ATE Insurance

Recovery of the Premium

The following passages from the judgment of Lord Justice Brooke in *Rogers v Merthyr Tydfil CBC [2006] EWCA Civ 1134* are key in justifying staged premiums:

In paragraph 107 of his judgement, Lord Justice Brooke stated that "*there is in principle no difference between a two staged success fee (whose merits this court has consistently endorsed) and a staged ATE premium. The financial risk to which the ATE insurer is exposed inevitably rises as a case proceeds towards trial. While defendants may be liable to pay a higher premium if they take a case to trial and lose, the situation is no different from that facing then in relation to their liability to pay a higher success fee when claims are resolved against them 14 days or less before the date fixed for the commencement of a trial in the cases covered by the new arrangements for fixed recoverable success fees in CPR Part 45. Exposure to this greater liability requires a defendant to think very seriously about the merits of his position before a trial takes place. This obligation, too, runs with the grain of the philosophy of the CPR.*"

In paragraph 117 of his judgment, Lord Justice Brooke stated that *"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 (No's 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."*

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 – see *Kris Motor Spares Limited v Fox Williams [2010] EWHC 1008*.

The difficulties for parties attempting to challenge premiums were also illustrated in the *Motto v Trafigura* case which involved a premium where the method of calculating the risk multiplier was in line with the formula approved by the Court of Appeal in *Rogers v Merthyr Tydfil CBC*.

Should the premium be "proportionate"?

Senior Costs Judge Hurst held in the case of *(1) Margaret Kelly (2) Paul Kelly v Black Horse Limited SCCO 1 August 2013* that the Defendant should pay only 25% of the premium claimed in the amount of £15,000.00 as he had found the amount claimed to be disproportionate.

The *Kelly* case involved an ATE insurance policy which covered adverse costs and the Claimants' own disbursements. Excluding the Claimants' Solicitors' and Counsels' own fees, the Claimants' disbursements totalled £1,406.20. This, added to the £5,837.10 Defendants' costs, meant that the insurer was facing a potential liability of £7,243.30 in respect of which the Claimants had paid a premium of £15,900.00 (including IPT).

The Defendant argued that as a result of the detailed assessment the ultimate exposure would have been far less than the potential liability figure of £7,243.30. Given that the detailed assessment was still continuing, Master Hurst did not think it appropriate to speculate as to the possible ultimate exposure, but instead he chose to proceed on the basis of the estimated maximum liability (EML).

In his view, there was no doubt that the ATE premium sought in the Kelly case was "wholly disproportionate". Master Hurst had already found that the base costs claimed in the bill were disproportionate, (as was the success fee of 100%).

He had been given no evidence as to the information which was given to the ATE insurers to enable them to rate the policy, but, given the risk assessment completed for the purpose of the CFA, which he had already found was entirely meaningless, he felt it was "safe to assume" that the insurers were not given accurate information.

By applying the Defendant's suggested formula (which in turn was based upon the decision in *Rogers)* to the premium of £15,000 plus IPT, and assuming the Claimants' disbursements at £1,406, it appeared the insurers, no doubt acting on the information given to them by the Claimants' Solicitors, would have predicted exposure for the Defendant's costs at something in excess of £20,000. Such a figure was found by the Master to be "wildly inaccurate". In his view, it would have been permissible at the outset of the proceedings to estimate that the Defendant's costs might be in the region of £7,000, which together with the Claimants' disbursements would produce a potential exposure of £8,406; this in turn would produce a premium of £3,677.63 (again applying the *Rogers* formula).

Adopting as a cross-check the broad brush approach of Akenhead J in *Redwing Construction Ltd*, Master Hurst found that the reasoning set out at paragraph 21(b) of the *Redwing* judgment fit almost exactly with his own view of the circumstances of the *Kelly* case, save that the Master was conducting a detailed assessment whereas Akenhead J was conducting a summary assessment.

The Claimant's Costs Lawyer had urged the Master to have regard to what was said by Lord Justice Brooke at paragraph 117 of *Rogers*, and to recognise that he did not have the expertise to judge the reasonableness of a premium "except in very broad brush terms". He accordingly submitted that Master Hurst should proceed with a broad brush approach, as demonstrated by Akenhead J in *Redwing Construction Ltd*.

In his judgment Master Hurst concluded that it was reasonable to expect the Defendant to pay 25% of the premium claimed of £15,000. This produced a figure of £3,750, which compared favourably with the £3,677 which he had calculated using the Defendant's suggested formula.

Accordingly the Claimants premium was allowed at £3,975, including IPT. This figure, in common with the rest of the bill, was subject to the Order of Deputy District Judge Dagnall, that the Defendant should pay only 70% of the Claimants' costs as assessed or agreed.

<u>Is your opponent entitled to Disclosure of the policy documents?</u>

The Senior Master sitting as a Judge within the High Court in *Arroyo v BP Exploration Co (Columbia) Ltd* [2010] EWHC 1643 *QBD)* having heard full argument on the matter concluded that a Court has no power to order a party to disclose an ATE policy of insurance.

The Senior Master went on to decide that the policy itself was covered by litigation privilege it having come into existence for the purposes of proceedings.

It was so held contrary to the earlier High Court decisions in *Henry v BBC [2005]* - an application for a costs capping order - and *Barr v Biffa Waste Services [2006]* – a Group Litigation Order – both decisions were reviewed in the *Arroyo case* and were departed from as full argument had not been heard in either of the earlier cases.

<u>Clients are liable for ATE premiums incurred after 1 April 2013</u>

As a result, there are a number of key factors that should be considered and viewed as important when deciding which ATE policy to select on behalf of a client:

- Whether the Insurer based within the UK and, therefore, regulated by the Financial Services Authority.
- The length of time any particular Insurer been involved in writing ATE insurance.
- The financial standing of that Insurer.
- The importance of making sure the premium is payable at the end of the case so that the client is not required to make payment up front.
- Whether the premiums are staged as this should help avoid any potential for a dispute with the client at the end of the case.
- Whether the Insurer can be relied upon to pay out under the policy e.g. if the claim failed at trial.
- Is the limit of indemnity adequate for the claim?
- Is the cover comprehensive?
- Whether there is cover for interim adverse cost orders.
- Whether premiums are block rated under delegated authority schemes for multiple cases of the same type.
- Whether the client requires a one-off (bespoke) policy – these are usually available for individual cases requiring low and medium limits of indemnity.

If you can show that you took into account some or all of these factors when advising a client as to an appropriate ATE policy then the potential for any subsequent disputes with that client as to the reasonableness or proportionality of the final premium should be lessened if not avoided completely.

Jim Knight

Jim Knight | Costs Lawyer | Harmans

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