



Neutral Citation Number: [2019] EWHC 539 QB

Case No: QB/2018/0107

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Order of Deputy Master Campbell, 28th March 2018
CCD1704323

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2019

Before:

MR JUSTICE STEWART

Between :

RICHARD MURRAY

**Claimant/
Respondent**

- and -

OXFORD UNIVERSITY HOSPITALS NHS TRUST

**Defendant/
Appellant**

Mr Roger Mallalieu (instructed by Royds Withy King) for the Claimant/Respondent
Ms Margaret McDonald (instructed by Acumension Ltd) for the Defendant/Appellant

Hearing dates: 13th February 2019

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.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

1. Pursuant to permission granted by Mrs Justice Cutts on 24th October 2018 the defendant appeals the order of Deputy Master Campbell dated 28th March 2018. The Deputy Master made the following order:
 - “i) The Claimant’s costs of the substantive action are assessed in the sum of £114,364.80 which breaks down as follows:
 - profit costs £33,411
 - success fee (43%) £14,366.73
 - VAT (20%) £9,555.55
 - disbursements £57,031.52
 - total £114,364.80.
 - ii) The Defendant is to pay the Claimant’s costs of detailed assessment and Part 8 proceedings which are summarily assessed in the sum of £27,839.75 ...”
2. The two Grounds of appeal are first, “mis-certification of the Bill and lack of proper sanction under CPR 44.11;” secondly, “ATE premium allowed in full.”
3. The underlying substantive action was a clinical negligence claim. The Claimant’s mother discharged herself from hospital following an appendectomy. The claim was that she should have been advised that she had sepsis and was likely to die if she discharged herself, whereas she probably would not have died had she not discharged herself. She died less than 48 hours post-surgery on 30th August 2006. The claim was compromised on 26th October 2016 prior to issue of proceedings. The Claimant, having attained majority, accepted the Defendant’s Part 36 offer of £175,000.
4. The Claimant instructed Marshall and Galpin who acted from 2006 until 31st August 2008. They became Withy King. Withy King acted from 1st September 2008 until 31st August 2016. Withy King then became Royds Withy King and acted from 1st September 2016 onwards. The Claimant reached his majority on 22nd September 2016 and novated the CFA on 14th October 2016.
5. By CPR 52.21 (3) the appeal court will allow an appeal where the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
6. It is the first Ground which is relied upon by the Defendant. In relation to the exercise of a discretion, what constitutes a sufficient error to warrant interference by the appeal court has to be such that the circumstances are that the lower court has exceeded the generous ambit within which a reasonable disagreement is possible.

Ground One – Mis-Certification and Lack of Proper Sanction under CPR 44.11

7. Five points of mis-certification are relied upon by the Defendant. These are:
- i) the Bill certified that there had been no interim payments on account of costs when interim payments of £90,000 had been made. It is accepted that the Bill should have contained this information.
 - ii) The Bill stated that the risk assessment was conducted by Withy King when in fact it was conducted by Marshall and Galpin.
 - iii) The Bill claimed a 100% success fee. The risk assessment stated that there was a 60% prospect of success which it is said equates to a 67% success fee.
 - iv) The statement of reasons for the percentage increase in the Bill narrative was inaccurate and bore no resemblance whatsoever to the true statement of reasons.
 - v) The Bill narrative inaccurately stated the Part 36 risk as: “if this happens we will not claim any costs for the work done after the last day for acceptance of the offer or payment”. The CFA actually states: “if this happens we will not add our success fee to the basic charge for the work done after we receive notice of the offer or payment.”
8. In addition, the Defendant says that every error was in the Claimant’s favour, the errors in the Bill were confirmed as accurate and were repeated and reinforced in the points of reply. Profit costs in the Bill were claimed at £55,935.11, so the difference between a 100% success fee and a 67% success fee is £18,458.59 plus VAT, a total of £22,150.30.

Mis-Certification of no interim payment of costs

9. The Deputy Master dealt with this in his judgment at paragraph 21. He said:

“... as I have said, it is accepted that when the bill was served the reference to £90,000 was not mentioned as having been paid. The reason for that, as Mr Patterson explained yesterday, was that when the draft Bill was served, the payments had not been made; when the Bill was formally served it had, but unfortunately that had not been noticed when the Bill was dispatched. It seems to me that is a trifling error. I am not persuaded that that should sound in any disallowance of the costs claimed.”

10. The following points are made by the Claimant:
- i) Unlike some other matters, the matter of payments on account of costs is known to both the paying and receiving party.
 - ii) In the points of dispute, the £90,000 payment on account omission was set out by the Defendant.

- iii) In the replies, the explanation was given that the bill had originally been produced uncertified and informally in March 2017. A copy had been sent to the Defendant's solicitors. Between then and the receipt of the formal court order and commencement of assessment, the interim payment of costs was made. The Claimant did not amend the Bill but kept the same Bill under a notice of commencement, something of which the Defendant was aware.
- iv) On the Precedent F "certificates for including in Bill of costs", there are certificates as to accuracy and certificates as to interest and payments. Payment on account of costs is in the latter category. This is not a point without merit. The matters certified under the certificate as to accuracy go to the fact that the "Bill is both accurate and complete". The figure as to interest and payments is on matters which will be in the knowledge of both parties. For this reason, it can be said that the certificate is to assist the court and contains no real risk of misleading the paying party.

11. I appreciate that the Defendant submits that the court should look at the totality of the errors. However, looked at on its own, the Deputy Master was fully entitled to describe this error as "trifling".

Risk assessment stated to have been conducted by the wrong solicitors/statement of reasons for setting the success fee inaccurate

12. As to the first point, i.e. the wrong solicitors, this was dealt with by the Deputy Master in his judgment as follows:

"23... the explanation for the error is simply that there were two changes of solicitor during the conduct of the case generated I think by mergers, first from Marshall and Galpin Solicitors, then there is a novation to Withy King and then Withy King merged with Royds to form Royds Withy King. What happened was that the original risk assessment should have been disclosed when Marshall and Galpin made the CFA. Instead when the Bill was drafted, Withy King's present standard form risk assessment was recited in the Bill. Again, in my view, this was an error, nothing deliberate and I accept that explanation."

13. The CFA and ATE Insurance had been entered into while Marshall and Galpin were conducting the case and the Defendant had been notified of the CFA and ATE. Therefore, the Defendant said that a reference to a risk assessment being conducted by Withy King raised the question of whether that was the correct assessment and, if Withy King had conducted a risk assessment, where was the risk assessment conducted by Marshall and Galpin.
14. A brief chronology of the period prior to the detailed assessment is helpful to understand the background:

- In March 2017 there was informal service by the Claimant of the Bill. (cf the reference to this in paragraph 21 of the Master’s judgment set out above).
 - There was a serious dispute as to whether the Claimant should have entered into any CFA or ATE insurance.
 - In May 2017 the Claimant’s solicitors served a copy of the CFA entered into with Marshall and Galpin on 4th December 2007 and with that name crossed out in manuscript and replaced with Withy King’s name and details. On page 2 the success fee is stated to be 100%. The agreement is signed by the solicitors and the Claimant.
 - The Part 36 provision on the face of the agreement provides, in the case of failure to beat a Part 36 offer or payment, for the solicitors to recover basic charges but not the success fee from the Claimant.
15. On the Bill of Costs, the risk assessment refers to it being done by Withy King. It also states that the case was transferred to Withy King on 1st September 2008, whilst in the same section:
- stating that “the claim was funded by a Conditional Fee Agreement which allowed for a success fee of 100%”. [I have underlined the word “a” as it suggests one CFA]; also, that “The contract of retainer was the same throughout the merger.”
 - describing the consequences of failure to beat a Part 36 offer or payment as: “... we will not claim any costs for the work done after the last day of acceptance of the offer or payment.”
16. Thus it was clear on the face of the Bill that something was amiss, especially when comparing that Bill with the already disclosed CFA. This was not lost on the Defendant who:
- raised the issue of the risk assessment being apparently by Withy King at the outset of the detailed assessment hearing.
 - pointed out that the 2007 CFA allowed the Claimant’s solicitor to charge costs even after the client failed to beat a Part 36 offer.
17. I shall return to this matter later in the judgment. I merely point out here that the fact that the risk assessment was said erroneously to have been carried out by Withy King was not, of itself, a mistake which could have benefited the Claimant. The nub of the matter was the erroneous risk assessment.

Mis-certification in claiming a 100% success fee

18. The point made by the Defendant is that the Marshall and Galpin risk assessment stated that there was a 60% prospect of success, equating to a 67% success fee.
19. The Deputy Master said this:

“24. So far as the 100% success fee contended for, insofar as it is contended that there has been an error in the bill in asserting a claim of 100% success fee, I disagree because I have yet to

adjudicate on the point. Insofar as it is suggested that the points of reply misstate the position, I would say two things. First points of reply are optional and in this case the Claimant should not be penalised for voluntarily putting his head in a noose when he did not have to. Second, it has made no difference whatsoever. Suppose 67% had been put in the Bill, which is the figure using the ready reckoner that would be appropriate where the chance of winning is 60% and the chance of losing 40%. The Defendant still says that is too much and would not have conceded 67%. Indeed, the matter is still open for argument.”

20. In fact the CFA did provide for a 100% success fee. The certificate as to accuracy on the Bill, so far as relevant, states:

“I certify this Bill is both accurate and complete and ... the costs claimed here do not exceed the costs which the receiving party is required to pay me/my firm.”

21. The 100% success fee claimed did not fall foul of either of those certificates as to accuracy. The Claimant was in fact entitled to seek to recover the success fee which he had agreed and to have it tested on assessment, even if it might be, or almost certainly would be, reduced. The fact that the Claimant may have had a dispute with his solicitor on the basis of the document “Conditional Fee Agreement: what you need to know” is not relevant to any alleged mis-certification.
22. Therefore, the Deputy Master was entirely correct to say that there was no error in the Bill in asserting a claim of 100% success fee.

Mis-certification because the Bill misstated the Part 36 risk

23. The Deputy Master dealt with this at paragraph 22 when he said:

“22. There is then the Part 36 risk. Again, Mr Patterson on behalf of his clients, owns up to the error. The effect of this is simply to sound in the level of success fee in my view. It is trite law that where the solicitor takes the Part 36 risk, this saying, ‘I will not claim any costs following a Part 36 offer if you fail to beat that offer at trial’, that will justify a higher success fee than here, where the CFA stated that at least the solicitors would recover their base costs. I am not persuaded that that is an error or omission or misconduct that should sound in any disallowance of the solicitor’s costs. Where it will sound is in the level of success fee, (if) any, payable.”

24. The Claimant accepts that this was an error which should not have been made and should have been picked up earlier. It is said that it appears to have followed on from the reliance on the Withy King risk assessment.

The legal framework

The CPR

25. CPR 44.11 provides:

“(1) The court may make an order under this rule where –

(a) a party or that party’s legal representative, in connection with a ... detailed assessment, fails to comply with a rule, practice direction or court order; or

(b) it appears to the court that the conduct of a party or that party’s legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

(a) disallow all or part of the costs which are being assessed; or

(b) order the party at fault or that party’s legal representative to pay costs which that party or legal representative has caused any other party to incur.”

26. As in the *Gempride* case referred to below “the focus of this appeal is upon rule 44.11 (1) (b), the basis of the application being that [the Claimant’s solicitors] conduct had been “unreasonable or improper””.

27. By 44 PD.11:

“Conduct which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective.”

28. Because this was an old style CFA of the type which was superseded by the Jackson Reforms, other rules to which I was referred are the old rules, namely:

i) Rule 44.15 which provides:

“(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.

ii) 44.3 B (1) Unless the court orders otherwise, a party may not recover as an additional liability –

...

(c) any additional liability for any period during which that party failed to provide information about a funding

arrangement in accordance with a rule, practice direction or court order;

(d) any percentage increase where that party has failed to comply with –

(i) a requirement in the Costs Practice Direction; or

(ii) a court order,

to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement...

- iii) 47 PD.5 at paragraph 32.5 requires the receiving party to serve with the notice of commencement and Bill of costs “either a statement of reasons for the percentage increase or a copy of the risk assessment prepared at the time the conditional fee agreement entered into.”

Case law

29. Since the decision of the Deputy Master in the present case the Court of Appeal has decided *Gempride Ltd v Bamrah and another* [2018] EWCA Civ 1367. This is the most recent, extensive and authoritative exposition of CPR 44.11. In paragraph 10 of the judgment of Hickinbottom LJ the learned judge refers to the decision of *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570 at page 574. Here it is emphasised that there is a presumption of trust afforded to the signature on a Bill of costs, and that the other side of that presumption must be that a breach of that trust should be treated as a most serious disciplinary offence.
30. The court then goes to consider the words “unreasonable or improper” in CPR 44.11. It was common ground before the court that the words had the same meanings as they have in the wasted costs provisions. The authorities on those provisions are then dealt with in detail. At paragraph 26 the judge said:

“26. Therefore, returning to CPR 44.11 the following propositions relevant to this appeal can be made.

- i) A solicitor as a legal representative owes a duty to the court, and remains responsible for the conduct of anyone to whom he sub-contracts work that he (the solicitor) is retained to do so. That is particularly so where the sub-contractor is not a legal representative and so does not himself earn independent duty to the courts.
- ii) Whilst “unreasonable” and “improper” conduct are not self contained concepts, “unreasonable” is essentially conduct which permits of no reasonable explanation, whilst “improper” has the hallmark of conduct which the consensus of professional opinion would regard as improper.

- iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to “unreasonable or improper conduct”.
 - iv) Although the conduct of the relevant legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have to be in breach of any form of professional rule nor dishonest.
 - v) Where an application under CPR 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that the conduct was “unreasonable or improper.”
 - vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.
 - vii) If the court determines to make an order, any order made (or “sanction”) must be proportionate to the misconduct as found in all the circumstances.”
31. At paragraph 127 the Court of Appeal decide that the solicitor’s conduct had been unreasonable or improper. They reemphasise the principle in *Bailey*, and say that the solicitor’s conduct in allowing part one of the bill to be submitted and then maintained with a rate which she knew was in excess of the contractual rate, was at least reckless. The analysis which led her to that conclusion had never been explained. The conduct permitted no reasonable explanation and no competent solicitor acting reasonably would have certified part 1 of the bill of costs in the circumstances in which Ms Bamhra had done so.
32. The Defendant took me to two other cases namely:
- i) *Kerins v Heart of England*, 31 July 2015, regional costs Judge Griffith Birmingham County Court. In my judgment this does not add anything. The finding of fact was that the solicitors had deliberately misrepresented the position in the bill of costs at the court hearing in order to gain practical advantage.
 - ii) *GSD v Wardman* [2017] EWCA Civ 2144. This was a second appeal. As can be seen from paragraph 25 the issues were procedural in that case.

Discussion

33. It must be made clear that the Defendant’s application was under rule 44.11. It was an application to disallow in full the Claimant’s solicitor’s costs served to reduce the bill from £182,212 to nil.
34. In relation to ground (a), namely mis-certification of the interim payments on account, the Master’s conclusion was an entirely proper one and cannot be interfered with.

35. In relation to ground (c) the Master was entitled to find that there was no mis-certification, for the reasons given.
36. I now deal in more detail with grounds (b) and (d), in addition to what I have previously set out. At paragraph 16 of his judgment, the Deputy Master referred to the Defendant's submissions about the success fee. He said:

“16. Finally, that 100% success fee has been claimed in the bill at a time when the risk assessment, as now disclosed, stated in terms when the CFA was made, that the prospects of winning were 60% and the prospects of losing 40%. Accordingly, applying the ready reckoner of the success fee should have been 67% maximum, not 100%. In the points of reply two errors are still relied on by the claimant, first, that the risk of winning and losing being 50/50 justifying a 100% success fee are still relied upon and there has been no concession. Second, all these errors could have been corrected by Mr Coleman, one of the partners in Withy King, when he made a witness statement a few days ago, and it all could have been put right. In the result, it is submitted that these multiple errors give an inaccurate portrayal of the funding position and the bill should accordingly be allowed at nil.”
37. The Deputy Master revisited the appropriate success fee in paragraphs 30-35 of his judgment. He came to the conclusion that this was not a 50/50 case. Having referred to the part 36 risk (see below), he considered the chances of winning were 70% and the chances of losing 30% based upon the facts as known when the CFA was signed, and therefore gave a success fee to the solicitors of 43%.
38. As an additional point the Deputy Master found that the Defendant had not been misled. The points of dispute did not rely upon the Claimant's statement of reasons. The success fee offered was 10%. This point is made in paragraph 24 of the Deputy Master's judgment.
39. There is mention in the judgment of rule 44.3B (1). There was discussion of this rule during the detailed assessment hearing and in the Deputy Master's judgment at paragraphs 17 and 18. Nevertheless, there was no ground of appeal based on this rule. Ground one is specific in referring to “Mis-certification and Lack of Proper Sanction under CPR 44.11.” [The only reference to 44.3(B) (1), is, along with some other rules, a reference to the allegation of breach of mandatory provisions of CPR]. Therefore, this rule does not arise for consideration in this appeal.
40. There was reference to the Deputy Master not requiring an application by the Claimant for relief from sanctions. This was the subject of some discussion during the hearing and a brief reference in the judgment. Nevertheless, it is irrelevant in this appeal as, in relation to rule 44.11, the question for the Deputy Master was whether to impose a sanction because of unreasonable or improper conduct – see the Deputy Master's judgment at paragraph 11.
41. Finally, I consider ground (e), namely the bill narrative misstating the part 36 risk. In paragraph 22 of the judgment, the Deputy Master found that this was an error. He was entitled to do so. In fact, he took the part 36 risk, which was limited to losing the success fee, into account in reducing the success fee; see judgment at [34].

42. In fact, because of the prior voluntary disclosure of the 2007 CFA, the Defendant's points of dispute asserted that the CFA allowed the Claimant's solicitor to charge costs even after his client failed to beat a Part 36 offer. Therefore, the risk would be limited further and the success fee reduced. This was at odds with the part 36 provision stated in the Claimant's Bill. In the event the Defendant was correct. Therefore, the Defendant was not in fact prejudiced in any way.
43. Standing back and looking at the matters before the lower court:
- 43.1 The Defendant submitted that there were 5 mis-certifications and, particularly when considered cumulatively, these amounted to unreasonable or improper conduct. As to this:
- i) in fact there were only 4 mis-certifications. The 100% success fee was not such.
 - ii) the mis-certification on interim payment of costs was "trifling."
 - iii) the other 3 mis-certifications were likely to have been based in the same error of using the standard Withy King risk assessment terms.
 - iv) although the error e.g. as to a 50/50 risk was repeated in the points of reply, the tension between the 2007 CFA already disclosed and the risk assessment referred to in the Bill had not been expressly pointed out.
 - v) the Deputy Master, who heard the matter, accepted that the risk assessment was an error which was not deliberate. He was entitled to do so. Indeed, the way matters unfolded, especially the disclosure of the 2007 CFA, indicates that he was entirely correct. There was nothing to suggest that the Claimant's solicitors realised their errors prior to the hearing.
 - vi) as a matter of fact, the Defendant was not misled such that events would have turned out differently. The Defendant spotted a problem, though did not specifically raise it until the hearing.
- 43.2 I remind myself of all the principles set out in paragraph 26 of *Gempriede*, in particular:
- i) certification of a Bill is very important. The court places trust in the solicitor's certification.
 - ii) conduct does not have to be in breach of any professional rule nor dishonest so as to amount to "improper" or "unreasonable".
 - iii) mistake or negligence, without more, is insufficient.
 - iv) even when the threshold criteria are established, the court still has a discretion whether to make an order.
44. The net result of going through the detail of the arguments is that, the experienced Deputy Master was fully entitled to find that this was not a case of improper or

unreasonable conduct within the terms of CPR 44.11. Therefore, the first ground of appeal is dismissed.

Ground 2 – the ATE premium

45. The Defendant submits that the premium was completely disproportionate and unreasonable.
46. In his judgment as to the level of premium, the Deputy Master made a number of points:
 - i) That a premium of £50,000 to ensure a maximum cost liability of £11,000 (i.e. said to be the defendant's costs) was submitted to be wholly disproportionate. The Master accepted that an insurance premium of £50,000 was a significant amount in the context of a recovery of damages of £175,000, but said that it must be remembered that the case was begun 10 years ago in circumstances that were very different.
 - ii) The Deputy Master referred to the letter sent by the claimant's solicitor, Mr Coleman, dated 22nd March 2017 giving the client advice as to the advantages and disadvantages of taking out the particular ATE insurance policy. Mr Coleman had also served a witness statement dated 22nd March 2018. Criticism was made of this witness statement but the Master responded that the answer would have been for the paying party to have required him for cross-examination. No such request has been made and therefore he could take his evidence as unchallenged. I note that the Defendant had not taken any point on late service of the statement, or requested an adjournment on the basis that the statement had been served only five days previously.
 - iii) Criticism was then made that there was no evidence from the insurer about how the policy was constructed and how the level of premium calculated. The Deputy Master said that the boot was on the other foot in accordance with the authority of *Kris Motor Spares v Fox Williams LLP* [2010] EWHC 1008 (QB). The onus is on the paying party, not the receiving party, to produce evidence of a comparator to say that the premium could have been obtained at a lower figure. The Deputy Master said that there was no evidence before him, only surmise, on that point.
 - iv) The point had been made that this was an unusual policy in that the premium was based on the Claimant's costs and not on the Defendant's costs. The Deputy Master said that that was pure submission and that there was no evidence from underwriters that this was an unusual insurance arrangement. The policy had been incepted 10 or 11 years ago when circumstances may have been very different.
 - v) As to the point that the solicitors received a 10% insurance commission, that had been disclosed to the client. CPR 11.10, then in force, said that a relevant factor in deciding whether the cost of insurance cover was reasonable would include the amount of commission payable to the receiving party or his legal representatives. The Deputy Master said that

the 10% was not a scandalous, outrageous or excessive figure. 10% commissions seemed to be commonplace.

- vi) Finally, the Deputy Master referred to the Court of Appeal case of *McMenemy v Peterborough and Stamford Hospitals NHS Trust* [2017] EWCA Civ 1941. At paragraph 76, Lewison LJ said that, even now, after the new rules, it is still permissible for ATE insurance to be taken out as soon as a claimant enters into a CFA. Further, the reasonableness of taking out ATE insurance should still be examined on a case by case basis. Finally, in paragraph 77 of *McMenemy*, the judge said:

“77. The case law has also emphasised that costs judges do not have the expertise to second guess the insurance market, still less to deconstruct the policy that is offered as a package into its constituent parts: *Rogers v Merthyr Tydfil* at [117].”

47. The Deputy Master’s conclusion was:

“Drawing those threads together, first, I am not persuaded that it was unreasonable to take out this policy when the CFA was signed. Secondly, there is no evidence before me to rebut the proposition that the level of premium was reasonable. Thirdly, it is still the law that costs judges do not have the expertise to deconstruct block rate policies as this was. In those circumstances, the premium will be allowed at £50,341.60.”

48. A number of criticisms of the Master’s judgment fall to be dealt with. These are:

- a) The premium was completely disproportionate, being 432% of the risks and costs against which it insured taking account of the defendant’s profit costs and disbursements. However, when the policy was incepted, it was not known that the case would settle pre-issue. The insurers’ potential exposure was £100,000.
- b) The premium was disproportionate because it was neither a staged premium that rewarded settlement at an early stage nor a reasonably priced single-staged premium. The premium of £50,341.60 provided a level of cover of £100,000. That, it is said, is not reasonable. Reliance was made on the *Rogers* case at paragraphs 107-110. There is nothing in those paragraphs which particularly assists the defendant. At [107] the court said that nobody had suggested that a staged premium model was in itself an illegitimate way of rating the risk. At paragraph 112 of *Rogers*, the court made reference to the fact that the defendant had been unable to identify any cheaper alternative provider. That is a factor of critical importance.
- c) It is said that the Deputy Master placed too much weight on the evidential burden, citing the *Kris Motor Spares* case. At paragraph 44, Simon J (as he then was) said:

“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 is satisfied that it was not in the insurer’s interest to fix the 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 is raised the court envisages 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...”

49. Later at paragraph 46, the judge said in relation to challenges to ATE premiums: “... such challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion.”
50. However, as the Master pointed out, there was no evidence before him, only, as he said, “surmise” on the point. He was not reversing the burden of proof. He merely found that the paying party had not advanced “at least some material in support of the contention that the premium is unreasonable.” The Defendant says that on the factual matrix of the present case it was not possible for the Defendant to produce comparators due to the antiquity of the premium and the fact that RAC are not a mainstream ATE provider. However, there was no evidence of this: Ms McDonald said the lay client (essentially NHS Resolution) had no data captured prior to 2010¹. If this is the case, then it proves the point that there was no evidential basis before the Master for him to depart from the premium charged. Nevertheless, it is perhaps surprising that NHS Resolution have no comparator evidence for ATE premiums prior to 2010, since much litigation on such agreements would be later than that date. The fact that RAC are not a mainstream ATE provider does not of itself inhibit a paying party from obtaining evidence that a lesser premium could have been obtained elsewhere.
51. In *Percy v Anderson Young* [2018] EWHC 2712 (QB), [2018] 1 WLR 1583, Martin Spencer J held that costs judges did not have the expertise to judge the reasonableness of the premium sought to be recovered for ATE insurance taken out by a Claimant to fund proceedings, except in very broad-brush terms. The premium was recoverable as a proportionate expense if it was necessarily incurred, even if the amount were large in comparison with the amount of damages reasonably claimed. If a costs judge decided that the level of cover was too high and the Claimant was therefore over insured, he could apply the broad-brush approach to reduce the premium on a basis proportionate to the reduction in cover considered to be appropriate. Where the level of cover was, however, reasonable, the costs judge should not, without the assistance

¹ This accords with the Court’s and the Respondent’s note. However the Appellant believes that what was said was that the NHS Resolutions legal representatives had only commenced systematic ATE premium data capture in 2010.

of expert evidence, regard himself as better qualified than the underwriter to rate the financial risk which the insurer faced.

52. Martin-Spencer J reviewed a number of authorities and came to the conclusion in paragraph 68 that:

“...there is an important distinction between a case where a Costs Judge decides whether the level of cover is too high and a case such as the present where the suggestion is that the underwriting decision is flawed. In the former kind of case, which is the kind of case considered by Mr Justice Foskett in *Surrey’s* case ... one can well see that, having decided that the Claimants had “over-insured”, the premium could be reduced on a basis proportionate to the reduction in cover which was thought to be appropriate.”

53. *Surrey’s* case had taken into account authorities such as *Kelly v Blackhorse Ltd* (unreported) 27th September 2013, a decision of Master Hurst. Martin Spencer J referred at paragraphs 66 and 67 to a decision of Akenhead J in *Redwing Construction Ltd v Wishart* [2011] BLR 186. The learned judge in *Percy’s* case said at paragraph 67:

“In my judgment the decision in the *Redwing Construction* case has no bearing on the issue for me to decide in the present case. This was not a summary assessment, nor is it a case where anyone could doubt the propriety of the Claimant taking out ATE insurance. As I have stated, there is no suggestion that the level of cover was unreasonably high in this case and the issue of the underwriting decision and whether the premium was unreasonably high is not touched on or affected by anything said in the *Redwing Construction* case.”

The Defendant here sought to rely on the cases of *Kelly* and *Redwing Construction* for the submission that the Deputy Master could have done an arithmetical calculation without the benefit of comparators. That this is not permissible is made clear by *Percy’s* case. This is not a case where the level of cover was too high; nor was it a summary assessment or a case where one could doubt the propriety of taking out ATE cover.

54. The Defendant relied heavily on the facts that the premium was “90% of basic charges plus any insurance premium tax applicable at the rate prevailing when the premium is payable.” There is nothing unusual about the premium being calculable only after the event. However, the matter which was argued vigorously was that the premium was calculated by reference to the Claimant’s solicitors charges rather than the Defendant’s costs, in circumstances where the indemnity was against exposure to Defendant’s costs. The following can be said about this:

- (a) Mr Coleman’s statement (paragraph 8) said that while this is perhaps uncommon in the present day to have a premium calculated by reference to the Claimant’s own base costs, this was not unusual at the time. Further, he

accepted that there will be cases where there is a significant difference between own costs and adverse costs/own disbursements, and also cases where adverse costs/own disbursements could be higher. He said that this was a risk reflected within the rate.

- (b) It may well be the case that in the vast majority of cases Claimant's own costs are higher, and on many occasions significantly higher, than the Defendant's costs. The important point is that the risk was reflected within the rate. There is no evidence that if the premium had been based on a calculation of Defendants' costs, the percentage would have been the same.
- (c) It must not be forgotten that this was a premium block rated at 90%. It was not a bespoke policy. There was no evidence before the court upon which to deconstruct the approach to the premium.

55. The Defendant also submitted that it was not clear which claims were covered by the insurance policy. There was the Claimant's claim, an estate claim, a Law Reform (Miscellaneous Provisions) Act claim and a potential claim by the Claimant's brother. The only claim which succeeded as to attract costs was the Claimant's claim. However, both the CFA and the insurance policy were entered into on the same date, 4th December 2007. The insured under the policy was a Mrs G English. The policy made it clear that it tied in with the CFA. The client under the CFA was Richard Murray suing by his grandmother and litigation friend Mrs Gillian English. Therefore, the relevant claim for the purposes of the CFA and the ATE policy was that of Richard Murray. He later took over the claim when he achieved majority.
56. Another submission was that it was unclear whether the premium was 90% of the basic charges chargeable to the Claimant or of the basic charges as assessed. The Deputy Master found the former. He was right to do so. Basic charges were defined in the Guide at clause 2.10 as "... the base costs of the solicitor acting for the insured under the Conditional Fee Agreement and which formed the basis for the calculation of the success fees." There is no reference to assessment of the base costs payable by the Defendant. It cannot be implied into the clause. As previously stated, there was a linkage between the ATE policy and the CFA. In the CFA it states "you are entitled to seek recovery from your opponent of part or all of our basic charges ...". This reinforces the point that the basic charges are not what is recovered from the Defendant.
57. For all those reasons the challenge to the Deputy Master's decision on the ATE premium must fail.

Summary

58. This appeal fails on both grounds.

