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The reluctant reassessment

Disputes surrounding the amount of After the Event (ATE) insurance policies continue on an almost daily basis. Defendants argue that the level of the premiums are wholly disproportionate to the risk involved and Claimants argue that they are merely paying the premiums the ATE market is demanding. When these conflicting arguments come together, it is left for the Court to decide. A recent example was the case of Kenneth Ronald Parker v Joel Carlos Seixo (2010).

The claim arose from an accident at a petrol station when the Defendant reversed his vehicle into the Claimant, knocking him down and breaking his leg. The Claimant instructed Bakers Solicitors to act on his behalf and they advised him to take out an ATE insurance policy issued by Keystone. The policy covered the Claimant's own solicitors' costs and the opponent's costs, so there was no need for a Conditional Fee Agreement (CFA). A letter of claim was sent and liability admitted within the relevant protocol period. Over 2 years later, the Claimant's medical condition had still not resolved and the claim was ongoing. At this point, in January 2007, the Claimant notified the Defendant of the existence of the ATE premium and the fact that it was staged such that the amount of the premium would increase following service of a Defence and again 28 days before trial. Proceedings were issued in September 2007 due to the impending limitation period and the Defendant made an offer to settle of £75,000 in November 2007. This was rejected and a Defence filed admitting liability. This step incurred the second stage of the ATE premium. Thereafter, the claim was allocated to the multi track and the matter was listed for trial on the 20th October 2008. Shortly before trial, on the 12th September 2008, the matter was agreed at £120,000 and a consent order sealed on the 24th September 2008. Costs were sought by the Claimant and the base costs were agreed at £30,708.82 with the issue of the ATE premium not capable of agreement. The matter therefore came before Master Wright in the SCCO (sitting as Deputy District Judge of the Central London County Court) to determine this sole issue.

The ATE premium was claimed in the total sum of £10,106.25, made up of the first stage of £551.25 paid at inception and a second stage of £9,555.00 paid when the Defence was filed. The Defendant raised a number of challenges to the level of the premium.

The Defendant first sought to deal with the difficulty of the Court of Appeal's judgment in Rogers v Merthyr Tydfil BC (2006). In Rogers, the Court had given general guidance that judges should be slow to interfere with the level of ATE premiums as they were set by reference to insurance criteria which they were not necessarily equipped to assess. The Defendant argued that, whilst a judge may not necessarily have the expertise to finely assess the reasonableness of an insurance underwriting assessment, they did have the experience to assess, in broad terms, whether the amount of an ATE premium is obviously unreasonable or if the methodology used to calculate the same is fundamentally flawed. In those circumstances, argued the Defendant, it cannot be right that the Court is prevented from disallowing or reducing the premium purely on the basis that it has been set at that level by an insurer. As an example, the Defendant cited the case of Smith v Interlink Express Parcels Ltd. (2007) where the Senior Costs Judge had reduced the amount of a staged ATE premium on the basis that it was simply too high given the likely risk exposure.

In support of this contention, the Defendant argued, quite simply, that the level of the premium was not commensurate with the risk and, in particular, the level of the second stage premium was too high. Firstly, it was noted that the second stage was seventeen times higher than the initial stage. In Rogers, the second stage of the premium had been about twice the level of the initial stage and it was therefore argued that a second stage premium of such disparity was manifestly unreasonable.

Turning then to the actual figures involved, the Defendant argued that the total conceivable loss arising from stage 2 was a total sum of £44,000, that is £30,000 for the Claimant's costs (taken from the Claimant's listing questionnaire) and £14,000 for the Defendant's costs (again from the listing questionnaire). However, even this potential liability would only be incurred if the Claimant discontinued their claim, the likelihood of which would be minute, given the Defendant's admission of liability, the value of the claim and the fact that the Defendant had already made interim payments of £14,000. The only other risk of the ATE insurance being called upon was if the Claimant failed to beat a Part 36 offer made by the Defendant. The Defendant put forward statistics, based primarily on Lord Justice Jackson's Review of Civil Litigation Costs, that showed the risks of this occurring and concluded that the risk of the Claimant having to meet the Defendant's costs was negligible and the risk of having to meet the Claimant Solicitor's own costs was only 4%. Applying this percentage to the £30,000 potential loss for the Claimant Solicitor's costs, and adding various percentages for overheads (25%), commission (4%)and Insurance Premium Tax (5%), gave a figure of £1,965 which, the Defendant argued was a reasonable amount for the second stage premium.

In the alternative, the Defendant argued that it would have been much cheaper for the matter to have been funded by way of a CFA (with a fixed success fee of 12.5%) and an ATE policy which only covered the opponent's costs. The total cost of this option would have been £3,638.25 and, once again, this demonstrated the unreasonableness of the ATE premium sought by the Claimant.

The Claimant's reply was based primarily on Rogers. The Court of Appeal had recommended that a solicitor provide a brief explanation as to the reasons why a particular ATE policy was chosen so that the Court could consider these reasons when determining if the choice was a reasonable one. Such a statement was provided by the Claimant and it confirmed that the reasons for choosing the Keystone policy included the reputation of the provider as a reputable insurer, the level of indemnity provided, the deferment of the premium, the absence of an application fee, the inclusion of Counsel's fees in the cover provided and the insurer's flexible approach and absence of onerous reporting criteria.

In addition to these reasons, the Claimant argued that the risks were not as low as the Defendant was suggesting, pointing to the Defendant's Part 36 Offer in November 2007, the dispute on causation and the Claimant's uncertain medical condition. In all of the circumstances, the Claimant argued that the choice of the policy was a reasonable one and the Court should not interfere with the level of the premium as set by the insurer.

Master Wright agreed with the Claimant, describing the Defendant's submissions as 'misconceived'.

> *'This is not a case where the court should (without the assistance of expert evidence) regard itself as better qualified than the underwriter to rate the financial risk the insurer faced.'* (at paragraph 33)

He held that the case was finely balanced due to the Defendant's Part 36 offer and the Claimant was still undergoing treatment. In such circumstances, the case was not as risk free as the Defendant was suggesting and the ATE premium would be allowed as claimed.

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For Defendant paying parties reading this decision, it must be assumed that it makes for a depressing read. Rogers has proved a very difficult hurdle to overcome when Defendants seek to challenge ATE premiums and this decision follows the orthodoxy of that case. The Defendant's submissions that the premium was just too high did not persuade the Court. It does seem paradoxical that the Courts, whilst they are happy to exercise their discretion in relation to the reasonableness of any other aspect of a costs claim, are so reluctant to do the same to ATE premiums. A court will regularly assess the reasonableness of a success fee and one would presume that the factors that affect such an assessment, namely the risks of a case being lost, are precisely the same factors that will affect the amount of an insurance premium. Similarly, a Court can and will reduce the fees of an expert when these are considered to be unreasonable, even though the Court does not profess to be an expert in that field. It does appear as though ATE premiums have been granted a certain protected status when it comes to costs assessment and, whilst this may help the viability of the ATE market, it does not seem to be equally beneficial to the Defendants who ultimately end up paying for them. In this climate, it can be seen why Lord Justice Jackson's recommendations to radically change the system of ATE premiums is attracting such polarised views.

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Cases Cited:

Kenneth Ronald Parker v Joel Carlos Seixo [2010] EWHC 90162 (Costs)
http://www.bailii.org/ew/cases/EWHC/Costs/2010/90162.html

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