of the error made by the Judge referred to in paragraph 10 above, asserting that the Judge thereby reversed the burden of proof. I do not however accept that she did for the reasons I have advanced in that paragraph. The Appellant also asserts that the Judge's finding that the Appellant had "failed to do all that is reasonably required" before taking out the ATE policy does not represent the correct test. It was asserted that the receiving party only has to show that they have made a reasonable choice, not necessarily the best or the cheapest choice. Normally, it is enough for the Claimant's solicitor to write a brief note explaining how he came to choose the particular ATE policy and the basis on which the premium is rated. It was asserted that the combination of Mr Cooper and Ms Clothier's evidence complied with this procedural requirement.

14. The Appellant also submits that the District Judge misdirected herself as to the law in relation to the evidence required to challenge a block-rated ATE premium. The Judge was mistaken in raising an analogy with the assessment of basic hire rate evidence in credit hire cases as there is a discrete body of case law about challenges to ATE premiums. The Appellant relies on a number of authorities which have questioned the expertise of a costs judge to judge the reasonableness of an ATE premium except in very broad terms including *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 and *Callery v Gray* [2002] UKHL 28. The courts have recommended the use of expert evidence to assist Judges who wish to decide the reasonableness of an ATE premium because such a process is likely to amount to an interference with the underwriter's carefully considered calculation of risk. Even, in the face of evidence from the Respondent (that the Appellant challenges the reliability of in any event) that there may have been cheaper products on the market this does not entitle the Judge to reduce the ATE premium on a broad brush basis in the absence of expert evidence to assist the analysis of the premium under consideration.

15. The Appellant also contends that the reduction of the ATE premium on the basis of the evidence produced by the Respondent was wrong in law. It is argued that the four alleged "comparator" premiums were no more than a selection of unexplained premiums taken out in personal injury cases, about which almost nothing was known. There was also no evidence whether the comparator insurers would have been prepared to insure the Appellant in respect of her claim. It was not clear in every case whether the policies would have insured the Appellant against the cost of her own disbursements and the Respondent's costs if she discontinued or was unsuccessful. It is not known whether the policies were block-rated or bespoke. No real information was provided about the actual cases covered and their prospects of success. It was not clear whether the Respondent had merely cherry-picked the cheapest premiums and not disclosed other premiums that were more expensive. It was submitted that the

research report was an academic study from which the Respondent had sought to extrapolate one figure to suit its argument without being able to say that a premium of such an amount would actually be available for this Appellant to buy on the open market covering all the risks she required covering.

16. The Appellant's final argument is that the District Judge paid insufficient regard to the risks under the policy before reducing the premium. The premium was priced at a level which enabled the premiums recovered as costs in successful cases to cover the cost of the premiums lost, and the money paid out, in unsuccessful cases. The actual value of the Appellant's claim had no real bearing on this calculation which was based on an assessment of risk and the total likely exposure. The approach taken by the insurer in this case was approved in principle by Lord Justice Brooke in ***Rogers*** (above). This was clear from Ms Clothier's statement and was not taken into account by the Judge in her somewhat arbitrary reduction of the premium.

17. The Respondent relies heavily on the District Judge's decision at the earlier hearing to reduce the success fee to 0% because of the absence of a risk assessment and her finding on the chronology of events. It also relies on the failure of Mr Cooper to directly respond to the question about which other providers of ATE insurance had been considered and what advice about alternative premiums had been given. This finding prevents the court examining why the Appellant incurred the costs that she did which is usually one of the matters taken into account when deciding whether costs are reasonably incurred. The Respondent submits that the District Judge was therefore right to find that the Appellant had not acted reasonably in incepting the ATE policy and incurring the liability for the ATE premium. It was submitted that a proper risk assessment was essential not only to fair setting of the success fee but also the proper selection of an ATE policy.

18. The Respondent also submitted that the failure to carry out a risk assessment and the absence of any evidence as to the reasons for choosing this policy made the evidence of Ms Clothier as to the structure and pricing of the premium largely academic. It was submitted that the District Judge was right to find that the Appellant through her solicitor had behaved unreasonably in incepting this policy and accordingly she was not usurping the function of the underwriter in assessing risk. It was submitted that the District Judge correctly drew a distinction between whether the Appellant acted reasonably and whether the premium was reasonable in amount which led her to a decision which cannot be impugned on appeal.

19. The Respondent submits that it has surmounted the procedural hurdle of advancing at least some material in support of the contention that the premium is unreasonable. The Respondent also relies on dicta in both ***Nokes*** and ***Pollard*** in support of the proposition that expert evidence is not always required, and the paying party can advance comparable market evidence to show that the ATE premium is unreasonable in amount.

20. The Respondent resists the criticism made of the District Judge for relying on the authority of ***Bent v Highways and Utilities Construction Ltd*** [2010] EWCA Civ 292 as it did no more than state a general principle as to the practice of Judges in the County Court when approaching matters of valuation by reference to the evidence of relevant comparators. The Respondent contends that the comparators produced are more than adequate to show that the ATE premium which the Appellant committed to pay was well in excess of the market rate for comparable products.

21. **Legal Analysis**

The appropriate test to be applied on an appeal is that set out in Civil Procedure Rule 52.21, namely:

> *"52.21 (1) Every appeal will be limited to a review of the decision of the lower court…..*
>
> *(3) The appeal court will allow an appeal where the decision of the lower court was –*
>
> *a) wrong*
>
> *b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."*

The Appellant says in this case the District Judge was wrong for the reasons advanced in the Grounds of Appeal and Skeleton Argument that I have summarised above. Both parties accept that the District Judge was attempting to assess costs on the standard basis that were reasonably incurred and of a proportionate and reasonable amount, with the benefit of the doubt going to the paying party. The issue of proportionality did not feature in the Judgment of the District Judge and so I do not intend to refer to it further in this Judgment.

22. The ATE policy was taken out on 11 October 2012. It was therefore a pre-April 2013 (and, as such, a pre-Legal Aid, Sentencing and Punishment of Offenders Act 2012) policy. Before the implementation of the changes made by LASPO on 1 April 2013, such policies were commonplace in injury litigation to insure claimants against risk of paying the cost of their own disbursements and defendants' costs in the event that their claims were unsuccessful. They were also recoverable from an unsuccessful opponent as an additional liability.

23. There is a long history of challenges to the recoverability of ATE premiums which started in *Callery v Gray [2001]* EWCA Civ 1117. The Defendant's insurers had sought to argue that a Claimant's solicitor should not set the uplift on a success fee or take out ATE insurance until sufficient was known about the Defendant's case to assess the risks. The Court of Appeal answered the question in the following way:

> *"100. For these reasons we have concluded that where, at the outset, a reasonable uplift is agreed and ATE insurance at a reasonable premium is taken out, the costs of each are recoverable from the Defendant in the event that the claim succeeds, or is settled on terms that the Defendant pays the Claimant's costs"*

24. The question of the quantum of the ATE premium was dealt with in *Callery v Gray (No.2)* [2001] EWCA Civ 1246 where the Court of Appeal had the benefit of a separate report from Master O' Hare who made the following point:

> *"61. I respectfully suggest that the proper function for the court when deciding questions of reasonableness concerning*

> *insurance premiums, is to consider the conduct of the insured, not the conduct of the insurer. In other words, the proper question to ask is whether the choice of policy made by the insured was a reasonable one. If it was, the premium paid or payable is recoverable (possibly subject to certain deductions such as those described above). A choice may be regarded as reasonable even if the insured did not in fact make the best choice available."*

25. The decisions of the Court of Appeal were reviewed by the House of Lords in *Callery v Gray* [2002] UKHL 28 where it was recognised that decisions of this nature have a public policy element about them as Lord Nichols identified:

> "*35. As my noble and learned friend Lord Scott of Foscote has observed, the criteria prescribed by the Civil Procedure Rules for determining whether costs are reasonable are framed entirely by reference to the facts of the particular case. Once one invokes a global approach designed to produce a reasonable overall return for solicitors, one moves away from the judicial function of the costs judge and into the territory of legislative or administrative decision"*

26. The difficulties in costs Judges making an assessment whether an ATE premium was reasonable in amount was recognised by Lord Nichols also:

> *42. "Furthermore, it is a question which costs judges are quite unable to answer. When the Court of Appeal asked for the report of Master O'Hare on the question of whether the Temple premium in this case was reasonable, he said [2001] 1 WLR 2142, 2163, para 20:*
>
> *"I am not convinced...market forces impinge upon the premium levied to the ultimate consumer and claimed by him from his unsuccessful opponent."*
>
> *43. That seems to me obviously right. ATE insurers do not compete for claimants, still less do they compete on premiums charged. They compete for solicitors who will sell or recommend their product. And they compete by offering solicitors the most profitable arrangements to enable them to attract profitable work. There is only one restraining force on the premium charged and that is how much the costs judge will allow on an assessment against the liability insurer.*
>
> *44. Again, the costs judge has absolutely no criteria to enable him to decide whether any given premium is reasonable. On the contrary, the likelihood is that whatever costs judges are prepared to allow will constitute the benchmark around which ATE insurers will tacitly collude in fixing their premiums. In its submissions to Master O'Hare, Temple said that the court "should not arrogate to itself the functions of a*

> *financial regulator of the insurance industry": see [2001] 1 WLR 2142, 2164, para 22. I am sure that is right, because the costs judge is wholly unequipped to perform that function…"*

In this passage Lord Nichols recognises that there is no real market for ATE premiums because the ultimate consumer will not be paying the premium. This contributes to the difficulties which the court faces in assessing what is reasonable.

27. This tension was thrown into stark relief in the decision which became the leading authority about the assessment of the quantum of ATE premiums in *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134. This case was similar in some respects to the present appeal. The infant claimant had suffered a fall in his local park and damages were agreed in the sum of £3105. His solicitors had taken out an ATE policy with DAS which was actually the predecessor of the policy which is under consideration in this appeal known as the 80e policy "Justice Solutions". The Court of Appeal had the benefit of extensive evidence from DAS, the insurers of the Defendant, the Law Society and other competitors in the ATE market. Master Hurst the Senior Costs Judge was asked to hear evidence and prepare a report for the benefit of the court. Unlike the current appeal, the Claimant's solicitor in that case gave detailed evidence why he chose the DAS 80e policy which included evidence that he had an agreement with DAS that they were preferred providers and he would not take out any rival ATE product unless DAS had refused indemnity.

28. The Defendants in *Rogers* produced evidence to Master Hurst of comparable products which the court found less than helpful and summarised the position in this way:

> *" 58.Mr Boobier (see para 14 above) produced a schedule of recent cases in which ATE insurance had been used by claimants in connection with claims brought against his clients and other local authorities. For the reasons Master Hurst set out in his report he was unable to find in this evidence anything which would assist the court, and it is unnecessary to say anything more about it.*
>
> *59. Mr Hudman (see para 14 above) had conducted some market research within the ATE insurance market in about December 2004 to determine, if possible, the extent to which DAS 80e premiums measured up with premiums offered by competing insurers. For the reasons he gave in his report, Master Hurst was able to derive little value from this evidence save to say that there might possibly be products available on the market which were cheaper than the DAS 80e policy if a case went to trial, but that the situation might well be reversed if a case settled early."*

29. Lord Justice Brooke gave the following guidance about what evidence would normally be required to justify the ATE premium claimed:

> *"117. If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's*

> *solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District judges and costs judges do not, as Lord Hoffmann observed in Callery v Gray (Nos 1 and 2) [2002] UKHL 28 at [44]; [2002] 1 WLR 2000, 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"*

30. The court attempted to assess the reasonableness of the premium in that case by the following analysis:

> *" 109. In the present case the total EML of £6,500 compared favourably with the actual outturn of £6,875 revealed to the deputy district judge. Given the defendants' determination to go to trial, the handler's assessment of the risk at no greater than 51% was not unreasonable, particularly as DAS's experience was to the effect that more slipping and tripping cases taken to trial were lost than won. And on these figures, it is impossible to say that a total premium of £4,680 was unreasonable. Put quite simply, if in two cases insurers face a 50% risk of having to pay out £6,500 on one of them, it is reasonable for them to charge a premium of £6,500 (not allowing for overheads or profit) on each. On the one they win, they will be able to get their premium" paid by the defendant, and this will recompense for them having to pay out £6,500 on the one they lose.*

The court by this passage approved the initially somewhat surprising concept that an ATE insurer is entitled to charge an additional amount to take account of those cases which are lost and payments have to be made for both the Defendant's costs and the Claimant's disbursements. By way of analogy, this is like a Claimant's solicitor charging a 100% success fee on a case with a 50/50 chance of success to make up for the one case in two that he is likely to lose statistically.

31. The court also ruled that it was unfair to compare single premium ATE policies with staged policies, particularly at the final trial stage:

> *"111.On the evidence now before the court the judge's reliance on Litigation Funding as a source of dependable evidence was not well founded. We would endorse what Master Hurst said about this material in his judgment in Re RSA Pursuit Test Cases. It is not legitimate to compare the total premium*

> *payable at the third stage of a three-stage premium model with the single premium under a single premium model that is payable throughout the progress of a claim to trial. As the evidence in this case shows, DAS's first stage premium was significantly lower than Temple's single premium. This discrepancy would benefit defendants in 63% of the cases covered by a DAS 80e policy. Many might think that this demonstrated a preferable approach to the rating of risk"*

32. In this appeal the Court of Appeal overturned the decision of the Judge below and found the premium of £4,860 not unreasonable. After this decision DAS altered the way in which they assessed premiums by increasing the EML rate from 54% to 100% to take account of the 50% of cases which were lost in accordance with the logic set out in paragraph 18 of this judgment. It would appear therefore that a premium of double that claimed would still have been found reasonable in amount.

33. In an annex to the Judgment, Lady Justice Smith expressed some concerns which have proved to be prophetic:

> *" 128 Two things concern me about this situation. One is that there is very little incentive for solicitors to look for the best value in ATE insurance. One can understand the position of someone like Mr Cater whose primary concern is to protect his client from the kind of problem that he had experienced with his previous provider. He can quite sensibly justify opting for a more expensive product. His client will never have to pay the premium regardless of the outcome. As the judgement of the court acknowledges, there is a pressure on insurers to keep their premiums at a reasonable level in order to avoid challenges such as has occurred in this case. However, the decision in this case may well have the effect of reducing that pressure."*

The current appeal shows that Lady Justice Smith was right to be concerned and it may explain why insurers became unhappy with the way the model was working which led to the Jackson reforms and the alternative structure which now applies under LASPO.

34. In *Kris Motor Spares Limited v Fox Williams* LLP [2010] EWHC 1008 (QB) Mr Justice Simon was dealing with an appeal involving a challenge to an ATE premium. He pointed out that "*There is no presumption that the premium is reasonable unless the contrary is shown".* He gave the following guidance about the procedure to be followed where a premium is challenged:

> *"44. I have concluded that in a case where the issue is raised as to the size of the premium there is an evidential burden on the paying party to advance 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…"*

The Respondent in this appeal seeks to argue that it has surmounted the evidential burden by advancing some material to show that the premium is unreasonable. In *Kris Motors* the challenge failed because the paying party had advanced no evidence which might have persuaded the Master that the premium was unreasonable.

35. In *Nokes v Heart of England Foundation NHS Trust* [2015] EWHC B6 (costs) Master Leonard was also dealing with a challenge to the amount of an ATE premium. This was a post-LASPO case and so the policy only covered the Claimant's own disbursements, but the arguments raised are still relevant to the current appeal. One factual element in this case may be said (if the Respondent's view is accepted) to be consistent with the current appeal:

> *"54. The Defendant has filed a witness statement dated 13 February 2015 from Mr Ken Corness, an experienced Costs Lawyer. Mr Corness points out that no evidence has been served by the Claimant's solicitors explaining what if any steps they took to identify the best policy or the lowest premium for the claimant; or about any advice that was given to the claimant in respect of the best policy. Assuming that the Claimant's solicitors (as counsel confirmed in the course of the hearing) were not obliged to use this Temple policy, there is no evidence of any review of the market."*

36. Master Leonard faced a similar challenge to the Defendant's evidence as arises in the current appeal, namely the receiving party's insistence on the need for expert evidence based on the dicta in *Rogers.* Master Leonard dealt with this as follows:

> *"101. It does not follow that a judge would never, unassisted by expert evidence, be in a position to conclude that an ATE premium is unreasonable or disproportionate. I respectfully agree with Mr Marven that matters have moved on to some extent since Rogers. It may well be appropriate, for example, to reduce an ATE premium where (all other elements of the calculation aside) it is evident that the prospects of success of a given case must have been miscalculated or misrepresented to the insurer. Kelly v Black Horse and Redwing v Wishart both furnish examples of that"*

37. In the event the Master was not satisfied on the evidence before him that the premium was unreasonable, despite there being no evidence of a review of the market or any reasons for the choice made:

> *"104.In my view the Defendant has not made out a case to the effect that the premium produced by Temple's block-rated scheme is, as a block-rated premium, in some way wrong or unreasonable. It would probably take expert evidence to do that, and I do not have any such evidence."*

38. The two examples referred to in paragraph 101 of the master's judgment came to be considered by Mr Justice Langstaff in *Pollard v University Hospitals of North Midlands NHS Trust* [2017] 1 Costs 45. He summarised them respectively as follows:

> *"34. Thus, in the case of Redwing Construction Ltd v Charles Wishart [2011] EWHC 19 (TCC), a premium which was assessed on 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……*
>
> *35. In a decision by Senior Costs Judge Hurst in Kelly v Black Horse Ltd the senior Judge considered a case in which the insurers had not been given the accurate information about the costs which were likely to be incurred (see paragraph 26). The cost 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"*

39. This review may explain why the Judge reached the following conclusion:

> *"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. The 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 where there is proper material to show that the product which has been chosen is a particularly and inappropriately expensive product."*

40. **Discussion**

This rather extensive review of previous authorities has perhaps been influenced by the 22 authorities referred to by one or other counsel in the appeal and contained in the bundle prepared for the appeal. It may perhaps be helpful to refer to some general principles which have emerged from the authorities over time.

41. It is clear that in pre-LASPO claims an ATE premium can be recovered from the unsuccessful opponent as an additional liability if it was reasonably incurred and of reasonable amount. A claimant can recover such a premium even if it was incepted at the outset of a case before all the relevant facts, in particular from the Defendant, were known. ATE insurers offer broadly two types of product, those which are block-rated so that the risk is assessed across the insurer's broad basket of cases on their books and those which are bespoke so that the risk is assessed on facts which are particular to the case under consideration. Both types of ATE policy are in theory recoverable as an additional liability. In addition, insurers may offer a single premium policy with one premium for the whole lifetime of a case or a staged policy where different premiums apply at different stages in the litigation. Again, either type of policy is in theory recoverable depending on the circumstances. It is probably true that most low value claims are insured under policies which are block-rated as insurers are reluctant to go to the additional expense and effort of individually risk assessing claims unless there is good reason to do so. In very expensive litigation bespoke policies are much more usual because the insurer will wish to make a more accurate risk assessment where their exposure is high. It is often said that bespoke policies are more expensive than block risked policies for this reason, but that may not always be the case particularly if the prospects of success in the individual case are high and therefore higher than the general average of risk across the insurer's basket of cases.

42. Similarly, it is often argued that insurance policies with staged premiums are more expensive than policies with a single premium, but this must be considered in context. When an insurer sets a single premium for a block-rated policy for a modest claim it is looking at the risk of having to make a payment together with the likely quantum of payment. This includes payments made throughout the lifetime of the claim, including those made at a very early stage involving modest payments. When an insurer sets staged premiums for an ATE policy it is only looking at payments made during each particular stage. You would therefore expect the premium for the pre-issue stage to be lower than the block rated policy (all other considerations being equal) and the premium for the trial stage to be higher. It is obvious that when the insurer is looking at the trial stage the amount of the potential exposure is at its highest and the risk of failure is also at its highest because an insurer is entitled to assume that a Defendant is unlikely to want to go to trial unless it considers it has at least a 50% chance of success. Sometimes insurers assess the risk on a bespoke basis for the trial stage using the actual risk of success and failure and the actual potential exposure in monetary terms if the trial is lost (as DAS did in the policy in this appeal in relation to the actual EML). When the number of variables which can apply when setting an ATE premium are taken into account it is understandable why there has been some judicial reluctance according to the authorities in attempting to second guess the underwriter who sets the premium with the benefit of statistical information of previous claims history across the insurers entire book.

43. In the current appeal the District Judge first of all looked at what reasons were provided by the Claimant's solicitors for choosing this particular policy. She recorded that the Claimant's solicitor had not answered the question posed in the Points of Dispute about whether alternative providers had been considered nor what investigations had been made into other premiums available. Mr Cooper had asserted that the policy was chosen because it was appropriate for the Claimant's needs, necessary to protect her from risk and offered the correct level of insurance. The

District Judge was however concerned that the first proper consultation with the Claimant was on 18th October 2012 about a week after the policy was incepted. She concluded that the Claimant had failed to show she acted reasonably in "blindly …relying on a block policy" and "failing to do all that is reasonably required in selecting a policy" which "matches the client's needs". On the evidence before her, these findings were probably justified. The chronology did not suggest any real consultation with the Claimant about her needs and the witness statement of Mr Cooper contained mere assertion without any reasoning justifying the choice of this particular policy.

44. The District Judge then went on to consider the adequacy of the Defendant's evidence as to comparable rates and I consider here she fell into error. Even though she may have been right that no real evidence was put forward explaining why the Claimant chose the DAS 80e policy this does not necessarily mean it was automatically unreasonably incurred or unreasonable in amount. It is established by authority that a Claimant may choose an ATE policy right at the outset of a case and it may be either block-rated or bespoke. A Claimant through her solicitor may choose a policy merely because a solicitor has used it before, or a colleague has recommended it without any real thought as to whether it is appropriate for the case in hand. If a Claimant does so however, the court will still objectively assess whether it was unreasonably incurred or of an unreasonable amount. The Claimant may be fortunate in choosing a policy which both has reasonable terms and a reasonable premium. If she does then it will not fall for reduction on a detailed assessment. When a claimant's solicitor fails to give reason for the choice however he places his client as a hostage to fortune, as he will be prevented from arguing that an otherwise expensive product was reasonably suitable for his client's needs due to her particular circumstances or the particular facts of the case he is litigating. Mr Cooper in the present case made this Claimant a hostage to fortune in the same respect. In paragraph 25 of this judgment, I pointed out that the Claimant in *Nokes* produced no evidence to justify her choice of ATE premium, yet it was considered by the Master to be reasonable. In the current appeal, having made her criticism of the evidence produced to justify the choice of ATE premium the District Judge should have gone on to consider whether it was in fact reasonably incurred and of reasonable amount.

45. Mr Waszak for the Appellant would say that at this point the District Judge should have relied on paragraph 117 of *Rogers* as set out in paragraph 17 above and concede she was not better qualified than the underwriter to rate the financial risk the insurer faces and in the absence of expert evidence, should have declined to interfere with the premium set by the underwriter on behalf of the insurer. Mr Simpson for the Respondent would respond that we have moved on from *Rogers* and faced with comparable evidence of other products the court can still reach a conclusion about the reasonableness of an ATE premium.

46. The first step I think is to look at the premium objectively and the evidence provided which supports the methodology. This is set out in full in the witness statement of Ms Clothier. The premium is in three stages. The first stage is for the period up to issue of proceedings and the premium is £595 plus IPT. This is assessed purely by reference to the insurer's experience of the number of claims which are withdrawn before proceedings and the cost of own disbursements paid out. The second stage is after proceedings are issued up to 14 days before trial. This is assessed again by reference

to the insurer's own claims experience compared with the average cost of paying own disbursements and opponent's costs. Not surprisingly the premium is higher at £1'500 plus IPT. The final stage is the cost incurred if the case is resolved at or within 14 days of trial. At this stage the insurer obtains bespoke information about the case from the Claimant's solicitor about the disbursements actually incurred and an estimate of the opponent's costs. These two figures added together form the Estimated Maximum Liability ("EML"). The underwriting experience is that slightly more than 50% of insured cases which reach this stage fail at or shortly before trial. In order to make allowance for the cases which actually fail and a full payment of the EML is made the burning cost is doubled to 100% in accordance with the logic set out in paragraph 109 of *Rogers* set out above, to this is added 25 % representing the insurer's overheads and an allowance for profit. The EML is therefore multiplied by 125% to reach the level of the third stage of the premium.

47. In this case the ATE insurer was told that the Claimant's own disbursements were £3,500 and the opponent's costs to trial were £10,000. In the days before fixed costs these would not have been unusual or inaccurate figures. The EML was therefore £13,500. When the multiplier of 125% was applied to this figure the result was £16,875 plus IPT for the final stage. An application of the principles set out in *Rogers* would support this calculation. The burning cost is 50% of the EML and the resulting figure has to be doubled to account for the insurer's losses on the cases which are lost. An uplift of 25 % for overheads and profit was approved in *Rogers* and so it is difficult to criticise the calculation of the premium either on principle or on the basis of arithmetic. The only criticism I expressed at the hearing was that I could not see why logically the insurer was entitled to the cumulative sum of all three stages rather than just the stage which was triggered by the settlement, win or loss of the claim. There is no Respondent's notice however and so this point does not need to be determined.

48. This was not a case like *Redwing* where an unrealistically high level of risk was applied. The level of risk accorded with the insurer's own statistical review of their claims history and accords with my own experience of about half of tripping claims which reach trial failing for whatever reason. It was also not like *Kelly* where an inflated estimate of the costs at risk was relied on. The present estimate of £3,500 for own disbursements (including counsel's fee at trial) and £10,000 for opponent's costs was both unremarkable and reasonable. In my review of the authorities there were very few cases where an ATE premium has been reduced without expert evidence in the absence of some criticism of the data which has been used to calculate the premium which is perhaps understandable where an insurer is setting the premium based on his own claims experience. The overall premium for the final stage in this case seems high at £16,875 but if you compare this with the calculation at paragraph 109 of *Rogers* it is not surprising. The EML was £13,500 and if you add a not unreasonable uplift for overheads and profit you reach the premium claimed. I would accordingly have reached the view that on an objective assessment the premium was reasonable.

49. The District Judge below found that it was reasonable to place reliance on the comparative evidence provided by the Respondent. I think she fell into error in doing so. Of the four comparators provided, three of them were policies with a single premium. As Lord Justice Brooke said in *Rogers:*

> *"It is not legitimate to compare the total premium payable at the third stage of a three-stage premium model with the single premium under a single premium model that is payable throughout the progress of a claim to trial"*

The reason why it is not legitimate is because in a single premium case the risks of loss are spread over the whole lifetime of the case whereas under the staged policy, at least at the final stage, it is already known that the case is going to trial where the risks of losing are highest and the amount at risk is greatest. It is instructive that the premium for the first stage of the DAS 80e policy is £595 plus IPT which is lower than any of the comparable premiums as one might expect using the same logic, but in reverse.

50. This leaves only one comparable policy which may be relevant which is the Abbey Legal policy referred to at paragraph 12 of the witness statement of Mr Purkayastha. He describes it as a staged public liability personal injury policy with a premium of £2,115 if the claim concludes post proceedings on the fast track and £4,335 on the multi track. I have to say that the redacted policy schedule only describes the accident type as "other" and does not make clear what happens if a fast track claim goes to trial. No details are given about the facts of the claim which the policy covered nor what is covered or the limits of indemnity. The main problem with this type of evidence is that there is no evidence that the policy in question could have been offered to and accepted by the Appellant. For commercial reasons some ATE insurers only offer policies to solicitors on their panel who are bound by certain service standards, including the need to place all business with that insurer (as the solicitor in *Rogers* was obliged to do). Insurers may also refuse to write business in relation to particular types of claims. The fact that *a* claimant has secured ATE insurance for their own claim against the Respondent's insurers in this case is not evidence that the Appellant in this case could have secured the same insurance on the same terms. The evidence from the University of Lincoln again is generic evidence which does not prove that this Appellant could have obtained ATE insurance in the current claim against this Respondent for £1,385.00. I assume this would be single premium policy in any event which is not comparable. I refer to paragraph 16 above where Master Hurst was provided with similar evidence in *Rogers* but did not find it helpful.

51. I therefore find myself in disagreement with District Judge Shepherd for the reasons I have set out above. Whilst I can understand why she formed a dim view of the conduct of the Appellant's solicitor, in my view she should have gone on to consider whether, more by luck than good judgment, he selected an ATE policy for the Appellant which both suited her needs and was reasonably incurred and reasonable in amount. The comparable premiums provided by the Respondent were not truly comparable for the reasons I have outlined, and a careful assessment of the methodology used by the ATE insurer would have shown that the premium was reasonable, at least reasonable by the standard set out in *Rogers*. It is fairly clear that decision was taken for policy reasons to ensure that a sustainable market continued for ATE insurance with the dire potential consequences for access to justice if the market failed. The decision effectively doubled the amount of premium recoverable by allowing the insurer to build a success fee into the premium. Lady Justice Smith's concern about the decision reducing pressure on insurers to keep their premiums at a reasonable level became a self-fulfilling prophecy.

52. The real answer to problems thrown up by this case lies in the Respondent's conduct of the litigation as a whole. If they had settled the case pre-proceedings the ATE premium would have been £595. If they had settled the case only 15 days before trial the ATE premium would have been £1,500. It was the decision to settle the case four days before trial which brought into effect the very significant premium of £16,875, which on the information available to the ATE insurer was an accurate reflection of their risk and exposure at trial.

53. For these reasons the appeal will be granted and the original claim for the ATE premium restored to the bill. I understand from Counsel for the Respondent that in the Points of Dispute the Appellant conceded that the recoverable sum was £19,800.93.

54. This Judgment will be handed down on a date to be fixed by the court in public. The time for appealing the Judgment shall not start to run until it is handed down. CPR Practice Direction 40E shall apply. If the parties can agree the form of an order and any consequential directions arising from this Judgment, then the attendance of counsel and solicitors will be excused.