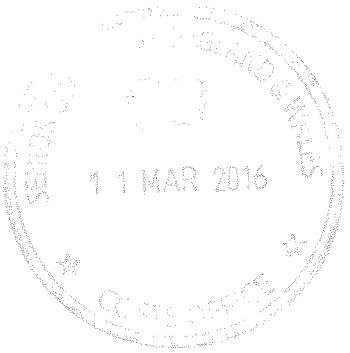
Case No: JR 1501532

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 11/03/2016



Before:

MASTER ROWLEY

- -

Between :

Miss Camille MacFadyen	**Claimant**
- and -	
(1) Event Technology Limited	
(2) World Video Distribution Limited	**Defendants**

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- -

Roger Mallalieu (instructed by **VLCW solicitors**) for the **Claimant**
Andrew Hogan (instructed by **DAC Beachcroft Claims Limited**) for the **First Defendant**

Hearing date: 16 November 2015

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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.

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MASTER ROWLEY

Master Rowley:

1. This judgment concerns the recoverability of an ATE premium taken out by the claimant as part of her personal injury claim against the defendants. The claimant was injured whilst attending a roller disco at the defendants' premises when she was struck by another participant which caused her to fall over and injure her wrist. Both physical and psychological consequences ensued and her claim for damages was eventually settled for £55,000 plus costs.

2. Those costs have not been agreed and that is due at least in part as a result of the ATE premium. At the detailed assessment hearing I heard submissions on the four points of principle. I dealt with proportionality (finding the cost to be globally disproportionate), hourly rates and the solicitors' success fee. I then received submissions from counsel at some length regarding the ATE premium and reserved judgment in order to reflect upon the matters raised.

3. The claimant's accident occurred on 30 January 2010. She instructed her solicitors via a CFA on 9 March 2010. During the same year a proposal was made to First Assist for ATE insurance but that proposal was declined. Following leading counsel's advice as to the merits of the claim in August 2011, a policy was incepted on 25 September 2011.

4. The methodology of the First Assist premium calculation is well known to the courts following extensive judicial consideration in the RSA Pursuit Test Cases (PTH 0310421 27 May 2005) and Motto v Trafigura [2011] EWHC 90207 (Costs) by the then Senior Costs Judge. The essence of the calculation is that the underwriter takes a view about the risks of the case expressed as a percentage and multiplies that percentage by a sum comprising the potential adverse costs of the opposing parties together with the claimant's own disbursements. Included in that calculation is added a further amount for profit and for commission. Mr Hogan, who appeared for the first defendant (the second defendant taking no part), readily accepted the multiplier and multiplicand methodology but did not accept the assumptions made in this case which underlay the calculation that has been put forward in support of the premium claimed. Furthermore he challenged the commission claimed in addition to the profit percentage.

5. In the run up to the detailed assessment hearing, the parties considered their positions as set out in the bill, points of dispute and replies. The defendant filed and served a witness statement from the defendant's cost draftsman Mr Hassey, and the claimant filed and served statements from her solicitor Mr Walker and from Mr Burbury of First Assist. In addition Mr Mallalieu, who appeared for the claimant, and Mr Hogan provided skeleton arguments on this issue. Consequently, the arguments put forward by counsel were not always entirely signposted by the points of dispute and replies. Some points were taken as to the late nature of the arguments raised and the prejudice said to accrue to the opponent as a result. I have to say that it did not seem to me that either party was really prejudiced by the submissions of the other and I will deal with the arguments raised by both parties as a result.

The evidence of Christopher Walker

6. Mr Walker was instructed by the claimant in March 2010 and dealt with her case until its conclusion. In his witness statement, he sets out the background to the case before

describing the funding arrangements from paragraph 19 onwards. Having found no before the event insurance available, he signed the claimant up to a CFA and sought to obtain ATE insurance. In his view there were uncertainties on liability, contributory negligence and quantum. Given the very robust approach of the first defendant he considered that an ATE policy with sufficient cover to protect against possible adverse costs running into six figures was required.

7. At paragraph 23, Mr Walker says that *"I/we had worked with different ATE providers previously including First Assist Legal Expenses Insurance Ltd ("First Assist")... As a result of the likely six figure adverse cost risk and our previous good experience of working with First Assist, it was decided that the First Assist Pursuit policy was appropriate..."*

8. Given the previous working relationship, the confidence in the policy and the recoverability of the premium based on decided cases, *"the decision was made to apply for an ATE policy to First Assist alone. I also took the view that it was as a result, unnecessary to trawl the ATE market at a time where the costs involved of doing so would be challenged as recoverable which in fact has been established by the Motto judgments."*

9. Having taken out the policy and succeeded on the claim, Mr Walker was involved in the calculation of the premium by seeking information on behalf of First Assist from the defendants' solicitors as to the level of their charges. The letters and emails between the solicitors representing the claimant and the two defendants are exhibited to Mr Walker's witness statement. Counsel for both sides sought to highlight different aspects of that correspondence. The remainder of Mr Walker's evidence is really a recitation of the chain of events as set out in that correspondence.

The evidence of Philip Nicholas Burbury

10. Mr Burbury is the claims and settlements manager with Burford Capital (UK) Ltd which company took over First Assist and for whom he worked during the relevant period. Mr Burbury has provided a detailed witness statement which I will not attempt to précis in full since a number of the matters dealt with are not relevant to the issues in the present case. He states that the original proposal form was submitted to First Assist on 4 May 2010. The assessment at the time was that the prospects of success were not in excess of 50% and as such the insurer declined to offer terms. Mr Burbury says that this is an important factor in the subsequent reassessment of the various risks when the proposal form was resubmitted on 9 September 2011.

11. Following that second proposal, Mr Burbury reconsidered the initial information and the extensive further information and documentation received. He does not specify what that further information was but it is clear that it included leading counsel's opinion since that opinion is referred to in the risk assessment form that was disclosed at the hearing.

12. Mr Burbury makes the point that the legal prospects of success are not necessarily the same as the insurance prospects of success in terms of the risks faced. He also refers to a number of cases over the last three or four years where the premium has not been recovered in successful cases for a variety of reasons. Consequently Mr Burbury states that the risks an ATE insurer faces, whilst in some respects are the same as for a solicitor e.g. the legal risks, they are somewhat different to and usually greater than solely the legal risks a solicitor or barrister will primarily assess. Having considered the various risks, Mr

Burbury, on behalf of First Assist, concluded that a realistic and appropriate assessment of the prospects of the claimant's case winning and also beating any and all future offers that might be made by the defendants was 55%.

13. Mr Burbury then sets out the standard Burford methodology which I do not propose to rehearse in any detail given that, other than in relation to the final commission / direct business acquisition cost figure, the methodology itself is not in dispute.

14. In relation to the "sales, marketing and direct business acquisition cost and expenses" Mr Burbury refers to the common practice of paying commission to brokers in respect of the work done in placing the policy and the cost to the broker of running its own business. An alternative route to market for the insurer is to employ its own sales and marketing capacity in place of the broker. Mr Burbury says that Burford adds an amount to the premium equivalent to a 15% commission for providing similar services of placement and administration of the policy. He refers to other markets and some decided cases where the percentage markup is higher than that claimed on this policy.

15. Mr Burbury also deals in his witness statement with the issues surrounding the defendants' costs which are an integral part of the calculation required to establish the premium. The need for the opponents' costs to be obtained arises from the RSA Pursuit cases. Chief Master Hurst's analysis criticised the methodology of using the insured's solicitors own costs figure. Thereafter, the Pursuit policy has been calculated with reference to the opponents' costs. The defendants' figures are meant to be "certified" by which Mr Burbury means that it is stated in some formal or validated way.

16. In the event that the defendant refuses to provide a certified figure for costs, Burford reserves the right to substitute its own approximate figure based on the best information available in the particular case. There is a dispute between the parties as to whether or not the first defendant did provide a figure in respect of its costs. Mr Mallalieu, on instruction, informed me that although as a matter of contract the insurer did not have to recalculate the premium once a calculation had been carried out on the approximate figure, as a matter of practice a recalculation based on subsequently provided information from the defendant would often be used. That information was provided by Mr Mallalieu as a result of a question I posed having read the correspondence between the parties where the possibility of a recalculation was aired.

17. In this case, the rationale for the approximated figure is set out in a lengthy paragraph in Mr Burbury's statement. He says that in the absence of co-operation from a defendant, First Assist very carefully consider all the information and documentation that is available in order to make the best possible approximation. He says that in this case the information was quite limited but included factors which are then set out from (a) to (o). Having considered those 15 factors, Burford decided to use the figure of the claimant's basic costs and disbursements and basic counsel's fees which were in the aggregate sum of £107,791.98 excluding VAT. This figure was used to represent the first defendant's costs. To it was added a figure of £29,703 for the second defendant's costs. That figure was made up of two components. Firstly the sum of £16,008.75 provided by the second defendant's solicitors by a letter dated 25 July 2014 in which they were asked to confirm the second defendant's costs up to 10 April 2014. For the costs from that date until settlement, Burford

used a figure of £12,828 which is apparently arrived at by some form of comparison with the claimant's costs in respect of work relating to the second defendant. The sums of £107,791.98 and £29,703 together with the claimant's own disbursements of £8,345.23, makes a total of £145,840.21 and which is the sum to which the risk multiplier is applied.

18. It would appear that the second defendant's solicitors were asked for the wrong information initially and in fact the correct figures are set out in a letter dated 20 August 2014. A slightly revised figure for costs up to 10 April of £14,483 together with costs thereafter of £29,811.33 should have been used. The claimant does not seek to increase the policy premium claimed as such. But if I consider that some reductions in the multiplicand are appropriate, Mr Mallalieu urged me to use these higher figures as part of that recalculation.

The evidence of Kevin Hassey

19. The defendant relies upon the evidence of Mr Hassey who is a costs draftsman employed by the first defendant's solicitors. The purpose of this statement is not for Mr Hassey to give evidence himself. It is essentially to put information before the court regarding policies provided by alternative ATE providers which the first defendant says were available at the time the First Assist policy was taken out in 2011.

Submissions on the reasonableness of choosing First Assist

20. The first argument raised by the defendant against the reasonableness of the premium is the question of the choice of a First Assist policy as opposed to an alternative ATE provider.

21. The First Assist premium is claimed in the sum of £171,124.08. Mr Hogan described this sum to be 'off the spectrum' of reasonable policies that the claimant might have taken out. He said that the First Assist policy was a very good one and indeed in some circumstances may well be the only policy available. However it was part of the "gold plating" approach of the claimant's legal team in this case and was far more than was required in this relatively straightforward personal injury case. In these circumstances the admission by Mr Walker that there had been no attempt to obtain an alternative quotation to the First Assist quotation because of the irrecoverability of the costs of so doing based on Motto was astonishing in Mr Hogan's submission. It would have been an easy matter to trawl the market using a broker such as The Judge to obtain alternative quotations.

22. If such an approach had been taken, then based on Mr Hassey's evidence there were plenty of alternative providers of ATE insurance and a policy could have been secured with one of them at a much lower sum. In the circumstances it was not a reasonable choice for the claimant to take out a policy with First Assist.

23. Mr Mallalieu pointed to the comment in Mr Walker's statement at paragraph 23 regarding the use of other insurers (see paragraph 7 above). He also referred to the factors set out in that paragraph as to why the First Assist policy was an appropriate choice. Mr Mallalieu described at some length the various Part 36 risks faced by the claimant in addition to the possibility of an outright loss. In Mr Mallalieu's submission, the "ring fencing" provision in the First Assist policy was of particular importance. By this Mr Mallalieu meant that the claimant's damages would be protected from being used to pay the opponent's costs

in circumstances where a Part 36 offer was not beaten. Mr Mallalieu said that not all ATE policies provided such ring fencing cover.

24. The unique aspect of the First Assist policy is that the size of the premium depends upon the costs of the opponent that have actually been incurred. It is therefore the case that the sooner the opponent settles the proceedings, the lower the premium will be. To this extent the size of the premium, in Mr Mallalieu's submission, had been in the defendants' hands. The original choice of a First Assist policy was a reasonable one for Mr Walker to advise the claimant to take out. The fact that it has become the size that is now claimed is a result of the defendants vigorously defending the case until near to the trial.

25. Mr Mallalieu made submissions regarding whether the claimant should have looked at other policies. A prerequisite for that question was the existence of other policies being available. The court would need to be satisfied that such policies were available before contemplating the question of whether the claimant should have looked at them. He referred to the passages in The RSA Pursuit Test Cases and Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134 regarding the adverse findings of Chief Master Hurst and the Court of Appeal respectively in relation to considering the Litigation Funding table as evidence of alternative policies.

26. Mr Mallalieu then went through the exhibits to Mr Hassey's statement in some detail. He sought to draw distinctions between the entries in the Litigation Funding table and the policy documents provided with the First Assist policy. For example, one of the other policies was for a fast track case rather than a multi track case. The ALP policy was only available as a scheme policy where the solicitors were on the insurer's panel. The ARAG policy that was specifically provided contained figures which appeared to be inconsistent with those set out for the same policy in the Litigation Funding table. The QLP policy, which was suggested as an alternative, was in fact underwritten by the same insurers behind the Pursuit policy. In short, Mr Mallalieu submitted that none of the alternatives was in fact comparable in any event.

27. Mr Hogan had, almost rhetorically, queried whether or not the defendant should have to meet the extra cost of a bespoke policy where the claimant solicitor did not have access to a block rated scheme with an ATE insurer. Mr Mallalieu responded to that rhetorical question by stating that the claimant was only required to act reasonably and it could not be reasonable to require a solicitor to be tied to a particular ATE provider. In any event, even if the defendant was right on this point, in this case the claimant would have had to insure herself immediately in order to get a block rated premium and such a premium would have reached the highest final stage by the time this case settled. There was no evidence before me to show that that final stage premium would have been any less than was being claimed. Having taken out that policy immediately, the claimant and defendant would both have been denied the opportunity to avoiding incurring an ATE premium in the first place.

Decision on the reasonableness of choosing First Assist

28. The purchase of an ATE policy in the year 2000 was, in my view, a very different process from a purchase nearer to 2013 when recoverability ended. In the early days, it was to be expected that a proposal form was completed for each and every policy sought from an

ATE provider. As time went by, schemes such as that run by ALP provided a simpler method of accessing ATE insurance as providers became more comfortable with the nature of the product and their claims exposure over a period of time. By the time of this case, many firms of solicitors had arrangements with individual ATE insurers which provided them with "delegated" authority to enable policies to be incepted with little or no involvement of the ATE provider so long as the case was within certain parameters.

29. Similarly, the need for a solicitor to have a volume of cases to interest an ATE insurer in providing a delegated scheme had also diminished over time. But there would always be cases, such as this one, where the solicitor did not have any tie-up with a particular ATE provider. I do not think that Mr Hogan put any great store in his rhetorical question but, for the avoidance of doubt, I confirm my view that a policy taken out on a bespoke basis does not found an unreasonable premium simply because it may be higher than another solicitor could achieve who had access to a block rated scheme.

30. There have been a number of high profile cases regarding the need for a solicitor to make enquiries of alternative funding arrangements before settling on a CFA and ATE policy. At one point it appeared that the extra expense of the additional liabilities of a success fee and ATE premium meant that other funding options such as legal aid or before the event insurance were to be preferred. The cases of Sarwar v Alam [2001] EWCA Civ 1401 and subsequently Myatt v The National Coal Board [2007] EWCA Civ 307, for example, involved the Court of Appeal expressing the view that before the event insurance should be used where available in certain cases. Here, there is no question of an alternative method of funding: the question is whether or not an alternative ATE insurance policy should have been considered. Cases such as Sarwar have shown that the courts expect a solicitor to carry out a thorough assessment of the client's funding options before incurring additional liabilities. Where, as here, a solicitor does not have an agreement with an ATE insurer to cover all the solicitors' cases, and therefore provide cover for riskier cases as well as the more straightforward ones, it seems to me that the solicitor is under an obligation to make some assessment of the ATE market as part of assessing the client's options.

31. Mr Walker's statement suggests that his firm have used other ATE insurers over time. There is no indication of who those insurers are or the frequency with which they were used. Indeed the slightly curious "I/we" in his statement suggests that it might have been Mr Walker's colleagues who had used alternative insurers in the past. Nevertheless, it is clear from Mr Walker's own statement, that he was aware that other ATE providers were available. Indeed he positively asserts a decision only to instruct First Assist in this case. That indicates a deliberate decision not to consider any alternatives. The basis for that decision is set out in subparagraphs (a) to (e) of paragraph 23 of his statement. I have to say that those subparagraphs are redolent of the drafting of the ATE insurer rather than Mr Walker. But, in any event, many of the features indicated are equally true of other ATE insurance products. Many policies are explicit in saying that they will not seek any shortfall from the client if the full premium is not recoverable on assessment. On that basis, previous scrutiny by the courts of the recoverability of the First Assist premium would only be of limited relevance. It is not my experience of solicitors using ATE insurance that they particularly value the knowledge etc said to be possessed by the Pursuit team nor am I sure that helpfulness and efficiency would have been particularly relevant to the decision solely to approach First Assist.

32. I take judicial notice of the number of challenges to the First Assist premium that come before the SCCO. By comparison, there are hardly any challenges to the ATE premiums of other ATE providers. The First Assist model calculates the premium in a different way from other ATE policies. The courts have consistently said that it is a perfectly proper methodology to follow. But, it seems to me, that it is one which regularly involves a premium which is higher than other policies seem to produce. In particular, the methodology here provides for the cost of the policy to be greater than the limit of indemnity actually required. I appreciate that there is in effect no upper limit of indemnity provided by this policy but a rating of 110% produces, for all intents and purposes, a premium of £171,000 for cover required of £145,000. I have not seen any other premiums claimed which would produce a similar result.

33. When reading the solicitors' file of papers for the detailed assessment hearing, I noticed that Mr Walker queried the rating of this particular policy. In Mr Walker's view, this case was no more risky than other ones that had been insured by First Assist. Mr Burbury did not take the same view and indicated that he had prepared a detailed risk assessment which supported the rating of 55% prospects of success. I will return to that risk assessment later. For the moment I refer to it because it seems to me to be relevant in considering whether it was reasonable for the claimant's solicitor to set his face against obtaining any alternative quotation despite essentially receiving a proposed premium which he considered to be high even in the knowledge that it was unlikely to be one which his client would ever have to pay.

34. The two reasons given by Mr Walker as to why he did not seek an alternative quotation are thin in my judgment. The first is that the costs of seeking an alternative quotation would not be recoverable from the defendant based on the Motto v Trafigura decision of the Court of Appeal [2011] EWCA Civ1150. The requirement for Mr Walker to write a client care letter to his client is a cost which is similarly irrecoverable between the parties but it is part of his professional obligation to do so. It seems to me that considering more than one ATE provider in circumstances such as in this case would fall similarly within the bracket of professional obligation. The second reason is that Mr Walker had had a good experience of using First Assist previously. Having worked with other ATE providers, and having not stated that he had had a bad experience with other providers, it seems to me that a good experience with one ATE insurer is entirely insufficient as a reason for not considering using any others.

35. It seems to me therefore that I am driven to conclude that it was unreasonable for the claimant simply to take out the First Assist policy without having considered alternative quotations, particularly once the First Assist quotation had been provided and had caused concern to the claimant's solicitor.

36. The nub of the unreasonableness in taking out the First Assist policy without considering any alternatives is simply the price of the policy that was purchased. There is no criticism of the policy terms other than that of the premium. Therefore, in order to reflect the unreasonableness that I have found, it seems to me that I must limit the level of the premium that is recoverable to one which is no more than was likely to have been payable if the claimant had trawled the market to any extent.

37. I do not think that the policies said to be available in the Litigation Funding table and redacted schedules from other cases, which may or may not have been at all similar, provide any cogent evidence. It is well-known that it is very difficult for paying parties to produce any evidence of alternative policies and so I do not criticise the paying party here for referring to the Litigation Funding magazine table notwithstanding the adverse comments made by courts in the past. But I do not think that I can assume that any of the figures put forward were necessarily available to the claimant in this case.

38. What can be drawn from the Litigation Funding table is the confirmation that there were a number of ATE providers with whom contact could have been made either directly or via a broker such as The Judge. I have previously assessed the solicitors success fee at 40% which based on the ready reckoner would suggest a prospect of success in the region of 70%. That in my view would be an attractive risk profile and I would have expected the claimant to succeed in obtaining quotations from at least one other ATE insurer even on a one-off basis. Such policies are invariably more expensive in terms of premium than a block rated scheme. That increased expense is likely to be exacerbated by a settlement in the final stage of any premium. Mr Mallalieu made this point and I accept it. Bearing these factors in mind, it seems to me that the maximum level of premium that any other ATE provider would have provided would be no more than 80% of the limit of indemnity. For example, in the case of Kris Motor Spares Ltd v Fox Williams [2010] EWHC 1008 (QB) the policy was taken out on the eve of the trial itself. Even so, the rating applied by the ATE insurer was 73.5%.

39. Therefore, in order to reflect the claimant's failure to consider any alternative policies I think it appropriate to impose a limit on the recoverability of the First Assist premium to a sum that is no more than 80% of the amount that it was reasonable to have insured.

Submissions on the multiplier

40. As referred to above, I have already assessed the solicitors success fee at 40% which, for the purposes of the ready reckoner reflects a prospect of success in the region of 70%. That assessment of risk took place in March 2010 which was considerably before the First Assist policy was taken out. In order to consider the risks faced by the insurer, it is necessary to look at what had altered since March 2010 until the policy was taken out in September 2011. There are three things in my view.

41. The first occurred in May 2010 and that was the declinature by First Assist of the original proposal for insurance. My reading of the claimant's file is that the original paperwork for that decision was no longer available when Mr Burbury considered the further proposal the following year. Nevertheless, the fact that a proposal for insurance in this case had previously been considered negatively would undoubtedly have been a factor when assessing the risks as they presented themselves in the autumn of 2011.

42. The second factor is the advice of Jacqueline Perry QC. She rated the prospects of success at 67% and entered into a CFA on a 50% success fee. Hers was a detailed advice and it was carried out almost immediately before the proposal was submitted. As such it could be expected to carry some considerable weight with the ATE insurers. I hope it is not doing a disservice to Mr Hogan to suggest that his submissions on this issue very much hung on the insurers accepting the 67% prospects as set out by counsel.

43. The third factor is the general increase in evidence and documentation obtained and in particular the evidence from the defendant as to their systems of accident prevention and safety.

44. At the hearing I queried whether or not the risk assessment completed by Mr Burbury was available. A copy was produced which provided considerably more detail than that set out in Mr Burbury's statement itself. The claimant's position was that the multiplier had not been challenged in the points of dispute and therefore the evidence in support of the methodology was kept to a minimum. However Mr Hogan's skeleton argument had raised the point and therefore Mr Mallalieu was armed with a copy of the risk assessment to provide to me should I require it.

45. Mr Hogan described the insurer's risk assessment as being overly pessimistic by an entity with a financial interest in being pessimistic. This is essentially the same argument as is often levelled at solicitors whose risk assessments are pessimistic in order to support a high level of success fee. There is no obvious reason for risks to be discounted in the system of CFAs and ATE insurance since success fees and insurance premiums are very unlikely to be increased on assessment: they are only ever reduced.

46. Mr Burbury's risk assessment is a comprehensive document and considers legal liability, causation and quantum as well as providing a separate insurance risk assessment. As far as the legal liability is concerned, it seems to me that Mr Burbury sets out the case very fairly and indicates in essence that the claimant is likely to win because the defendants' systems are unlikely to prove to be adequate if put to the test in court. There are no particular issues regarding quantum. As far as causation is concerned, Mr Burbury picks up the issue of whether or not any wrist guards that had been provided might have been ineffective in any event and as such a lack of provision of them may have had no causative effect.

47. When it comes to the insurance risk assessment that causation issue raises some concern to Mr Burbury. So too does the issue of primary liability and on which I have to say the insurance risk assessment seems to take a bleaker view than the legal liability assessment notwithstanding that it is essentially covering the same ground. In particular, the suggestion that although the solicitors state the prospects of success to be 65 to 70% the fact that they have a 100% success fee and therefore only really considered the prospect of success to be 50% seems to me to be questionable. The same statement is made about counsel but as far as I can see that is simply wrong. Counsel claimed a single stage 50% success on the basis of a 67% prospect of success. No doubt however Mr Burbury has seen many optimistic assessments of the prospects of success from solicitors and counsel and he is obviously entitled to take his own view. He also takes into account the foreign nature of the insurance and the reliance therefore on their UK agents and their capabilities as well as the fact that there are two defendants albeit that at the time they appeared to be working in alignment.

48. Mr Burbury concludes that the case might reasonably have been rated at 51% for the insurer's prospects of success but, having taken everything into account, his opinion is that the insurance prospects of success are 55%.

49. Mr Hogan pointed out that this was an individually rated case and therefore there was no

need to consider any generic risks spread across a wider caseload. It was purely grounded in the facts of this case. Whilst he accepted that insurers are in a slightly different position to the lawyers because they have to take into account insurance risks as well, Mr Hogan says that they are in fact in a better position because they have a raft of terms and conditions which can entitle them to refuse to pay out in varying situations.

50. Mr Mallalieu did not accept that the risks to insurers were less than those of the solicitor. There was no suggestion of any fraudulent, or similar, matters which would allow the insurers to avoid the policy. It was simply a case involving witness evidence and who would be believed. Regrettably, the CCTV evidence which might have corroborated the accounts had been overwritten by subsequent taping. The risks were in any event obvious. There were significant liability issues regarding the disclaimers that were displayed and the protective gear that may or may not have been provided. There were allegations of volenti non fit injuria by the defendant and not only had there been a previous declinature, there had been a previous barrister consulted who was not prepared to take this case on.

51. Mr Mallalieu pointed out that Jacqueline Perry QC's view of the prospects of success may have been influenced by the fact that she was not taking on a Part 36 risk whereas the solicitor and the insurers took a considerable risk on that aspect. All in all, it could not be said that Mr Burbury's view of the prospects of success were outside the margin of appreciation indicated in the Court of Appeal case of C v W [2008] EWCA Civ 1459 on the issue of success fees.

Decision on the multiplier

52. The methodology used by First Assist means that any policy which is rated with a 55% prospect of success will result in a premium being calculated which is greater than the limit of indemnity that will be required. It is easy therefore to view any such assessment as being unduly pessimistic. This is all the more so where leading counsel has advised immediately beforehand with a more positive view on the prospects of success.

53. It is well recognised in relation to success fees that a small difference in the prospects of success can lead to significantly different success fees. The obvious example is that of a case with a 50% prospect of success attracting a 100% success fee: whereas a case with a 67% prospect of success only attracts a 50% success fee. Whilst mathematically this is entirely logical, it does put a premium upon relatively small differences in the prospects of success and which are to some extent a matter of individual viewpoint. The 12% difference between 55% as viewed by Mr Burbury and 67% as viewed by leading counsel is modest in all aspects other than the effect it has on the mathematics.

54. I take the view that Mr Burbury has been cautious in his assessment of the prospects but that is not unusual in my experience of insurers' risk assessments. They tend to see more complications than solicitors and counsel. It does not seem to me that Mr Burbury should be criticised for taking a cautious approach and I do not regard the risk assessment that I have read as being prepared in an unduly pessimistic way with a view to supporting a large premium.

55. Accordingly, whilst I think the assessment of 55% is at the lower end of the reasonable prospects of success, it does seem to me to fall within the "reasonable bracket" referred to by Moore-Bick LJ in C v W. Consequently, I heed the sentiment of the Court of Appeal

in Rogers as to the inadvisability of judges seeking to impose their own views on underwriting other than in the clearest of cases.

56. The second challenge to the multiplier raised by the defendant was one which had not been foreshadowed in the points of dispute but was first raised by Mr Hogan in his skeleton argument. In that document the question was raised as to whether or not the burning cost should be uplifted solely by 15% for profit and administration or also by a further 15% in lieu of the broker's commission. This is described as being a secondary consideration but nonetheless was one that Mr Hogan put forward with some emphasis. He accepted that the 15% for profit and administration was uncontroversial on top of the burning cost i.e. the amount which the insurer needs to pay out on losing cases.

57. Mr Hogan's argument was that the payment of commission to a broker is sometimes added to the premium. However, in this case no broker was used but instead the insurer had taken the additional share of the premium for its marketing costs rather than reducing the premium to reflect the fact that no broker was involved. Mr Hogan considered that the prospect of the direct marketing costs happening to equate to the commission paid to brokers was slim and it was clear that he considered it to be simply further profit claimed by the insurer. According to Mr Hogan, this further addition of overheads to the burning cost was not one which was approved in Motto.

58. I have to say that I am not at all convinced that Motto does deal with the premium in the manner put forward by Mr Hogan. For example, in Kelly v Black Horse Ltd (PTH 1300060 27 September 2013) the then Senior Costs Judge précised the methodology set out in Motto at paragraph 16. Having dealt with the burning cost he then states that *"the basic figure is then adjusted to include an allowance for overheads, marketing and brokerage costs and profit"*. The court clearly records both profit and marketing / brokerage as being part of the premium. Moreover, in Callery v Gray (no.2) [2001] EWCA Civ 1246, the Court of Appeal specifically considered the makeup of ATE insurance and paragraphs 24 to 26 clearly record the elements to include "distribution commission" as a separate element from profit and administration.

59. In any event, I do not think that it is a good point taken by the defendant. The payment to a broker for placing the insured's business with the insurer is only one so-called route to market. Direct selling by the insurer is another route and it has its costs. I do not accept there is anything wrong with the insurer taking the view that the cost of selling directly is equivalent to that of selling via a broker. There has to be some form of overhead built in for selling the product itself and it does not seem to me that 15% is a surprising figure for this at all. Indeed, Mr Hogan refers to 10 to 15% being paid to a broker and on the face of it the overheads involved in advertising, employing a sales force etc are not dissimilar from those of a broker in any event. In the absence of anything other than an assertion from defendant's counsel that this figure is unreasonable, this does not seem to me to be a matter which should be entertained by the court.

Submissions on the limit of indemnity

60. The terms of the policy described the method as follows:

> *"The figures used for the calculation of the Premium in respect of the Opponent's Costs shall be the total costs the Opponent may have sought to*

> *recover under an order for costs or other entitlement to costs had the Opponent been successful, as certified by the Opponent's Solicitor if appropriate....*
> *In the event that the Opponent refuses to provide Us with the value of the Opponent's costs, then for the purposes of the calculation of the Premium, We reserve the right to make an approximation as to the quantum of the Opponent's costs using the best information available."*

61. When setting out the evidence of Mr Walker and Mr Burbury I alluded to the dispute between the parties as to whether or not the first defendant, as the "opponent", had provided sums for the calculation of the premium. It is the claimant's case that no such figures were provided and therefore the claimant was entitled to approximate the figures involved. The first defendant disputes that assertion entirely.

62. The correspondence starts on 21 July 2014 when VLCW wrote to DAC Beachcroft asking for the latter to provide the first defendant's total costs and disbursements "up to but not including 17 July 2014." The letter goes on to state that the claimant expected a breakdown between the solicitor's costs, counsel's fees and other disbursements together with hourly rates and clarification as to the VAT status of the first defendant if VAT was claimed. The information requested "should be certified by a Partner as complete and accurate." References are then made to the words of Master Hurst from the Test Cases to explain why the request had been made.

63. On 6 August 2014 the solicitor at DAC Beachcroft is chased up by an email from Mr Walker for the information requested. A time limit of noon on the following day is given together with a reference to the ATE insurer's entitlement to make its own assessment of the first defendant's costs in the absence of information.

64. Judging by VLCW's next letter dated 12 August, a telephone conversation must have taken place between a solicitor at DAC Beachcroft and Mr Walker on the day after his email. The letter sets out a breakdown of the claimant's costs and includes a figure for the ATE premium of £171,124.08 which is described as *"Calculated on a provisional basis in the absence of actual costs information to include IPT at 6%."*

65. DAC Beachcroft respond on 21 August. The great majority of the lengthy letter concerns the ATE premium. The request is made for a breakdown of how the figure of £171,000 is calculated. Requests for information are set out and lettered from (a) to (m). Confirmation is requested that the costs figure of £30,350 set out in the first defendant's costs estimate served with the directions questionnaire was communicated to the insurer.

66. VLCW respond on 26 August stating that the points raised in DAC Beachcroft's letter of 21 August are issues for a detailed assessment procedure and would be responded to in due course. The remainder of the letter deals with the question of an interim payment.

67. On 5 September VLCW write again to DAC Beachcroft on the question of interim payments. The letter then goes on to say that if a detailed assessment should prove necessary *"we again invite you to let us have the information requested in our letter dated 21 July 2014 so that our client's ATE insurer can if necessary recalculate the ATE premium based on your own cost calculations as opposed to the ATE insurer's estimate in the absence of the same."* Reference is again made to information requested by DAC

Beachcroft being provided in the detailed assessment.

68. On 9 September DAC Beachcroft respond in respect of the costs claimed generally. In relation to the ATE premium, the request is reiterated for confirmation that VLCW have communicated to First Assist the first defendant's estimate of £30,350 set out in the directions questionnaire. On 7 October 2014 VLCW confirm that the estimate of £30,350 had been communicated to First Assist.

69. In his witness statement, Mr Burbury says at paragraph 24 that despite VLCW's requests and reminders neither defendant made any declaration of their opponent's costs figures. I have not set out the response from Wellers on behalf of the second defendant but it seems to me that figures were undoubtedly provided in that correspondence. The only shortcoming was that there was nothing signed by a partner to certify the figures contained in the open correspondence.

70. Mr Burbury says that it did not surprise him that the defendants did not provide the figures requested. That is partly because of the conduct of the solicitors throughout the legal action but *"primarily because my recent experiences of requests made to DAC Beachcroft for their opponent's costs figures have not met with their cooperation. Indeed a number of cases have followed a similar sequence of events to the one in the instant case. Namely, an initial refusal, then waiting for Burford/First Assist to make its approximation and premium calculation and then (only if it is financially advantageous to the paying party to do so) making a subsequent lower costs declaration in the expectation the premium will be recalculated at a lower amount."*

71. It is abundantly clear from Mr Burbury's evidence that he simply did not accept that the figure put forward by DAC Beachcroft of £30,350 was a genuine calculation of their costs up to July 2014 and on that basis decided to use his own figure instead. As I have described at paragraph 17 above, Mr Burbury's evidence is that he considered a wide range of factors before coming to the conclusion that he should use the figures of the claimant's basic costs and disbursements and basic counsel's fees.

72. In relation to the costs of the second defendant which were requested by VLCW, they are split into two periods i.e. before and after 10 April 2014. The significance of that date is that the first defendant was to pay the second defendant's costs up to 10 April 2014 and the claimant was to pay them thereafter. But as the calculation relates to the claimant's potential adverse exposure, the costs incurred throughout by the second defendant were in fact relevant.

73. Initially, the second defendants placed their costs up to 10 April 2014 at £16,500 together with counsel's fees of £375 (no VAT being payable). Those figures were subsequently revised to £14,468 plus £375. For the costs post 10 April 2014 they were £22,853 plus counsel's fees of £6,958.33. In error, as I understand it, the premium now claimed only includes the initial figures i.e. £16,875 rather than the later figures which total £44,654.33.

Decision on the limit of indemnity

74. Given that the second defendant is not taking any part in this detailed assessment, the figures are to some extent peripheral. However, in my view they do shine a light on the figures put forward by the claimant and the first defendant. In its points of dispute, the first

defendant suggests that the figure of £30,350 is the highest figure that should be used in respect of the potential costs to which the claimant was exposed in respect of the first defendant. The points of dispute say that the first defendant's costs actually came in below the estimate. They then seek to deduct from the estimated figure various elements such as solicitor and client costs and the likely reduction on detailed assessment so that the figure in the points of dispute is reduced in stages to £20,000. There are previous court decisions regarding the First Assist methodology which consider that both solicitor and client costs and those potentially reduced on detailed assessment are to be ignored for the purposes of calculating the relevant opponent's costs figure. Therefore, of the figures put forward by the first defendant, it is only the £30,350 that I need to consider.

75. The first defendant's figure is not one which sustains much scrutiny in my view. It is considerably below the second defendant's figure notwithstanding the fact that this case was essentially defended by the first defendant rather than the second. An estimated figure at the time of the directions questionnaire for a case which resolved close to trial is not one, sadly, which often bears a great deal of resemblance to the final outcome. There is no breakdown of the figure between profit costs, counsel's fees and other disbursements. There is no information as to whether that figure was calculated on the basis of a successful outcome to the defendant or an unsuccessful outcome and whether or not the hourly rates charged differed between the two. It is, on the face of it, an unlikely figure and given that the first defendant has not sought to formalise it via a witness statement or some other certificate suggests that little weight should be attached to it.

76. I have some sympathy with the position of First Assist who, as a result of a court decision, have to require the opponents of their insured to provide a figure to enable the correct level of premium to be claimed. It is obviously a situation which is fraught with the possibility of games playing. Consequently, the provision within the policy which allows First Assist to approximate the level of the opponent's costs in the absence of any credible figures is a sensible one. The only issue is whether or not the approximation carried out is one that can be justified in the circumstances of the case.

77. As I have said, Mr Burbury set out many different factors that he says he considered before arriving at the approximate figure. Many of those factors relate to the claimant's own costs. Some relate to First Assist's past experience of the level of defendant's costs and disbursements but there is no indication of what effect that past experience has had. It is rather surprising in my view that, having taken into account the 15 factors set out, the claimant's own costs figure exactly is utilised. Given Master Hurst's exposition of why using the claimant's own costs is not an appropriate tool, I would have thought that any figure other than the one incurred by the claimant would have had more chance of being justified. As it is, I have already found the claimant's costs to be disproportionate under the Lownds test and it seems to me to be inescapable that I should consider the figure therefore used to calculate the premium also to be disproportionate. Mr Mallalieu recognised that position because he suggested that, if I found difficulty with using the claimant's figure, I should consider the sums put forward by the first defendant and to increase them to reflect what were in his view clearly inadequate figures put forward.

78. Other than the bare assertion in the points of dispute, there is nothing in the papers before me to give any clue as to what the first defendant's costs actually were. It was within the

gift of the first defendant to put forward figures formally, for example in Mr Hassey's witness statement. The claimant is in no position to assist me on this particular point and this is recognised to some extent by their use of the claimant's solicitors' figures instead. I have little doubt that First Assist do have figures in relation to defendants' costs generally which could have been utilised but they have not been put before me either. Therefore, I can but rely upon my experience of assessing costs in such matters and doing the best I can, I consider the figure of £75,000 inclusive of counsel's fees and disbursements to be a reasonable figure to use.

79. Consequently in order to calculate the premium, the correct figure for calculating the opponents costs is as follows:

First defendant's costs	£75,000
Second defendant's costs	£44,654.33
Claimant's disbursements	£8,345.23
Total	£127,999.56

80. Having allowed the multiplier as claimed of 110.695%, the reasonable premium based upon the First Assist methodology is therefore £141,689.11.

81. I do, however, need to reflect the decision I made earlier in this judgment regarding the reasonableness of purchasing a First Assist policy without taking any steps to consider an alternative policy notwithstanding the premium quoted by First Assist.

82. I have said that the figure otherwise calculated on the First Assist methodology is to be limited to no more than 80% of the reasonable limit of indemnity. The question I need to consider therefore is what is the reasonable level of indemnity?

83. All ATE policies, other than the First Assist policy, in my experience essentially provide a fixed level of indemnity. Whilst the premium chargeable may vary, for example, depending upon the stage reached, the limit of indemnity generally stays the same unless there is a specific endorsement to the policy to increase that indemnity. The Pursuit policy is the only one of which I am aware in which a completely different approach is taken to quantifying the amount of cover required.

84. If VLCW had sought to obtain a quotation from another ATE insurer, they would, in my view, have done so for a policy which had at least £100,000 of cover. I do not think that a lower level of cover would ever have seemed to provide sufficient protection for a case against two defendants. As quoted above, Mr Walker in his witness evidence referred to the need for an ATE policy with sufficient cover to indemnify possible adverse costs of six figures was required. I do not accept however that a policy of more than £100,000 would have been obtained in the first instance. In my experience, very few policies offer such levels of cover on a one-off basis as a starting point, although some would have considered a later request for an increased level of cover.

85. By the time a "top up" to the level of indemnity would have been considered, and bearing in mind the risks identified by Mr Burbury later in this case, it seems to me that a prudent underwriter would be unlikely to wish to increase the level of exposure subsequently. I take the view therefore that a £100,000 limit of indemnity would have been the most the

claimant would have been able to obtain if she had sought an alternative policy.

86. It might be said, given the figures set out as to the ultimate level of exposure for First Assist, that such a policy would therefore represent an under insurance of the claimant's risk. But in my view that would not be correct. The idiosyncrasy of the First Assist calculation means that a counterfactual situation has to be considered in order to calculate the premium. In other words, the claimant has to consider how much the adverse costs and own disbursements would have been if she had lost notwithstanding the fact that she did not do so. In respect of any other policy, the issue would simply be whether, in addition to the claimant's own disbursement, she was liable to pay the defendant or defendants under an order for costs. That might have been the entirety of the defendant's costs but it was at least as likely to be for only some of those costs, for example, if the claimant had only succeeded against one defendant or if the claimant had failed to beat a Part 36 offer. Payment in respect of any such costs would only be those recoverable on assessment, unlike the First Assist calculation. I do not consider therefore that £100,000 of cover would be an unreasonable choice in this case simply because the First Assist calculation, based on events that did not occur, suggests the level of cover obtainable would appear to have been below the sum required.

87. I also note that the First Assist policy contained an endorsement to the effect that if the claimant was successful against one defendant, the insurer would have no liability for adverse costs and expenses. That would relate to the other, presumably successful defendant and the claimant's own disbursements. Any other insurer would be entitled to a similar restriction if policies are to be compared and that would, in my view, confirm that coverage of £100,000 against adverse costs and own disbursements would be appropriate.

88. I have come to the conclusion earlier in this judgment that the maximum level of premium would be 80% of the reasonable limit of indemnity. Having decided that the reasonable limit of indemnity is £100,000 the maximum sum recoverable is therefore £80,000. I have calculated the reasonable premium under the First Assist methodology to be more than this figure and so I allow the premium in the sum of £80,000. IPT will need to be paid in addition.

Submissions and decision on the overall level of the premium

89. At the beginning of his submissions, Mr Hogan encouraged me to take what he described as being the "modern" approach of Master Hurst in Kelly v Black Horse Ltd and Akenhead J in Redwing Construction Ltd v Wishart [2011] EWHC 19 (TCC). In those two cases, notwithstanding the dicta of the Court of Appeal in cases such as Rogers, the respective judges had considered premiums to be disproportionate as well as being unreasonable and had reduced them significantly as a result.

90. In Kelly, Master Hurst considered the prospects of success to be much better than those allowed for by the claimant's solicitors. On the basis that their assessment of risk was far too gloomy, the solicitors were presumed to have given misleading information to the insurers in terms of rating the risk that was being run and consequently an unnecessarily high premium was the result.

91. In this case, I have also considered the solicitors to have been overly pessimistic in their

consideration of the prospects of success and consequently reduced the success fee claimed to 40%. I have, however, then considered the insurer's view of the prospects of success and I have be able to do so with not only the evidence of Mr Burbury but also the risk assessment that he completed at the time of underwriting the policy. In this respect it seems to me that I have been placed in a better position than Master Hurst in being able to come to some conclusion about the reasonableness of the insurer's risk assessment.

92. Having concluded, as I have, that the insurer's assessment was a reasonable one, it does not seem open to me simply to take the Kelly approach. In Redwing Akenhead J considered the premium to be unreasonable on its face and so only allowed 20% of it on a summary assessment. I consider that the figure that I have allowed in this case to be both reasonable and proportionate and there is no need to allow only a percentage of it in the manner of Redwing.

Next steps

93. This decision concludes the preliminary issues set down by the parties. I presume that, if it has not already occurred, some discussion between the parties as to whether the remaining items can be settled will take place before determining whether a further hearing is required. In order to facilitate that discussion, I have provided a handing down date that is a little further ahead than normal. If the parties are able to agree any consequential directions then no doubt they will be provided prior to the handing down and no attendance will be required in that event.