Case No: HQ15C03768

SCCO reference CL1701915

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas Moore Building
Royal Courts of Justice
London WC2A 2LL

Date: 21/08/2017

Before :

MASTER LEONARD

- -

Between :

Rebecca Louise Mitchell	**Claimant**
- and -	
Dr Carole Gilling-Smith	**Defendant**

- -
- -

Matthew Waszak (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Robin Dunne (instructed by **Acumension Ltd**) for the **Defendant**

Hearing dates: 6 June 2017

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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 (on the standard basis) the costs of the Claimant, payable by the Defendant under the terms of a Tomlin order dated 17 May 2016. I am required to address a challenge to an ATE premium of £10,000 plus Insurance Premium Tax (IPT) included in the Claimant's bill of costs.

2. ATE premiums incurred since 1 April 2013 are, with specified exceptions, irrecoverable under orders for costs between parties. The Claimant seeks recovery under an exception provided for under section 58C of the Courts and Legal Services Act 1990 and Regulation 3 of the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 ("the 2013 Regulations").

3. The material provisions of section 58C are:

"Recovery of insurance premiums by way of costs

(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

(2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—

(a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,

(b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),

(c) the policy is of a prescribed description,

(d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence ("the relevant part of the premium"), and

(e) the amount is to be paid in respect of the relevant part of the premium..."

4. Regulation 3 of the 2013 Regulations says:

Costs order may require payment of an amount of the relevant part of the premium

(1) A costs order made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy may include

> provision requiring the payment of an amount in respect of all or part of the premium of that policy if—
>
> (a) the financial value of the claim for damages in respect of clinical negligence is more than £1,000; and
>
> (b) the costs insurance policy insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence (or against that risk and other risks).
>
> (2) The amount of the premium that may be required to be paid under the costs order shall not exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence in connection with the proceedings."

5. It is not in issue, in this particular case, that the ATE premium incurred by the Claimant falls within the statutory provisions for recoverability. The Defendant takes issue with the premium that the Claimant seeks to recover, arguing that it is disproportionate, unreasonably incurred and unreasonable in amount.

The Background

6. The following account of events is derived largely from a detailed narrative to the Claimant's bill of costs. The facts as set out in that narrative are not, to the best of my knowledge, contested, at least insofar as they are repeated here.

7. The claim was for negligent treatment, in September 2012, of an ovarian endometrioma. It was the Claimant's case that this had been misdiagnosed by the Defendant as a simple cyst; that the treatment received by the Claimant was therefore inappropriate; that the Claimant did not receive an adequate explanation of the potential risks and benefits of the procedure to allow her to give informed consent to the treatment; and that as a result of the Defendant's breaches of duty she suffered serious and continuing complications including a severe abdominal infection, abdominal bleeding, pelvic inflammation, and (following further surgery) an incisional hernia.

8. These complications resulted in severe discomfort and distress and repeated hospital admissions between October 2012 and August 2013, with continuing treatment including further surgery to March 2015.

9. The Claimant instructed her solicitors, Irwin Mitchell, in June 2013. Following receipt and review of medical records, in January 2015 Irwin Mitchell instructed Professor Cheong, a consultant in gynaecology and obstetrics. Professor Cheong's initial report was received in February 2015.

10. Professor Cheong reported to the effect that the treatment received by the Claimant had not been to an adequate standard. His opinion was that, had she received appropriate treatment, on the balance of probabilities she would not have suffered the severe complications which followed her surgery and she would not have suffered the damage sustained to her ability to conceive.

11. Irwin Mitchell sent a formal Letter of Claim to the Defendant on about 17 March 2015. The Medical Defence Union responded on behalf of the Defendant on 23 March 2015 and indicated that they would require the Claimant's medical records in order to investigate the potential claim. On about 8 April 2015 the Defendant's solicitors, Nabarro LLP, confirmed that they had been instructed.

12. On 7 August 2015, Irwin Mitchell requested confirmation as to when they were to receive a Letter of Response, due under the Clinical Negligence Protocol (by their calculation) on 8 August. They also put the Defendant on notice that as the limitation period would expire on about 23 September 2015, the Claimant would issue proceedings without further notice in order to protect the limitation position.

13. The reply, in a letter dated 10 August 2015, was that the Defendant was still waiting for expert evidence and was not in a position to provide a Letter of Response. Irwin Mitchell then confirmed that the proceedings would be issued and an extension of time sought for service.

14. A Condition and Prognosis report was received from Professor Cheong in August 2015 and a further Condition and Prognosis report received from Mr Smith, a consultant colorectal and general surgeon, in September 2015.

15. Protective proceedings were issued on 7 September 2015.

16. In a letter dated 1 October 2015, Irwin Mitchell asked the Defendant to provide a timeframe for service of the Letter of Response. They also confirmed that they would now commence work in preparation for service of proceedings. Proceedings were served upon the Defendant, through Nabarro LLP, under cover of a letter dated 11 December 2015.

17. After extensions of time the Defendant served a defence on about 4 March 2016. Breaches of duty were admitted to a limited extent, and causation to a very limited extent, extending only to initial abdominal inflammation. The severity of that information, and its sequelae, were not admitted. Contributory negligence was alleged in failing to advise the Defendant, before treatment, of medical advice previously received by the Claimant elsewhere.

18. There were significant differences between the parties about the directions to be given. The Claimant argued for directions based upon the proposition that in view of the admitted breach of duty, the Defendant could not escape liability for injury sustained by the Claimant and in consequence, that expert evidence would be needed only in relation to causation, condition and prognosis and quantum. The Defendant did not agree. The Claimant proposed that judgment to be entered for the Claimant for damages to be assessed. On 18 April 2016, the Defendant rejected that proposal, given that neither breach nor causation were fully admitted.

19. On 6 April 2016, the Defendant had made a Part 36 offer to settle for £150,000 net. This was rejected and on 3 May 2016, the Claimant put forward two alternative Part 36 offers. These were to settle for £200,000 on a provisional basis and £230,000 in full and final settlement.

20. On 9 May 2016 the Defendant proposed that the parties agreed a stay of proceedings to allow negotiations to continue, and for a joint settlement meeting to be arranged. The Claimant refused to agree to this, on the basis that the Defendant had, to date, delayed in its response to the claim and refused to allow judgment to be entered.

21. The Defendant rejected the Claimant's Part 36 offers on 11th May but on 13 May 2016, the Claimant accepted the Defendant's alternative offer of £200,000 plus costs in full and final settlement. The claim, therefore, came to an end about two months after service, the parties subsequently filing a consent order.

Funding

22. On 10 July 2014, the Claimant signed a conditional fee agreement with her solicitors. They countersigned the agreement on 25 July and on the same date, the Claimant took out an ATE insurance policy with Allianz Insurance Plc ("Allianz"). The policy provided cover, to a limit of £100,000, for medical experts' reports, other disbursements and opponents' legal costs. It is evident, from the schedule of document time appended to the Claimant's bill, that at this point the Claimant's medical records had been obtained and reviewed by her solicitors.

23. The total premium under the policy was £13,500 plus IPT. This was split into a "recoverable" premium of £10,000 for medical experts' reports and £3,500 for other disbursements and opponents' legal costs.

24. The Claimant has filed a witness statement from Victoria Lyddon, a Legal Expenses Underwriter at Allianz. Ms Lyddon confirms that the purpose of the Claimant's ATE policy was to cover the risk to the Claimant of, for example, having to pay an opponent's costs after failing to beat a Part 36 offer and (with regard to the recoverable element of the premium) of paying for one or more medical expert reports on breach of duty and causation, and then having to abandon the case.

25. Ms Lyddon says that with ATE insurance, the normal arrangement is that after a policy is incepted the premium becomes payable on the successful conclusion of that case, even where it subsequently transpires that no medical expert reports on either breach of duty or causation were in fact obtained (as where an early admission is made). The point, as with any policy of insurance, is to take out cover before a problem occurs.

26. She explains that the policy taken out by the Claimant is a "litigATE" policy, developed specifically for Irwin Mitchell in order to provide sufficient cover for all of their clinical negligence clients in respect of all risks. Under the agreement between Allianz and Irwin Mitchell, Irwin Mitchell carry out their own initial vetting and screening procedures, for example in relation to limitation. Subject to that, Irwin Mitchell has delegated authority to issue policies to all clinical negligence clients at the point that each client enters into a CFA.

27. The policy is, in consequence, block-rated. Premiums are calculated by reference to the claims cost of the overall portfolio, adjusted by reference to the value of the claim itself. Lower value cases will enjoy lower premiums, and more serious cases, where the level of damages is likely to be high, require higher premiums. Specific premiums are set using actuarial principles and models, but the overall average premium remains the same.

28. I will consider further evidence offered by Ms Lyddon in the context of the submissions to which it is relevant.

Other evidence

29. I have been supplied by the Defendant with seven copy policy schedules from Lamp Insurance Company Ltd, another ATE insurer. They are clearly from post-March 2013 Clinical Negligence policies. The limit of indemnity on each schedule is shown as £9,000 "plus premium", indicating that the policy is self-insured. The total premium in each case (net of IPT) is £2,200, of which £1,870 is attributable to expert reports on liability and causation, of which the cost is recoverable, and £330 to other expert reports and disbursements. In each case the policy is expressed to exclude Wasted Costs Orders but to provide cover for adverse costs as well as other disbursements.

30. The schedules are accompanied by a set of contractual conditions, though as the documentation provided by the Defendant is not accompanied by witness evidence I cannot assume that those terms cross-refer to the schedules produced. Nor have I been referred, in submissions, to any of the conditions.

31. The Defendant has also produced two similarly anonymized Allianz Clinical Negligence policy schedules from 2014, showing a limit of indemnity of £100,000 and a premium of £3000, of which £2500 provides cover for the recoverable element of medical expert evidence and the balance of £500 for other disbursements and opponents' legal costs.

32. I have also been given an anonymized schedule from DAS LawAssist. I cannot quite make the figures work: it appears to show a limit of indemnity of £112,000 plus premium of which the "recoverable element" limit is £2,000 and the "non-recoverable element" limit £100,000. The "recoverable element" premium is £500 plus IPT, and the "non recoverable element" premium £2,000 plus IPT.

33. The last is from Alpha, showing a limit of indemnity of £50,000 split into two elements of £10,000 and £40,000, with a total premium of £3,900 split into £3000 and £900, respectively, for what would appear (though I cannot be certain) to be the recoverable and irrecoverable elements.

The Points of Dispute

34. In the Points of Dispute, the Defendant argues that the Claimant's bill of costs includes only one fee for Professor Cheong for reporting on liability, totalling £1,750. Other reports, says the Defendant, were limited to comment upon condition and prognosis, and any further reports relating to breach of duty or causation were at the least highly unlikely.

35. The figure of £1,750 may not be correct; the bill seems to show Professor Cheong's fee for his initial report at £2,000 (his fee for the condition and prognosis report is £1,650).

36. In any event the Defendant argues that there is, at the least, "very real doubt" that the ATE premium was reasonably incurred and challenges Irwin Mitchell to explain the advice given to the Claimant (who would have to pay a further substantial sum for the irrecoverable ATE premium). Irwin Mitchell is also challenged to state whether there

was any financial benefit to the firm from selling or recommending the policy. In the absence of such evidence, the Defendant asks me to assume that the ATE insurance was purchased either as a matter of internal, routine procedure or simply because it was believed that most of the cost could be passed on to the Defendant.

37. I should perhaps say now that I regard the "financial benefit" challenge as beside the point and that it would be quite wrong for me to make any such assumption.

38. The Defendant relies upon *Sarwar v Alam* [2001] EWCA Civ 1401 in arguing that the court must consider whether an ATE premium is reasonable and proportionate in the context of the individual circumstances of the case. The Defendant argues that the post-March 2013 statutory regime is intended to permit recovery for cases where expert reports relating to breach or causation are necessary to determine whether there was a case to bring, and that this is not one of those cases.

39. Further, says the Defendant, the risks being insured against are narrower than was the case under the pre-April 2013 costs regime and they are controlled entirely by the conducting solicitor, who decides whether and when to instruct an expert to prepare a report. The effect of Qualified One Way Costs Shifting means that there is no longer any need to ensure against adverse cost at the outset, nor is there any perceived benefit (as identified in *Callery v Gray (No. 1)* [2001] EWCA Civ 1246) in premiums being purchased prematurely.

40. The Defendant also argues that the cost of the ATE premium is disproportionate. Given the low cost of expert reports relating to breach and causation and that any perceived risk was (says the Defendant) controlled entirely by the solicitor, and open to re-evaluation at a later point, it was not proportionate to purchase an ATE premium at all. In the circumstances the premium should be disallowed in its entirety. In a case with modest damages, says the Defendant, it was plainly disproportionate for the Claimant to incur a liability of £10,000 plus IPT to protect against the risk of not recovering a much smaller sum.

The Defendant's Submissions

41. Mr Dunne, for the Defendant, expanded upon the above submissions, arguing that the ATE premium paid by the Claimant was not reasonably incurred; not reasonable in amount; and, relying upon the decision of Master Gordon-Saker in *BNM v MGN Limited* [2016] EWHC B13 (Costs), not proportionate under CPR 44.3(5).

42. This, Mr Dunne says, was a relatively uncomplicated clinical negligence case. 14 months passed between the sending of a Letter of Claim and settlement. Given the admissions made by the Defendant in its defence and the Part 36 offers made by the Defendant it was clear that the potential value of the case was recognised by the Defendant. Once proceedings were issued, it took a short exchange of offers to settle the matter.

43. Mr Dunne points to the 14-month period between initial instructions and the taking out of the ATE policy in support of the proposition that this was not a case where it was thought necessary to take out an ATE policy at the outset. At that stage, he submits, either the Claimant's solicitors understood that evidence on liability and causation

would be limited to one expert, or they did not yet know, in which case they should have waited until they were in a position to know.

44. Following the Points of Dispute, he argues that the *Callery v Gray* [2001] EWCA Civ 1246 principle, that it is reasonable to take out ATE insurance at an early stage, no longer applies to the very different regime in place from 1 April 2013. The Claimant is entitled to recover the reasonable cost of a policy with a specific, limited purpose. She is not insuring against all risks and it is reasonable for her advising solicitors to wait, before advising on ATE insurance, until they are in a position to understand what will be needed. What was not, and was never foreseeably going to be needed, was cover of £100,000 and a premium of £10,000 to cover exposure to an expert's fees which came to no more than £2,000.

45. *Sarwar v Alam*, he argues, supports the proposition that an ATE insurance premium cannot be reasonably incurred and reasonable in amount simply because a claimant's solicitors have a block-rating arrangement with an insurer. There may be cases for which such an arrangement is not appropriate. This, submits Mr Dunne, is one of them.

46. With regard to the evidence of alternative policies offered by the Defendant, Mr Dunne submits that limited though that evidence is, the schedules produced by the Defendant do at least cast doubt upon the reasonableness of the Claimant's ATE premium on a standard basis assessment.

47. As to proportionality, the Claimant relies upon *King v Basildon & Thurrock University Hospitals NHS Foundation Trust* [2016] EWHC B32 (Costs), *Savings Advice Ltd & Anor v EDF Energy Customers Plc* [2017] EWHC B1 (Costs) and *Murrells, Estate of v Cambridge University NHS Foundation Trust* [2017] EWHC B2 (Costs), in which Masters Rowley, Haworth and Brown each found that additional liabilities are not subject to the post-March 2013 proportionality test.

48. In response Mr Dunne argues that a central premise of all of those judgments is incorrect because Master Rowley and Master Brown based their findings in part upon the fact that additional liabilities are, from 1 April 2013, excluded from the definition of "costs" at CPR 44.1. He argues that that definition is not exclusive, and that if one treats additional liabilities as entirely excluded from the definition of "costs" then they would also be free from any test of reasonableness. That, he suggests, cannot be right.

49. Nor, argues Mr Dunne, can the Claimant rely upon *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134. The essential logic of that decision was that, if a claimant found it necessary to pay the cost of an ATE policy dictated by the market, then the cost of the policy would, by definition, be proportionate. Under the new test applicable from 1 April 2013, necessity expressly gives way to proportionality and *Rogers* cannot be relied on by the Claimant to recover an obviously disproportionate ATE premium.

50. Mr Dunne submits that Master Gordon-Saker, in *BNM v MGN Limited* [2016] EWHC B13 (Costs) adopted the right approach, both in concluding that additional liabilities must be included when the new test of proportionality is applied and in applying that test to an ATE premium as an individual item (in this respect, he submits, *Giambrone v JMC Holidays Ltd* [2002] EWHC 2932 (QB) is still good law).

51. I will not repeat in any detail the submissions of Mr Waszak for the Claimant, as it will be evident from my conclusions that I accept them.

Conclusions: Proportionality

52. We currently await guidance from the Court of Appeal on the application of the post-March 2013 proportionality test to additional liabilities. I do not in the meantime consider it necessary for the purposes of this judgment to follow in the footsteps of Masters Gordon-Saker, Rowley, Haworth and Brown in setting out a considered view of my own. I say that because it seems to me that, even if Mr Dunne is entirely correct and the insurance premium incurred by the Claimant can be considered in isolation in the way contended for it cannot be said to be disproportionate.

53. The post-March 2013 proportionality test is set out at CPR 44.3(5):

> "Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party; and
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance".

54. In applying that test, I am required by CPR 44.4 to have regard to all the circumstances, which would for example include what is available on the ATE market.

55. Notably, CPR 44.3(5) provides that costs <u>are</u> (my emphasis) proportionate if they bear a reasonable relationship to the specified factors. It seems to me that the wording of the rule leaves no room for the Defendant's attempt to measure the proportionality of the Claimant's ATE premium by reference to the amount ultimately paid for the expert evidence covered by it. That is not the test.

56. There are other objections to the Defendant's approach, perhaps the most obvious being the application of hindsight, but given that I must apply CPR 44.3(5) it does not seem to me to be necessary to go further into the merits of a proposed proportionality test which is not consistent with it.

57. Applying the correct test, my conclusion is that even assuming that it stands to be considered in isolation, an ATE premium of £10,000 could not be characterised as disproportionate in the context of a Clinical Negligence claim that settled, in the circumstances I described above, for £200,000.

Conclusions: Whether the Premium was Reasonably Incurred

58. I do not accept the assertion in the Points of Dispute that "the risks being insured against are…controlled entirely by the solicitor (for it is the solicitor who decides if or when to instruct an expert to prepare a report)". Any requirement for independent medical evidence is dictated by the needs of the case, not by the whim of the conducting solicitor. It is not suggested, nor could it realistically be suggested, that it was not necessary to obtain independent medical evidence in this case.

59. As for the level of risk, that will also be dictated by the facts of the case, not least by the Defendant's response. At the time this ATE policy was taken out, the response of the Defendant to the claim was an unknown quantity. The argument that the Claimant and her solicitors should have understood that the case would ultimately settle is, again, based on hindsight and in any case is belied by the approach of the Defendant, which relied upon a robust case on causation.

60. As for the proposition that it was incumbent upon the Claimant's solicitors to wait until a point at which they had a clear understanding of the level of recoverable ATE cover that was going to be required by the Claimant, I must bear in mind the evidence before me as to the way in which the Claimant's block-rated policy worked.

61. The evidence of Ms Lyddon, to which the Defendant neither objects nor offers any evidence in response, confirms that the block-rating arrangement entered into between Irwin Mitchell and the Claimant requires that the ATE insurance policy is taken out when a CFA is signed. If a different, more selective model were to be adopted, cover for some cases would have to be refused and premiums for those that were accepted would be likely to increase. It would also, as she suggests, potentially result in a firm like Irwin Mitchell being unable to secure insurance cover for some clients and leave them open to criticism on the basis that they had denied their clients the opportunity to protect their position by insuring at the earliest stage.

62. Mr Dunne's argument, accordingly, falls foul of the fact that the block-rated ATE policy taken out by the Claimant did not allow for the sort of individual approach for which he argues. I have heard no answer to the evidence of Ms Lyddon to the effect that attempting to introduce such an approach would be counter-productive.

63. The Defendant rather argues that the Claimant does not have any right to rely upon the fact that this was a block-rated policy. That in turn relies upon the argument that established judicial authority since *Rogers*, approving the practice of block rating, has no application after March 2013. I cannot accept that. Apart from the fact that I have seen no evidence to support the proposition that the underlying logic of block rating has changed in any way since 1 April 2013, the argument seems to me to run directly contrary to the conclusions drawn by Foskett J in *Kai Surrey v Barnet And Chase Farm Hospitals NHS Trust* [2016] EWHC 1598 (QB) (at paragraph 105):

> "… *Rogers* is very clear authority that the court should be slow to adjust block rate premiums in particular. There are inevitably swings and roundabouts with such premiums and it is not appropriate in my view to be trying to deconstruct the premium.… "

64. It is also contrary to the conclusions drawn by Langstaff J at paragraphs 41 and 42 of his judgment in *Pollard v University Hospitals of North Midlands NHS Trust* [2017] 1 Costs LR 45, referred to below.

65. Even if I were to accept that I should approach the Claimant's ATE policy as if it was (or should have been) individually rated, it seems to me that the Defendant's arguments would not stand up to analysis.

66. I say that first because Mr Dunne did not identify any particular point at which the Claimant's solicitors might have been expected to have sufficient knowledge to know, with acceptable precision, what the prospective cost of expert evidence was likely to be. Nor did Mr Dunne suggest that if the Claimant had waited before taking out the ATE policy, she could have reduced the premium payable. That is not the Defendant's case. Rather the Points of Dispute say that the policy should not have been taken out at all, without conceding when (if ever) it would have been reasonable to do so.

67. I do not regard the Defendant's suggested approach as workable. The proposition that it is incumbent upon a claimant to refrain from taking out ATE insurance until some undefined point at which the level of risk to be insured has become entirely clear, seems to me rather to miss the point of taking out insurance at all.

68. In any event the policy, self-evidently, is not restricted to recoverable liabilities. It covers all disbursements as well as adverse costs (the risk of having to pay an opponent's costs in a clinical negligence case has been reduced substantially by the QOCS regime but it still exists).

69. Mr Waszak has referred me to the judgment of His Honour Judge Pearce in *McMenemy v Peterborough & Stamford Hospitals NHS Foundation Trust* (Appeal Number 68/2015, Liverpool Civil and Family Justice Centre, 12 February 2016, unreported) in which the learned judge analysed and rejected similar arguments to those upon which the Defendant, in this case, attempts to rely.

70. HHJ Pearce's key conclusions, with which I respectfully agree, are pertinent. They are set out at paragraphs 28 to 30:

> "…it is wrong to focus on this issue without looking at the broader benefits to the Claimant of taking out the policy early stage, as the Court of Appeal in *Callery v Gray* considered reasonable. In particular… Any prospective Claimants approaching solicitors to investigate an allegation of clinical negligence is likely to want to be reassured that their exposure to any costs is minimised. Such a concern will be best met by a policy being taken out at an early stage of investigations…
>
> In a case like this, disbursements will be incurred by the claimant's solicitors and early stage… Policies such as the ARAG policy here will typically cover the claimant against liability for other disbursements. Since regulation 3(2) … Allows recovery only of "*that part of the premium*" which relates to expert reports on the issues of breach of duty and causation, it is clear that the legislature contemplated combined policies that covered other risks. It is understandable (and reasonable) that the claimant will want to obtain the protection offered in respect of other disbursements at the earliest stage-

> indeed solicitors might reasonably refuse to act for claimants if they were not reassured that cover was in place in respect disbursements that might not be recovered in the event of the claim being unsuccessful…
>
> It is likely to be the case that, if the institution of the policies delayed until the Defendant's position on liability is known, the premium will be higher… It seems to me that, as a matter of common sense, the crystallisation of the Defendant's position that comes from a denial of liability would inevitably lead to higher premiums being charged. The position as identified in paragraph 99 (ix) of the judgment of the Court of Appeal in *Callery v Gray* is likely to be no less the case here…
>
> it must have been contemplated that there would be cases where no expert's report was obtained, yet this would not be a bar to recovery of the premium. This is not easily reconciled with a finding that it is unreasonable to take a policy until the expert report was about to be obtained."

71. Notably in *McMenemy*, the defendant argued that it had been premature (and so unreasonable) for a claimant to incur the cost of an ATE policy because she did so before her solicitors had obtained her medical records. In this case I have rather been invited to conclude that it was unreasonable for her to incur the cost of an ATE policy after her solicitors had obtained medical records.

72. The latter argument is based upon the proposition that, in view of the long period that expired between initial instructions and the taking out of the ATE policy, there must have been no perceived need for such a policy at the outset. As Mr Waszak submits, there is no real basis for that conclusion. The fact that the policy was taken out at the same time as the Claimant entered into her CFA with her solicitors simply indicates that the policy was taken out when the merits of the case appeared sufficiently clear for it to be taken forward, at which point the Claimant entered into a formal CFA with a supporting ATE arrangement. In cases of clinical negligence it may take some time for a solicitor and a client to reach that point.

73. My conclusion is that it was reasonable for the Claimant to take out the policy in July 2014, as soon as it was clear that the case was going to proceed. The subsequent history of this case (in particular the firm line taken by the Defendant on causation) seems to me to demonstrate that it was prudent to do so.

Conclusions: Whether the Amount of the ATE Premium is Reasonable

74. The Defendant's case in this respect rests on four propositions: that a premium of £10,000 to cover expert evidence costing no more than £2,000 is self-evidently unreasonable; that the level of cover, at £100,000, was excessive, so that the premium was excessive; and that it was unreasonable for the Claimant to enter into the block-rated scheme arranged between Irwin Mitchell and Allianz, suitable cover being available from other insurers at a lower cost.

75. I have already addressed the block-rating issue, but even on the basis that the block-listed policy taken out by the Claimant should be considered as if it were individually rated I do not accept that the arguments advanced by the Defendant raise any real doubt about the reasonableness of the amount of premium paid. I say so for these reasons.

76. The comparison between the premium paid by the Claimant and the cost of the expert evidence on liability and causation obtained by the Claimant prior to settlement falls foul of the observation I have already made: the Defendant is applying hindsight. There is really nothing to support the proposition that the Claimant's solicitors must (or at least should) have known that the cost of the expert evidence covered by the recoverable part of her ATE premium would have been in the region of £2,000. On the contrary, if they had made that assumption they would probably have been wrong. If this case had not settled, it seems likely that there would have been a need for significant further expenditure on expert evidence in relation to causation.

77. As regards the overall level of cover, as Ms Lyddon has pointed out it is not limited to the cost of expert evidence. I have heard nothing to substantiate the suggestion that the policy limit is excessive for the overall cover offered.

78. Nor have I seen any evidence to justify the conclusion that there is any direct relationship between the level of cover offered by the Claimant's ATE policy and the level of premium payable. It would clearly be wrong to assume that, particularly where the policy is block-rated: Mr Waszak has referred me to the judgment of Mr Justice Langstaff in *Pollard v University Hospitals of North Midlands NHS Trust*, in which (at paragraph 50) the learned judge concluded, on the evidence in that particular case, that there was no such relationship between the limit of indemnity and the policy premium.

79. In *Pollard*, at paragraphs 41 and 42, Langstaff J also offered some observations on the correct approach to a challenge to an ATE premium:

> "41 … in dealing with the assessment of a premium when determining costs, especially where the policy is known to be block rated and is not a bespoke policy, a judge should be very hesitant before concluding that the premium is in error, and should have good reasons for doing so. Those good reasons are likely to include, though I do not suggest they are necessarily limited to, situations in which it is clear that the risk of failure has been overstated and the chance of success understated, those where the insurer has not been given proper information about the level of costs so that they have been overstated, or it may be where there is proper material to show that the product which has been chosen is a particularly and inappropriately expensive product...
>
> 42 The selection of the appropriate policy is a matter for the solicitor and it is in that context that *Rogers* suggests at para 117, as I have cited, that the solicitor concerned should make some note, or be prepared to give some evidence, as to why the particular product was chosen…"

80. I have such evidence in this case, albeit from the insurer rather than from a solicitor.

81. I turn to the handful of anonymized policy schedules offered to me by the Defendant as evidence of the existence of cheaper alternatives to the Claimant's policy.

82. The Claimant in turn relies upon the judgment of Simon J in *Kris Motor Spares Ltd v Fox Williams LLP* [2010] EWHC 1008 (QB). Simon J made this observation, at paragraph 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.…"

83. I have no real evidence to support the proposition that suitable, less expensive alternative policies were available to the Claimant. The redacted policy schedules offered by the Defendant in support of that argument, entirely unsupported by witness evidence, are of very limited if any evidential value. They could at most be taken to demonstrate that some other insurers have offered cover for some other clinical negligence claims at lower cost. I have no evidence about the pertinent detail; whether for example the claims covered were Fast Track or Multi Track; the assessment of risk; the way in which the relevant premiums were calculated; or whether the relevant policies were individually rated or block-rated.

84. In summary it seems to me that the Defendant has failed to discharge the evidential burden identified in *Kris Motor Spares*, or to give me the sort of good reason for disallowing all or part of the ATE premium contemplated by Langstaff J in *Pollard*. I am, rather, invited on little or no relevant evidence, to conclude that some element of doubt has been established and to reduce or disallow the premium on the basis that it seems, in broad terms, to be too high. That seems to me to be precisely the approach against which Langstaff J warned.

85. For those reasons, the challenge to the ATE premium fails and it is allowed in full.