Case No: A51YM411, B3/2015/2128
SCCO reference: CL1900024, CL1900026

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 31/10/2019

Before :

MASTER LEONARD

- -

Between :

Andrew Judge	**Claimant**
- and -	
The Donkey Sanctuary Trustee Ltd	**Defendant**

- -
- -

Matthew Waszak (instructed by **Ford Simey LLP**) for the **Claimant**
Margaret McDonald (instructed by **Acumension Ltd**) for the **Defendant**

Hearing dates: 6 to 8 August 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.

.....

MASTER LEONARD

Master Leonard:

1. I am assessing the costs of the Claimant, awarded against the Defendant in two orders. The first was made by Recorder Blunt QC in the County Court at Exeter on 12 March 2015 and the second by the Court of Appeal on 19 June 2017.

2. The Defendant charity cares for donkeys that have been neglected, mistreated, or can no longer be cared for by their owners. It owns and manages farms and licensed holdings to provide shelter for donkeys in the United Kingdom and across Europe.

3. The Claimant had been employed by the Defendant as the Senior Manager and Head of Operations responsible for all continental European operations. On 21 June 2012, he travelled to Romania to attend the opening of a new shelter and to check that the Defendant's donkeys were in good health and that the facilities for their care were adequate.

4. The following day, the Claimant assisted two Romanian workers in putting together a large metal feeder designed for feeding up to twelve donkeys at a time. In the course of doing so, he tapped a bolt with a small claw hammer in an attempt to fit it into its setting. This caused a piece of galvanised metal to fly off and enter the Claimant's right eye, penetrating the cornea and causing retinal bleeding. Ultimately he suffered permanent partial loss of vision.

5. The Claimant issued proceedings against the Defendant for personal injury, claiming that the accident was caused by the negligence of the Defendant. The Defendant denied liability on the basis that the Claimant was acting outside the remit of his employment, and alleged contributory negligence.

6. The claim was allocated to the multi-track. There seems to have been some disagreement between the parties as to whether there should be a split trial, but I understand from Mr Waszak for the Claimant that by the time the Court gave directions for trial on 12 November 2014, it had been agreed that there should be an initial trial on liability only, and that was the order that was made.

7. The liability trial came before Recorder Blunt QC 12 March 2015. He handed down judgment on 12 June 2015 giving judgment for the Claimant, with no finding of contributory negligence, and ordering the Defendant to pay the Claimant's costs of the claim. As the Claimant had made a Part 36 offer on the apportionment of liability, the Defendant was ordered to pay the Claimant's costs on the indemnity basis after 13 January 2015.

8. The Defendant sought permission to appeal, which was granted by Longmore LJ on 11 July 2016. The appeal was compromised between the parties on the basis of an 80:20 apportionment of liability in the Claimant's favour. The parties filed with the Court of Appeal the order made on 19 June 2017 dismissing the appeal and providing for the Defendant to pay the Claimant's appeal costs.

9. The claim was finally compromised when the Defendant accepted a Part 36 offer of £215,000. The quantum costs in the County Court were agreed. I am assessing the Claimant's costs of the liability proceedings in the County Court, and his costs in the Court of Appeal.

The ATE Policy

10. On 6 March 2013 the Claimant took out an "after the event" (ATE) insurance policy with DAS Legal Expenses Insurance Company Ltd. At that stage, liability had been denied by letter but proceedings had not yet been issued. DAS's "80e" policy provided retrospective cover from 25 September 2012, the date that the Claimant had entered into a CFA with his solicitors. The limit of indemnity was £100,000 plus the amount of the (self-insured) ATE premium. The policy covered the Claimant's own disbursements and the Defendant's costs and disbursements.

11. The policy provided for a three-stage premium. Stage A applied from the date of the CFA to the date of issue of proceedings. The block-rated premium payable for that stage was £595 plus IPT. Stage B covered the period from the date of issue to the beginning of stage C. The stage B premium was an additional block-rated premium of £1,500 plus IPT. Stage C provided for a final additional premium, individually calculated based upon the costs risk, applicable no more than 14 days before trial. The stage C premium was calculated, 14 days before the liability trial, at £73,312.50 plus IPT.

12. On 2 June 2014, the Claimant's solicitors give notice on form N51 of the ATE policy, giving details of the three policy stages (the stage C premium having not yet been calculated).

13. The Claimant has produced two policy schedules, one for the County Court proceedings ("the County Court schedule") and one for the appeal ("the appeal schedule"). The County Court schedule describes "Stage of Case" as "Trial Period". The evidence does not tell me when the schedule produced to me was generated: I am aware that policy schedules may be generated in an updated form from time to time (see the report of the Assessors to the Court of Appeal in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220 at paragraph 53) and this version of the County Court schedule was evidently produced after the stage C premium had been calculated.

14. Under the heading "What Is Not Covered" the Claimant's ATE policy excluded various categories of costs including the costs of "Any counterclaim against you or any appeal you make against the final judgment or order without our agreement".

15. The section headed "What Is Covered" explains the scope of the indemnity to be provided under particular circumstances, for example where a Part 36 offer is not beaten. It does not mention appeals, counterclaims or any other specific category of proceedings.

16. On 10 January 2017 (in the course of the Defendant's appeal) the policy was amended. The appeal schedule was issued. The copy I have describes "Stage of Case" as "Appeal" and provides for an additional premium (the "appeal premium") of £15,000 plus IPT. Cover, again, extended to the Claimant's solicitor's disbursements and the Defendant's costs and disbursements. The overall limit of liability was not increased.

17. The appeal schedule refers to three endorsements: "014-Cover for Appeals", "011-Additional premium for appeal", and "013-Counsel on a CFA".

18. Endorsement 014 provided for the deletion, from the section of the policy wording headed "What Is Not Covered", of the words "Any counterclaim against you or any

appeal you make against the final judgment or Order" and added "Indemnity has been extended to cover the costs of Appeal in this action".

19. Endorsement 013 amended the wording of the policy slightly in relation to the scope of cover. It does not appear to have any material bearing upon the issues before me.

20. Endorsement 011 seems to have been incorporated in the appeal schedule rather than recorded in a separate document.

21. On 17 January 2017, the Claimant's solicitors wrote to the Defendant's solicitors:

> "We have been in correspondence with our client's Legal Expenses Insurers and they have indicated that an additional premium will be payable for the appeal... This is covered by the original Notice of Funding and we would refer you to Stage C on that notice… We enclose a copy of the Schedule of Insurance for your file."

22. The letter enclosed the appeal schedule and a copy of the original notice of funding, served 2 June 2014, giving details of the original three-stage premium.

23. Receipt was briefly acknowledged in an email dated 20 January 2017:

> "… thank you for your letter dated 17 January, confirming the position in relation to your Client's additional premium. We have advised our client accordingly."

Evidence

24. Both parties have filed witness statements. Ms Kendall, a solicitor and partner in Plexus Law, who represented the Defendant in the County Court and the Court of Appeal, has submitted evidence in relation to the Defendant's actual costs to the conclusion of the liability trial, which seems to indicate that total costs were in the region of £14,600 excluding VAT (rather than a lower figure referred to in the Points of Dispute, discussed below).

25. The Claimant has served a witness statement from David Brown, an ATE Underwriting Manager employed by DAS, explaining the basis upon which the policy premiums were calculated.

26. Mr Brown explains that the application of the stage C premium is deliberately left as late as possible to allow for settlement before it becomes payable. The £100,000 limit of indemnity is standard and considered more than sufficient for most cases, as it was in this case. The exact quantum of the block-rated A and B premiums depends upon the type of case and is based on historical experience.

27. When DAS is told that a trial date window has been set, it provides to the insured's solicitors a stage C questionnaire. The solicitors provide details of their insured disbursements, excluding the ATE premium itself, and of the opponent's anticipated costs of the conclusion of the proceedings.

28. The sum of adverse costs and disbursements produces the Estimated Maximum Loss (EML) figure to which a set rating of 125% is applied to calculate the stage C premium.

That figure of 125%, says Mr Brown, is based on underwriting experience. It allows a 100% figure for the insurance risk and 25% allowance for overheads.

29. The 100% figure represents a 50/50 prospect of success at the trial stage: cases which go to trial are the most risky and expensive. That figure was increased from 54% following *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 in which, says Mr Brown, the court accepted the evidence of Mr Bellamy for DAS to the effect that a previous 54% multiplier set by DAS was inadequate.

30. The relevant parts of Mr Bellamy's evidence, for the purposes of this decision, are summarised at paragraphs 50 to 52 of the court's judgment. I shall quote them in full, as they are referred to further in submissions:

> "50 Mr Bellamy exhibited to his witness statement a table analysing "claims disposed of" by stage and income against costs. This table sets out the total premium recoverable, from which is deducted the total paid out in respect of lost or discontinued cases, and also the premiums rendered uncollectible because the case has been lost or discontinued. It demonstrates that in 100 average cases: (i) the total premiums due would be £101,377; (ii) the total paid out in respect of lost and discontinued cases would be £57,779; (iii) total uncollectible premiums would be £28,718; (iv) there would therefore be a gross profit (prior to expenses) of £14,880.
>
> 51 This figure breaks down to a gross profit of £2,351 for Stage One and £21,802 for Stage Two, but a loss of £9,273 for Stage Three. Mr Bellamy points out that, in arriving at his average figures, he is dealing with a very immature book which is currently only five years old, and there are still a large number of cases to run off. Until these cases close DAS cannot calculate its losses accurately.
>
> 52 Mr Bellamy went on to suggest that a reasonable allowance for overheads would be 25% of net premiums. Using his figures he suggests that DAS should expect to recover £24,137 for overheads. This would in fact produce an operating loss overall of £9,257 for every 100 policies written. His figures are only on the basis of overheads and running costs, and they make no allowance for any operating profit. Nor is there any allowance for commission to intermediaries. (There is no commission element in this particular case in any event.) When the DAS 80e product was originally conceived the idea was that the Stage Three premium should break even. The calculations were based on an assumption that about one third of cases would fail at trial. On this basis a premium of 54% (see para 44 above) would have meant roughly a break even point. Experience has shown, however, that in fact some 50% of cases fail at trial. 54% is therefore inadequate…"

31. A multiplier of 100%, accordingly, represents a 50/50 risk based upon DAS's underwriting experience, and a June 2019 review of that experience, says Mr Brown, confirmed that this is still appropriate. The additional 25% reflects internal operating costs, again as explained by Mr Bellamy in *Rogers*, at 25%. Other insurers giving evidence in *Rogers* thought this figure too low, as recorded at paragraph 73 of the court's judgment:

> "… Temple and Keystone take the view that 25% (of net written premiums) is a minimum allowance for overheads. A more realistic allowance would be closer to 50%. The cost of dealing with premium challenges and dealing with reductions in premiums is an important factor here. They consider that Mr Bellamy's estimates of defendants' costs are broadly consistent with their experience."

32. There is no allowance for profit, says Mr Brown, in the stage C premium. It is calculated so as to achieve a "break even" result. Profit is only made if stages A and B are recovered in addition. This is intended to make the policy commercially viable, although in reality, of those cases that are concluded at trial, DAS has recovered less in premiums than it has paid.

33. The Defendant's costs figure, for the purposes of the calculation of the stage C premium, was indeed £55,799, based upon the Defendant's Precedent H budget. There was no additional allowance for VAT, which is understood to have been recoverable by the Defendant. The Claimant's estimated, insured disbursements to trial came to £2,851, so the EML was £73,312.50 and the premium (£58,650 x 125%) = £73,312.50 plus IPT.

34. As regards the proposition that the stage C premium should have been based upon the liability costs risk only, Mr Brown comments that DAS does not offer a staged premium for separate liability and quantum trials, nor (to his knowledge) does any other insurer. Such separate rating would, he says, increase the costs of such policies, given necessarily increased overheads. He points out that the Defendant has produced no evidence of any other insurer adopting the approach cited by the Defendant as the correct one.

35. Mr Brown confirms that the appeal schedule attaches to the County Court schedule and is issued under the same policy. The limit of indemnity was not increased. The additional premium was applied in relation to the extension of the policy to cover the appeal proceedings, but the limit of indemnity was considered already to be sufficient. Any increase in the limit of indemnity would have resulted in increased premium.

36. The process of extending the ATE policy began in June 2015, but there was insufficient information available to calculate the premium until 30 August 2016, when the Claimant's solicitors estimated their insured disbursements at £750 and the Appellant's costs at £12,000. By this time, the Defendant had been given permission to appeal and the substantive hearing was listed to be heard. A quotation was given for the premium on 26 October 2016 and the Claimant accepted it.

37. The calculation of the premium was based on the limit of indemnity for the appeal of £12,000 within the total indemnity limit of £100,000. Again a 50/50 risk was assumed and a multiplier of 125% applied to produce a premium of £15,000 plus IPT.

38. A further witness statement was served on behalf of the Claimant on 7 August, in the course of the detailed assessment, in response to a query raised by me. The statement was made by Jane Harper, an ATE technician of DAS's technical underwriting division.

39. Ms Harper states that stage C of the 3 ATE insurance model reflects the EML to trial only. As the appeal entailed additional costs and risk, an additional premium was

payable by the Claimant. She says that the appeal premium related to the extension of the policy, as the original did not provide cover for an appeal by the insured or any counterclaim by the opponent, being intended for first instance proceedings only. Where a defendant appeals, the authority of DAS is required for the policy to be extended beyond the trial period for the appeal. A premium is charged to reflect the additional risk.

The Rules

40. The parties refer to pre-April 2013 provisions of the Civil Procedure Rules, applicable, under transitional provisions, to the recoverable additional liabilities in this case, including the ATE premium.

41. They include CPR 44.15:

> "(1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.
>
> (2) Where the funding arrangement has changed, and the information a party has previously provided in accordance with paragraph (1) is no longer accurate, that party must file a notice of the change and serve it on all other parties within 7 days..."

42. CPR 44.3B:

> "(1) Unless the court orders otherwise, a party may not recover as an additional liability…(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order…"

43. The Practice Direction on Pre-Action Conduct, which at paragraph 2.1 says:

> "This Practice Direction describes the conduct of the court will normally expect of the prospective parties prior to the start of proceedings…"

44. And at paragraph 9.3:

> "Where a party enters into a funding arrangement… That party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim."
>
> (2) Where the funding arrangement has changed, and the information a party has previously provided in accordance with paragraph (1) is no longer accurate, that party must file a notice of the change and serve it on all other parties within 7 days..."

45. The Costs Practice Direction, paragraph 19.3:

> "(1)Rule 44.15 imposes a duty on a party to give notice of change if the information he has previously provided is no longer accurate…
>
> (2)Further notification need not be provided where a party has already given notice:
>
> (a) that he has entered into a conditional fee agreement with a legal representative and during the currency of that agreement either of them enters into another such agreement with an additional legal representative; or
>
> (b) of some insurance cover, unless that cover is cancelled or unless new cover is taken out with a different insurer…"

46. Paragraph 19.4:

> "Unless the court otherwise orders, a party who is required to supply information about a funding arrangement must state whether he has…taken out an insurance policy to which section 29 of the Access to Justice Act 1999 applies…
>
> (3) Where the funding arrangement is an insurance policy, the party must –
>
> (a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates (including Part 20 claims if any);
>
> (b) state the level of cover provided by the insurance; and
>
> (c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable…"

The Points Raised by the Defendant

47. The Defendant raises a number of objections to the ATE premiums claimed by the Claimant, variously in a first set of Points of Dispute for each of the County Court and appeal bills, in a supplemental Point of Dispute in relation to the appeal premium only and in written submissions for the detailed assessment hearing.

48. The Defendant's original Points of Dispute take issue with the amount of the stage C premium on these grounds. It was based upon the Defendant's Precedent H Costs Budget in the sum of £55,799. It should not however have been calculated based upon the Defendant's budget, because the budget was based upon the case progressing to a full liability and quantum trial. It stands to be recalculated by reference to the costs of the liability trial only, which the Defendant says were £10,442.50. On that basis, says the Defendant, taking into account the Claimant's actual disbursements according to the bill, the premium should be £17,349.96.

49. The Points of Dispute as originally drafted do not advance any positive ground for disputing the additional ATE premium sought for the proceedings in the Court of Appeal.

50. The Supplemental Point of Dispute says that the notice given by the Claimant's solicitors on 17 January 2017 left it unclear to the Defendant "that the additional premium was payable in the event that the case did not proceed more than 14 days before trial" and on that basis should be disallowed under CPR 44.3B(1) and CPR 44.15.

51. The Defendant's written submissions, as put by Ms McDonald, raised a number of new arguments on the ATE premium. I am treating them as amendments to the Points of Dispute, notwithstanding that they have been raised so shortly before the detailed assessment hearing, and some of them involve arguments as to the calculation of the ATE premium to which the Claimant has had no proper opportunity to respond. I am doing so because they can be disposed of fairly readily.

52. These are the new points. The Defendant argues that the risk multiplier of 125% utilised by DAS for calculating the stage C premium is inappropriate. As for the appeal premium, the Claimant served no additional notice of the appeal premium. The appeal was settled 63 days before the listed hearing so only stages A and B would be payable, and they have already been accounted for in the County Court bill.

53. This is the new argument about the 125% risk multiplier. In *Rogers*, Mr Bellamy identified an operating cost of £24,137 over 100 cases. The operating cost per case should however not be divided by 100, but by the number of cases won, through which those operating costs will be recovered. Assuming 71 successful cases, that gives a "benchmark" operating cost per case of approximately £340.

54. DAS's multiplier for a "break even" third stage premium, based upon the proposition that about one in three cases would fail at trial, was 54%. A one in three risk however generates a risk multiplier of 50%, so it is (as Ms McDonald puts it) "fairly safe to assume" that the additional 4% covers operating costs at the third stage.

55. Operating costs, says Ms McDonald, should therefore be allowed at 4%. She contrasts the £14,662.50, representing a 25% "operating costs" element in the stage C premium in this case, with the £340 per case she has calculated by reference to DAS's figures in *Rogers*.

56. As regards the costs figure upon which the stage C premium was based, Ms McDonald expanded on the Points of Dispute in submitting that there was no reason why DAS could not have had two stage C premiums for a split trial case. Once the Claimant had got past the liability trial (and, in the circumstances, the appeal) the costs risk would have been massively diminished.

57. In fact, she argued, the appeal premium was really a "stage IV" premium, demonstrating that DAS can vary the policy's premium arrangements if it wishes. If the matter had proceeded to a quantum trial, DAS would similarly have charged a top-up premium if their exposure had increased beyond the £100,000 limit of indemnity.

58. As for the appeal premium itself, in addition what is said in the Supplemental Point of Dispute Ms McDonald's written skeleton refers to the fact that the Claimant's solicitors' letter of 17 January 2017 stated that the stage C premium was payable 14 days before trial. By reference to Paragraph 9.3 of the pre-2013 Practice Direction on Pre-Action conduct, she says that the Defendant should have been notified of the appeal

premium within seven days of its inception and should have been notified of when it was triggered. The Defendant was not notified within the time required, and the premium should be disallowed on that basis.

59. Ms McDonald relies upon the fact this is a standard basis assessment, so that any doubt as to the reasonableness of the ATE premium claimed by the Claimant must, in accordance with CPR 44.3(2)(b), be resolved in favour of the Defendant as paying party.

The Authorities

60. The key authority on the correct approach to the assessment of ATE premiums is the judgment of the Court of Appeal in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220. That appeal concerned the reasonableness of a category of ATE premium still recoverable, after the changes in April 2013, in the clinical negligence cases, but the judgment of the court restated established principles which continue to apply to all assessment of ATE premiums.

61. At paragraph 56 and 57 the court summarised those principles in this way:

> "Disputes about the reasonableness and recoverability of the ATE insurance premium are not to be decided on the usual case-by-case basis. Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case...
>
> Issues of reasonableness go beyond the dictates of a particular case and include the unavoidable characteristics of the ATE insurance market...
>
> District judges and cost judges do not have the expertise to judge the reasonableness of a premium except in very broad-brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces…
>
> It is for the paying party to raise a substantive issue as to the reasonableness of the premium which will generally only be capable of being resolved by way of expert evidence...
>
> Those are the relevant principles applicable to any consideration of the reasonableness of an ATE insurance policy. They must be applied in every case...."

62. At paragraphs 62 to 65 the court added:

> "None of this is to say that a paying party… is automatically bound to accept the reasonableness of whatever premium has been paid. The fact that ATE insurance provides access to justice does not mean that the relevant premium must automatically be regarded as reasonable…

> The practical issue is how and in what sorts of cases can the reasonableness of the premium be challenged…
>
> The first point to make is that, if the ATE policy is a bespoke policy, then the grounds of challenge of the amount of the premium are relatively wide. For example, it would be open to the respondent to challenge the bespoke policy premium on the basis that the risk had been wrongly assessed…
>
> As regards a block-rated policy, such as the policies in the present appeals, the ability of the paying party to mount a sustainable challenge will be much more restricted. The majority of challenges to block-rated premiums must relate back to the market in one way or another, and would therefore require expert evidence to resolve..."

Conclusions: The Stage C EML Figure

63. I start with the submission that the stage C premium should have been calculated by reference only to the Defendant's costs to the end of the liability trial. I do not think that it is unfair to describe that proposition as entirely without merit.

64. On 6 March 2013 the Claimant took out a three-stage DAS ATE policy of a kind that has been in common use since before *Rogers* was decided in 2006, and was accepted in *Rogers* as producing a reasonable premium. When he did, the Claimant and his insurer entered into a contract which set out binding terms upon and the extent to which ATE cover would be offered, the stages at which the three stages of the premium would become due and the way in which the amount of each premium would be calculated.

65. The Defendant has not suggested that it was open to the Claimant, in March 2013, to obtain an alternative ATE policy in which a premium could be calculated by reference to a trial on liability only. That is not surprising, given that the only evidence I have indicates that no such policy has ever been on the market.

66. Nor, as I understand it, has it been suggested that the Claimant should have deferred taking out insurance cover against all or part of the overall costs risk until the point, 22 months after the inception of the policy, when a decision was taken to have a split trial. Any such proposition, as well as being wholly impracticable, would offend the principle first stated in *Callery v Gray (No.1)* [2001] EWCA Civ 1117 and recently reaffirmed in *Peterborough & Stamford Hospitals NHS Trust v McMenemy* [2017] EWCA Civ 1941, to the effect that (as Mr Waszak put it) it is not incumbent upon the Claimant to defer insuring against risks until all the risks can be quantified.

67. The argument as put to me by Ms McDonald was rather that when the decision was made to have a split trial it was incumbent upon DAS, in effect, to change the terms of the insurance contract to create a new kind of four-stage ATE policy which has never, on the evidence before me, been offered by any insurer.

68. The proposition seems to me to be quite plainly insupportable. I do not understand why the fact that DAS would have been entitled to (and in fact purported to) charge an additional premium for extending cover under the policy is cited in support of it.

69. The Defendant's formulation of an alternative stage C premium based only on its liability trial costs is, in any case, hopelessly simplistic.

70. As Mr Waszak points out, the Claimant was at risk from the outset as to the costs of determining quantum, and that risk did not disappear when a split trial was ordered. The Defendant's calculation does not address that risk, how separate cover could have been provided for it, or what the cost would have been. It assumes that no further premium would have been payable after the liability trial, notwithstanding that the case actually went on to the determination of quantum. Nothing is said about the calculation or timing of the hypothetical fourth stage premium.

Conclusions: The Stage C 25% Operating Costs Figure

71. I am similarly unable to accept the Defendant's criticism of the 25% operating costs figure adopted by DAS.

72. The evidence of Mr Brown for the Claimant is relatively straightforward. It has not been objected to (nor, given that the issues raised justified evidence in response, would I have entertained any objection). It could have been challenged by the Defendant in cross examination, but it has not.

73. Mr Brown refers to the evidence given by underwriters to the court in *Rogers* to the effect that it was appropriate to claim operating costs at between 25% and 50% of the net premium in any given case. Of necessity, in an immature market, those figures were somewhat broad-brush, but 25% seems to have been accepted as a minimum, and it has been applied by DAS ever since. That includes the stage C premium in this case.

74. Only the costs figure upon which the stage C premium was assessed on the facts of this particular case. The risk assessment and the overheads figure were, as Mr Brown has confirmed, based upon underwriting experience. A judge should not interfere with such figures without sound evidence, most probably (as the Court of Appeal pointed out in *West*) expert evidence.

75. It was open to the Defendant to produce such evidence, if it could, and to advance Points of Dispute based upon that evidence. Instead, in a very late afterthought to the Points of Dispute, I have Ms McDonald's submissions on operating costs.

76. Those submissions incorporate a supposition to the effect that the historic 54% multiplier mentioned by Mr Bellamy in *Rogers* must have included 4% for operating costs. That supposition is used to advance the argument that it must be unreasonable for DAS to claim any more than 4% for operating costs in its third stage premium (much less any element of profit).

77. Leaving aside that the standard "ready reckoner" multiplier for a 66% chance of success is 52%, not the 50% cited by Ms McDonald, it seems to me that that argument cannot stand up to any degree of scrutiny.

78. The evidence presented to the Court of Appeal in *Rogers* indicates that within the insurance industry it was, in 2006, considered appropriate to factor a given percentage into a premium to represent operating costs, and that the appropriate percentage was between 25% and 50%.

79. Mr Bellamy has not given evidence in this case, and in *Rogers* he said nothing specific about the operating costs element within DAS's 54% multiplier for the third stage premium. Even if his 54% multiplier did, in 2006, include 4% for operating costs in the third stage premium, one cannot extract from that a principle to the effect that it must be unreasonable to charge any more. On the contrary, the evidence of Mr Brown indicates that this approach would exacerbate a situation in which DAS is already losing money on cases that go to trial.

80. It is also evident, by reference to the relative sizes of the stage A, stage B and stage C premiums, that if the operating cost element of the stage C premium in this case were limited to 4%, then across the total three-stage premium DAS would not recover anything like 25% for operating costs. The full amount of the stage A and B premiums, added to 4% of the stage C EML, would by my calculation come to only about 8% of the total.

81. As for Ms McDonald's "benchmark" operating cost figure of £340, even assuming that she is right to extract it from the evidence in *Rogers* in the way that she has, it seems to me to be equally unhelpful in the absence of any evidence to the effect that the operating costs element of an ATE premium should at any stage be calculated by reference to a fixed figure rather than a percentage of the premium.

82. The Court of Appeal has, in *Rogers* and again in *West*, clearly expressed its disapproval of the sort of approach urged on me on behalf of the Defendant, which is to substitute my own judgment, by reference to a hypothetical (and in this case, unrealistic) calculation of a reasonable premium, for that of the insurer.

83. I would add that in *West* the court also (at paragraph 30) expressed its concerns about the practice of challenging an ATE premium with weak evidence in an attempt to create an element of doubt and falling back upon CPR 44.3(2)(b). The difference here is that the Defendant has produced no relevant evidence at all.

Conclusions: The Stage C Disbursements Estimate

84. Finally I should address the proposition that the "own disbursements" element of the stage C premium should have been calculated by reference to the disbursements claimed, several years later, in the bill of costs (£975.81), rather than estimated disbursements at the time (£2,851). In the absence of any cogent case to the effect that the estimate was, at the relevant time, outside a reasonable range, this challenge is no more than an invitation to employ hindsight and has no substance.

Conclusions: The Challenges to the Appeal Premium

85. The Defendant's case to the effect that the appeal premium must be disallowed on the basis that the Claimant failed to give any, or any adequate, notice of the premium seems to me to fail on the basis first that the Claimant was not obliged to give notice, and second that notice was in fact given.

86. In oral submissions, I understood Ms McDonald to accept that notice was given: her point was that it was insufficiently clear. I think that the concession made by Ms McDonald must be right. Notice was given.

87. With regard to procedural obligations, the pre-April 2013 Protocol for Pre-Action Conduct expressly dealt with conduct prior to the issue of proceedings. It has no relevance. The pre-April 2013 Costs Practice Direction is the applicable provision. As Mr Waszak for the Claimant points out (and as the Claimant pointed out, over two months before the hearing, in its Reply to the supplementary Points of Dispute) paragraph 19.3(2)(b) of that Practice Direction provides that the Claimant was under no obligation to give the Defendant any notice of a change in the insurance cover provided by the original insurer.

88. As for clarity, I accept that the reference to the stage C premium in the letter of 17 January 2017 could have been confusing, but that would not offer any ground for disallowing the premium where the Claimant was under no obligation to give notice at all.

89. In any case, it is evident from the Defendant's response that the Defendant understood that the appeal premium was additional to the three-stage premium of which earlier notice had been given. So much would have been obvious by comparing the new schedule enclosed with the letter of 17 January 2017 with the information previously given. The point seems to have been raised on assessment purely as a pretext for challenging the premium.

90. As for the submission that the appeal premium should itself have been (or, as some of Ms McDonald's written submissions seem to suggest, was) staged, it was not a staged premium and I have seen nothing to support any argument that it should have been.

Conclusions: Whether DAS Was Entitled to Charge an Additional Appeal Premium

91. For the reasons I have given, I do not believe that the Defendant has raised an effective challenge to the appeal premium. I do however have to address a point which (given that the whole of the appeal premium is in issue) I felt duty bound, in the course of the detailed assessment hearing, to raise myself: that I read the DAS policy as extending cover, from the outset, to any appeal by the Defendant.

92. Read as a whole, the policy is evidently intended to cover the lifetime of the litigation. It does not exclude appeals other than an appeal by the Claimant without DAS's agreement. It follows that it must, subject to the limit of indemnity, cover any appeal by the Defendant. Only an increase in the limit of indemnity could have justified an additional premium for the Defendant's appeal, and there was no such increase.

93. I have considered whether the incorporation of the words "Trial Stage" in the County Court schedule might have any bearing, but my conclusion is that, even if those words were not (as seems likely) added, by way of update, when a second schedule was issued for the appeal, they could not alter the plain meaning of the policy wording.

94. Endorsement 014, deleting from the policy wording the exclusion of any counterclaim or appeal made by the Claimant (as opposed to the Defendant) was entirely redundant where there was nothing for the Claimant to appeal (and there had never been a counterclaim). This seems to me to illustrate that consideration was not adequately given at the time to the distinction between the appeal by the Claimant and an appeal by the Defendant.

95. The statement of Ms Harper, provided in response to the concern I raised, does not assist in this respect. She argues that the policy does not extend beyond first instance proceedings but cites no policy wording in support except the exclusion of any appeal by the Claimant. This again fails to distinguish between an appeal by the Claimant and an appeal by the Defendant.

96. I appreciate that the stage C premium was calculated by reference to trial costs only, but it does not follow that an appeal by the Defendant was not covered by the policy. That is determined by the policy terms. If DAS underestimated the cost risk in excluding any element of cost attendant on a potential appeal by the Defendant, that is a matter for DAS.

97. In summary, it seems to me that the appeal premium was claimed by DAS in error. DAS was not entitled, under the terms of the policy, to charge the Claimant for additional appeal cover when such cover was already in place. For that reason, although the stage C premium can be allowed in full, the appeal premium must be disallowed.