Neutral Citation Number: [2019] EWCA Civ 1220

Case No: A2/2017/0928
A2/2017/0930

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER COUNTY COURT
HHJ Smith
M16X154
M16X151

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE IRWIN
and
LORD JUSTICE COULSON

- -

Between :

Suzanne WEST	**Appellant**
- and -	
STOCKPORT NHS FOUNDATION TRUST	**Respondent**

And between :

Lee Thomas DEMOUILPIED	**Appellant**
-and-	
STOCKPORT NHS FOUNDATION TRUST	**Respondent**

- -
- -

Nicholas Bacon QC and **Rupert Cohen** (instructed by **Kain Knight Costs Lawyers, as agents for Slater and Gordon (UK) Ltd and Forster Dean Solicitors**) for the **Appellants**
Roger Mallalieu (instructed by **Acumension Ltd**) for the **NHS Trust**

Hearing dates : 18 & 19 June 2019

- -

Approved Judgment

Sir Terence Etherton MR, Lord Justice Irwin and Lord Justice Coulson :

1) Introduction

1. These appeals raise a number of specific issues arising out of the respondent's successful challenge to the amount of the ATE insurance premium recoverable by the appellants. By common consent, however, the issues also raise a number of wider points relating to reasonableness and proportionality and the proper approach to the assessment of costs.

2. The potential significance of these appeals led to this court's order that there be a fact-finding hearing, before two assessors, which resulted in a detailed report ("the Assessors' Report") being provided to the court for the purposes of the appeals. Details of that exercise are set out in Section 6 below. As a consequence of that report, this court has been able to reach a number of conclusions which were not previously open to first instance judges grappling with these and related issues.

3. We begin by setting out the unique position of ATE insurance premiums in clinical negligence cases (**Section 2**). Then, having set out the factual backgrounds to the appeals of Ms West and Mr Demouilpied (**Sections 3 and 4**), we identify in **Section 5** some of the wider concerns that have arisen on costs assessments relating to such premiums.

4. In **Section 6** we deal with the Assessors' Report, which is attached in its entirety at **Annex 1**. At **Section 7** we identify what seem to us to be the substantive issues that arise on these appeals. We then deal with questions of reasonableness at **Section 8** and issues concerned with proportionality at **Section 9**. At **Section 10** we set out what we consider to be the right approach to costs assessments generally. At Sections **11 and 12** we set out our conclusions on the two appeals before us. At **Section 13** we outline what we consider to be a realistic way forward for the future in disputes about ATE insurance premiums. We are very grateful to both counsel for their assistance in arriving at these conclusions.

2) The ATE Insurance Premium

5. ATE insurance became popular following the severe restrictions on the availability of legal aid introduced some 20 years ago. Concerns were expressed, however, about the recovery of ATE premiums from unsuccessful defendants. In his *Review of Civil Litigation Costs* Sir Rupert Jackson recommended that ATE insurance premiums should cease to be recoverable from unsuccessful defendants. This recommendation related to all civil litigation. Although that recommendation was generally accepted by the Government, an exception was made for clinical negligence cases. The explanation for that stance can be found in paragraph 6 of the Government's formal response to Sir Rupert's recommendations (*Reforming Civil Litigation Funding and Costs in England and Wales (Cmnd 8041) (2011)*), which said:

> "**Refinement to the proposals for public policy reasons**
>
> The Government is aware of specific concerns in relation to the funding of expert reports in clinical negligence cases. These expert reports can be expensive and we need to provide a

> means of funding them to ensure that meritorious claims can be brought by those who cannot afford to pay for these reports upfront. To address this, the Government is making one change to Jackson LJ's key recommendation. The Government intends to have a tightly drawn power to allow recoverability of the ATE insurance premiums to cover the costs of expert reports only in clinical negligence cases. The details would be set out in Regulations."

6. We also note that, in paragraph 24 of the same document, there was express reference to the difficulties involved in pursuing a clinical negligence claim without an expert's report. Again, the response concluded that ATE insurance premiums, limited to the cost of such reports, would "remain recoverable".

7. Section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 repealed Section 29 of the Access to Justice Act 1999 and inserted a new Section 58C into the Courts and Legal Services Act 1990 which took effect on 1 April 2013. That provides:

> "58C Recovery of insurance premiums by way of costs
>
> (1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).
>
> (2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—
>
> (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,
>
> (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),
>
> (c) the policy is of a prescribed description,
>
> (d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence ("the relevant part of the premium"), and
>
> (e) the amount is to be paid in respect of the relevant part of the premium.
>
> …

> (5) In this section—
>
> "clinical negligence" means breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services);
>
> "clinical negligence proceedings" means proceedings which include a claim for damages in respect of clinical negligence;
>
> "costs insurance policy", in relation to a party to proceedings, means a policy insuring against the risk of the party incurring a liability in those proceedings;
>
> "expert report" means a report by a person qualified to give expert advice on all or most of the matters that are the subject of the report;
>
> "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated."

8. Following one false start, the relevant Regulations were introduced by SI 2013/739. They were entitled the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (Number 2) Regulations ("the Regulations"). Regulation 3 provides:

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

9. As Lewison LJ noted in *McMenemy v Peterborough and Stamford Hospitals NHS Trust* [2017] EWCA Civ 1941, [2018] 1WLR 2685, at paragraph 40, the Regulations effected three particular changes, namely the removal of the absolute bar against recovery of ATE insurance premiums in the event that the expert's report was not in fact obtained; the introduction of a minimum financial value of the claim before an

ATE insurance premium was capable of being recovered; and the removal of the contemplation that the cost of the report may not be allowed under the costs order.

10. The Explanatory Memorandum which accompanied the Regulations said at paragraph 7.3:

> "However, the Government has allowed for a permanent limited exception for clinical negligence cases, where ATE insurance premiums covering the cost of expert reports will still be recoverable. This is because expert reports are often necessary to establish whether there is a case for bringing proceedings, but can be expensive. Currently ATE insurance can insure against the risk of incurring liability to pay the costs of such reports, but with the substantial withdrawal of legal aid in personal injury (including clinical negligence) cases, a funding mechanism available to claimants to purchase those reports is required. As a result, the practical effect of this exception is it will allow claimants to purchase expert reports for clinical negligence claims and the premium in respect of incurring the costs of those reports will remain recoverable from defendants."

11. Paragraph 7.4 of the same Memorandum dealt with the need to control costs. It stressed that the Regulations restricted the recoverability of the insurance premium "to the risk of incurring liability to pay for an expert report or reports determining liability and causation only". This was contrasted with, for example, reports dealing with quantum. In this way, it was said that "claimants will still be able to progress their claim, whilst ensuring that the costs paid by defendants to cover claimants' ATE insurance premiums are reasonable and proportionate."

12. There is no doubt, therefore, that the availability of ATE insurance, and the recoverability of the relevant premium, is an important means by which access to justice continues to be provided in clinical negligence cases. That was stressed by Brooke LJ, giving the judgment of the Court of Appeal, in *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134; [2007] 1WLR 808, at paragraph 105, and Lewison LJ in *McMenemy* at paragraph 74. Access to justice must therefore be the starting point for any debate about the recoverability of ATE insurance premiums in any dispute about costs.

3) The Factual Background/*West*

13. Ms West sought damages against the respondent for clinical negligence. Her claim was settled for £10,000. In order to obtain the necessary expert's report required for that claim she took out ATE insurance. The recoverable element of the premium was £5,088. Her overall bill of costs was in the sum of £31,714.44.

14. The ATE insurance policy was with ARAG. It was a block-rated policy. The particular features of such a policy are set out in greater detail in **Section 6** below. For present purposes, it is sufficient to say that such a policy is not a bespoke policy; instead, it has a fixed premium set by reference to a wide "basket" of cases rather than

individually assessed by reference to the risk of the particular case. It is a policy which, at least contractually, a solicitor with a contract with ARAG is obliged to use.

15. The draft bill of costs was the subject of lengthy Points of Dispute served by the respondent. A similar document was served in the *Demouilpied* case. It is clear that these documents are generic and repetitive, with numerous references to authorities and requests for further information. We set out our observations on the utility of such documents in **Section 8** below, when dealing with the question of reasonableness.

16. In relation to the ATE insurance premium, the amount was challenged by the respondent by way of a separate set of written submissions which contained further references to authority. This separate document referred to a number of what were called "wider factors involved in the proceedings" including this:

> "4(b) It is a matter of public importance that the court ensures that ATE premiums, if held to be recoverable in principle, are assessed in proportionate and reasonable sums. Save for a relatively small number of claims brought against other organisations/persons defending clinical negligence claims, ATE premiums will be charged inter partes to the NHS LA acting on behalf of NHS trusts in England and Wales. The NHS LA paid damages and costs in circa 10,000 cases per annum. Post-Jackson, all of those claims continue to have claims for ATE premiums brought against the public body. This is a very substantial impact on the public purse, should the court fail to allow proportionate and reasonable premiums."

17. The respondent's submissions then suggested that Ms West's prospects of losing the case were very low (which obviously raised the question of why the claim had not been admitted from the outset) and calculated what it described as an appropriate premium in the sum of £834.75. In the alternative, the respondent put forward what it said was a comparable policy obtained from LAMP Services Limited ("the LAMP policy") with a premium of between £1,802 and £1,982.20. Although the submissions made plain that the respondent "does not endorse the LAMP ATE insurance product", they asserted that the policy "clearly demonstrates" that an alternative available insurance product should have been chosen.

18. A copy of the LAMP insurance policy was attached to the submissions. It appears that LAMP was a company registered in Gibraltar. It is now insolvent, although it was apparently still trading at the time of the cost assessments in these cases.

19. Ms West's costs bill was the subject of a provisional assessment by District Judge Iyer. He disallowed the premium in full "because C does not allege that any inquiries were made about availability of litigation insurance and letter of retainer recommended ATE without any reference to this". In addition, he reduced the base solicitor and own client costs to £10,000 on grounds of proportionality.

20. Ms West's solicitors applied for a review of the provisional assessment. At the review, the only point in issue was the recoverability of the ATE insurance premium. On that topic, DJ Iyer said:

> "Even if I had not seen any evidence about what the premiums might be, I would have thought that the premium really should not have exceeded £2,500. I do have evidence here. There is a question about whether the evidence indicates an alternative policy but I think that given the information that there is here, that the evidence is sufficient, and according to these, it does rather look as if the claimant could have found insurance policies available to cover a figure that was no more than what the likely expert report costs would be, ranging from £2,120 to £2,332… My instinct would have been a figure of about £2,500 and that is the figure that I consider would have been a reasonable premium to have paid."

21. Ms West appealed to His Honour Judge Smith. In his judgment dated 4 November 2016 Judge Smith dismissed the appeal. He rightly said that the DJ Iyer's judgment was concerned solely with the question of reasonableness. He said that, in so far as that judgment was based on an "instinctive" view that the premium was unreasonable, the District Judge had been wrong to proceed on that basis. Judge Smith said, however, that the respondent had discharged the necessary evidential burden in view of the existence of the LAMP policies. He noted that the appellant had not relied upon any material in response. He concluded:

> "The District Judge was therefore entitled, as a matter of law, to rely upon the evidence before him. At that stage, he was also entitled to rely upon his experience, which in fact led him to award a higher figure than that given in the LAMP documents. He was entitled to do so in the exercise of his discretion to allow a reasonable figure, having resolved the doubt as to reasonableness in favour of the paying party, as he was required to do by CPR 44.3 (2) (b). I therefore dismiss the appeal."

4) The Factual Background/Demouilpied

22. Mr Demouilpied also sought damages against the respondent for clinical negligence. His claim was settled for £4,500. His bill of costs was in the total sum of £18,376.36. That included the recoverable element of the ATE insurance premium of £5,088. The policy was a similar block-rated ARAG policy to that taken out by Ms West.

23. The respondent produced Points of Dispute of a similar length and nature to that produced in Ms West's case. Again, the challenge to the ATE insurance premium was made by way of a separate set of submissions, which included lengthy citation of authority, together with the same passage about the public purse noted at paragraph 16 above. There was again a reference to the same LAMP policies. In the separate document the respondent stated that it calculated that a reasonable and proportionate premium was £175. This was significantly less than the premium payable on the LAMP policies.

24. The costs were the subject of a provisional assessment by Deputy District Judge Beard. As to reasonableness, he concluded that it was reasonable to incur the ATE premium. As to proportionality, however, he had regard to the LAMP policies and

noted: "Comparable premium approach adopted in satisfaction of achieving overriding objective and proportionality. Defendants' comparable premium of £1982.20 adopted."

25. There was an application by the appellant for a review which was carried out by Deputy District Judge Buckley. In an eleven page judgment dated 11 May 2016 he concluded that "the amount of the premium was disproportionate in the light of the compensation targeted, and the limited amount of the risk to which the insurer was exposed". He also considered, however, that the cost of the LAMP policies was disproportionate and undertook his own calculation, taking a starting figure of £1,100 (which was unexplained) and then reducing that by fifty per cent to reflect the prospects of success. Accordingly, he calculated the appropriate premium at £650. He concluded:

> "34. While I appreciate that [a] block rate scheme, with its 'one size fits all' approach, makes good commercial sense, I fear that that approach is not reconcilable, in small claims such as this, with the requirement of proportionality."

26. The appellant appealed. On the appeal Judge Smith correctly noted that DDJ Buckley had reached his decision on the basis of proportionality. Judge Smith thought that the Deputy District Judge's freestanding calculation of a premium of £650 was "both inappropriate … and potentially inadmissible". He said, however, that the Deputy District Judge was entitled to consider proportionality, and in view of his conclusion that the figure of £650 was proportionate:

> "… I am satisfied that it was within the generous ambit of his discretion to reach that conclusion. The fact that he used an inappropriate calculation to support that figure does not mean that his conclusion was wrong. Accordingly, the appeal is dismissed."

5) Wider Concerns

27. These appeals raise specific points about the assessment of ATE insurance premiums, but they also highlight wider concerns about the costs assessment process, including those noted below.

28. First, there is a clear risk that an issue (such as the recoverability of a fixed premium), which ought to be the subject of clear guidance with minimal room for debate, is being decided on an ad hoc, case-by-case basis. So, in the present appeals, involving as they do the same fixed premium of £5,088, the respondent put forward its own calculations of £834.75 and £175, or alternatively the higher figures derived from the LAMP policies of between £1,802 and £1,982. Further, there have been a wide range of answers from the judges, running from disallowance of the premium altogether (paragraph 19 above), increasing to the freestanding figure of £650 (paragraph 25 above), and up to the £1,982 referable to the LAMP policies (paragraph 24 above) and the calculation of £2,500 said to be based upon those same policies (paragraph 20 above). In this way, four different assessments of the same figure by three different district judges produced four different results.

29. Secondly, linked to that first point, some of those assessments appear to have been the result of the instinctive or subjective reaction of the judge undertaking the costs assessment without reference to objectively ascertained comparable policies and premiums. As Judge Smith correctly observed, that is impermissible. Not only does that approach increase the risk of inconsistent results which are unclear and unexplained but, even more important, it has a direct impact on the claimant's access to justice noted in paragraphs 10-12 above. If a claimant's right to recover the ATE insurance premium in clinical negligence cases is the subject of a capricious system of cost assessment, then a claimant may be denied the very access to justice which the exception at s.58C and the Regulations were designed to protect.

30. Thirdly, there are concerns about the respondent's repeated reliance on the burden of proof. This can be seen in their Points of Dispute documents and other written submissions, and it was noted unfavourably in the Assessors' Report (see paragraphs 42 and 45 below). The respondent's strategy appears to be to offer something minimal to put the reasonableness or proportionality of the ATE premium in issue, and then assert that the burden of proof falls upon the individual claimant, who will usually be unable to deal with the wider questions that might be raised concerning the insurance market. On this aspect of the case at least, the respondent has access to much more information than an individual claimant, so that the respondent's reliance on the burden of proof has potentially a distorting effect on the costs assessment.

31. Fourthly, and related to the previous point, we note the respondent's use of so-called comparables. We consider that, when dealing with reasonableness, detailed evidence about unarguably comparable insurance policies and premiums would be admissible. What is not permissible is reliance on the production of a few photocopied pages of another policy which, taken as a whole, is not in fact comparable.

32. In the present cases (which are doubtless mirrored in many other clinical negligence cases) the insurers behind the appellants, on the one hand, and the respondent, on the other, are advancing two extreme positions. The effect of the appellants' submissions is that an ATE insurance premium, certainly if it is a block-rated policy, is essentially inviolable and should always be regarded as reasonable and proportionate. On the other hand, the respondent says that each case is different and that each district judge or costs judge should be left to work out the answer to the questions of reasonableness and proportionality in each case, producing a range of different results.

33. The Assessors' Report has enabled us to steer a course between those two extremes. The report has resolved various issues of fact concerning block-rated ATE insurance premiums which allows us to formulate guidance in a way that was not open to the first instance judges in the present cases.

6) The Assessors' Report

6.1 Background

34. Permission to appeal was granted by Lewison LJ on 13 July 2017.

35. Irwin LJ gave directions on 24 August 2018, followed by a hearing on 9 October 2018. It was accepted by the parties that it would be necessary to adduce new evidence to enable the issues to be properly determined on the appeals. Pursuant to

CPR 35.15 and CPR 52.20, and in the light of the procedure adopted in *Rogers and Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 1 WLR 2142, Irwin LJ ordered that there be prepared by assessors a report to assist the determination of the appeals The assessors were to be a High Court Judge sitting with a costs judge.

36. Irwin LJ ordered that the issues to be addressed in the report were:

i) the origin and characteristics of the policies and premiums in issue in these appeals;

ii) the approach to setting the premiums which fall within the scope of the Regulations;

iii) the approach to setting the 'non-recoverable' element payable out of the insured's damages;

iv) an analysis of the operation and features of the ATE market offering policies of a form described in section 58C of the Courts and Legal Services Act 1990 including the approach to the assessment of risk, and the consequences for premium setting and insurance;

v) the likely effect of a reduction in the recoverable level of premiums on the availability of such policies in the market; and

vi) such consequential factual matters as the assessors considered appropriate.

37. Kerr J and Master Leonard were the assessors. They sat and heard submissions and evidence for five days between 1 and 8 April 2019. They recorded their conclusions in the Assessors' Report, which was a detailed and meticulous report of some 70 pages and was handed down on 24 May 2019. The Assessors Report is appended to this Judgment as **Annex 1**. We express our considerable thanks to them.

6.2 The Key Findings

38. The following paragraphs in the Assessors' Report are of particular relevance and importance in the disposal of these appeals.

39. Paragraphs 38-48 deal with the terms of the contracts between ARAG and its panel solicitors. The assessors note that those terms provide that the panel solicitor must use the ARAG scheme as the insurance provider for ATE insurance in respect of all cases in agreed classes. At paragraph 44 they note that "the solicitor must recommend the relevant ARAG scheme policy to any eligible client when entering into the funding agreement."

40. There is an extensive description of the single-stage block-rated policy and premium at paragraphs 49-57, followed by a lengthy section of the report dealing with the approach to setting the premiums and the non-recoverable element payable out of the insured's damages, starting at paragraph 58 and running on to paragraph 113. The assessors conclude at paragraphs 94 and 95 that, in the absence of expert evidence as to the methodology in setting premiums, the evidence before them (including evidence from the respondent) indicated that the ATE premiums in these appeals are "fairly typical".

41. Between paragraphs 114 and 155 there is a detailed comparison of the different policies provided by some of the principal insurers in this market. This notes the different experience of different insurers, which obviously informs the terms of their policies and the premiums payable. At paragraph 125 the assessors refer to the LAMP policies, which are regularly used as comparables, and say:

> "He [Mr Cousins, then the CEO of LAMP] described the policies with a £9,000 indemnity limit, memorably, as a 'pregnant albatross', referring to the fact that schedules from those policies are regularly produced, out of context and without reference to availability or scheme specifics, to challenge on detailed assessment insurer's clinical negligence ATE premiums. That includes, ironically, LAMP's own premiums under other schemes, which can be significantly higher …"

The assessors also note in the next paragraph that the LAMP policies relied on by the respondent in these appeals would not have been available to these appellants (because one was not available at all in the market at the relevant dates and, as regards the other, Mr Demouilpied's solicitors were signed up to another scheme).

42. The Assessors' Report compares policy premiums between paragraphs 156 and 160. At paragraph 158 they note that Mr Haynes, who was the underwriting and marketing director of ARAG, had concluded that ARAG's insurance came at more less the same cost as that of its competitors, or as a little less expensive, which they say at paragraph 159 was broadly supported by Mr Cousin's evidence, and was also supported, to a degree, by the respondent's own evidence. In dealing with that evidence at paragraph 160, the assessors noted that the respondent's approach before them was to produce a body of evidence "largely designed to put the appellants to proof of what they say, rather than advancing any positive case on behalf of the respondent." As we have already said, this reliance on the burden of proof is a feature of the respondent's general approach.

43. In their conclusions as to cover, starting at paragraph 191, the assessors are clear that the limit of the indemnity plays a marginal role in the setting of recoverable clinical negligence ATE insurance premiums. The premium was primarily a function of the average cost risk. At paragraph 198 the assessors note that there is little incentive for solicitors to undertake any thorough or detailed ongoing review of the market, "at least where recoverable premiums are concerned". They explain that, provided that a solicitor and an ATE insurer have a good working relationship, clients are not burdened with unattractively high irrecoverable premiums and difficulties are not experienced in recovering from an opponent the recoverable element of the premiums for the client, there is little incentive to review the market. At paragraph 199 they note that the extent to which a solicitor's contractual obligation to recommend a particular insurer's product has any bearing on market choices "seems limited".

44. At paragraphs 239 onwards the assessors express their concern about the approach adopted by the respondent in these terms:

> "239. The difficulty with submissions based upon what will happen if premiums are reduced to a 'reasonable and

> proportionate' level is that they beg the question what a reasonable and proportionate level is. The position of the insurers, understandably, is that their premium levels are already reasonable, proportionate and (across the board, taking into account the variations in risk modelling and policy cover) competitive. It would be difficult for them to advance a positive case founded on a hypothetical adjustment to those premiums; they would have first to decide what degree of hypothetical adjustment to make and it is understandable that they have not sought to do so.
>
> 240. The proposition that reducing insurance premiums will lead to a better managed market seems to rest largely upon what we have concluded are unrealistic expectations of the management and monitoring of legal costs by insurers."

45. Finally, as to the amount of the premiums themselves, we note the following conclusions both as to the respondent's attitude to the burden of proof and the "reasonably competitive" rate of the premiums:

> "246. As Mr Clegg [a costs consultant employed by Acumension, the respondent's representatives] has explained, the respondent did not think it appropriate or necessary, in giving evidence for the purpose of this report, to disclose what would appear to be a large body of comparable evidence tending to support ARAG's case to the effect that its premiums, across the market, are reasonably competitive. Mr Clegg's answer to this was that it was not incumbent upon the respondent, which does no more than seek to raise a legitimate element of doubt about the choice made by the appellants, to do so...
>
> 248. The assessment of recoverable clinical negligence ATE premiums, particularly in small cases, will typically take place within a short time frame at county court level, in the course of which a judge may be required to exercise a broad discretion. Even in the larger cases, for example at the Senior Courts Costs Office (SCCO), detailed assessment proceedings do not generally entail lengthy investigations into complex financial and actuarial calculations, the cross-examination of witnesses on such matters, or the weighing of large bodies of evidence. Orders for disclosure are exceptional.
>
> 249. Normally there will be no evidence from the insurer to assist the assessing judge. Nor is the paying party under any obligation to do more than produce documents which suit its case.
>
> 250. We appreciate that one of the issues in this appeal is whether it is appropriate, when judging the proportionality of an ATE insurance premium, to take into account the workings

> and nature of the ATE market. If and to the extent that it is, the assessing judge in the situation we have described is effectively 'flying blind'. Making an informed decision may be impossible. The judge may have to choose between a broad-brush uninformed decision and taking the view that the evidence produced by the paying party is insufficient to raise any real element of doubt..."

The Report goes on to say, at paragraph 251, that perhaps both insurers and NHS Resolutions "could do better". That is a point to which we return at the end of this judgment.

6.3 Matters Outside The Scope Of This Appeal

46. During the course of his oral submissions Mr Roger Mallalieu, counsel for the respondent, said that the points which we should decide arising out of the Assessors' Report included the following: the self-insurance of premiums; the failure rate; and the effect, in setting the amount of the premium, of agency fees, commission, profits and overheads. None of those were matters identified by Irwin LJ at the outset of this process (see paragraph 36 above).

47. We do not propose to deal with those issues. The Assessors' Report addressed directly the issues identified in the Order of 28 October 2018 set out in paragraph 36 above. In describing the efficient operation of the market, however, the Assessors' conclusions were reached allowing for the setting of premiums in the light of agency fees, overheads and profits.

7) The Issues

48. The following issues arise for our determination:

    i) How should a reasonableness challenge to an ATE premium be made and resolved?

    ii) Is a proportionality challenge limited to a consideration of the circumstances of the case in question pursuant to CPR 44.3(5), or can it go wider and deal with "all the circumstances" in accordance with CPR 44.4?

    iii) If the ATE insurance premium is reasonable, should it also be subjected to a proportionality assessment?

    iv) Taking account of the answers to (a) - (c), what is the proper approach to a costs assessment as regards reasonableness and proportionality?

    v) Applying the answers to issues (a) - (d), should the appeals in either *West* or *Demouilpied* (or both) be allowed?

    vi) What is the way forward for future challenges to the reasonableness of ATE insurance premiums?

49. We now turn to consider those issues in sequence.

8) Issue (a): The Reasonableness Of The ATE Insurance Premium

8.1 The Principal Authorities

50. We have already referred to Rogers. Part of the judgment of the Court of Appeal was concerned with the decision of this court in *Lownds v Home Office (Practice Note)* [2002] EWCA Civ 365, [2002] 1 WLR 2450, in which Lord Woolf said at paragraphs 28-31 that, if an item of cost was both necessary and reasonable, then it was automatically proportionate. In his report at paragraphs 5.11 and 5.12 Sir Rupert Jackson recommended that the effect of *Lownds* should be reversed and that an item of cost could be disproportionate even if it is necessary. The consequent changes to the CPR are addressed in Section 9 below. For the reasons noted there, we make clear that *Lownds* must no longer be regarded as good law.

51. *Rogers* remains, however, an important and useful authority. That is because the Court of Appeal considered carefully the limits of any challenge to an ATE insurance premium. Brooke LJ said:

> "105. … Necessity here is, we think, not some absolute litmus test. It may be demonstrated by the application of strategic considerations which travel beyond the dictates of the particular case. Thus it may include, as we are persuaded it does, the unavoidable characteristics of the market in insurance of this kind. It does so because this very market is integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world.
>
> 106. It is important to recognise that this conclusion runs with, not across, the grain of the procedural reforms expressed in the CPR. The very recognition that justice requires a use of resources that is proportionate to what is at stake implies the rightness of a strategic approach. There can be no touchstone of a proportionate use of resources so understood, without an eye to the context in which any such resources are expended. Once it is concluded that the ATE staged premium here was necessarily incurred, principle and pragmatism together compel the conclusion that it was a proportionate expense. We turn therefore to the question whether the ATE staged premium was necessarily incurred.
>
> …
>
> 117. If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District judges and costs judges do not, as Lord Hoffmann observed in *Callery v Gray (Nos 1 and 2)* [2002] 1 WLR 2000, para 44, have the expertise to judge the reasonableness of a premium

> except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges."

52. It is accepted that the particular comments as to necessity need to be disregarded following the change in the law and the over-ruling of Lownds, but the Court of Appeal's observations as to the inability of judges, without the assistance of expert evidence, sensibly to address the reasonableness of the premium (except in very broad brush terms), and the risk to the whole market if they do, remain entirely relevant and appropriate.

53. In *Kris Motor Spares Limited v Fox Williams LLP* [2010] EWHC 1008 (QB), [2010] 4 Costs LR 620, Simon J (as he then was), sitting with assessors, said:

> "44. I have concluded that in a case where the issue is raised as to the size of the premium there is an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable. I have reached this conclusion in the light of the cases which I have cited, and in particular Rogers v. Merthyr. Despite the doubts about the operation of the Market, the Court of Appeal was satisfied that it was not in the insurer's interest to fix a premium at a level which would attract frequent challenges; and that a Master was not in a better position than the underwriter to rate the financial risk that the insurer faced. Where a real issue was raised the court envisaged the hearing of expert evidence as to the reasonableness of the charge. If an issue arises, it must be raised by the paying party. This is not to reverse the burden of proof. If, having heard the evidence and the argument, there is still a doubt about the reasonableness of the charge that doubt must be resolved in favour of the paying party, see (for example) Lord Scott of Foscote in Callery v. Gray (Nos 1 & 2) at [126]. In the present case, no evidence was deployed by KMS which might have assisted the Master; and Fox Williams received no further requests for information. On the material he had it cannot be said that Master Rogers's conclusion on the level of premium was wrong.
>
> …
>
> 46. The recoverability of ATE premiums under a costs order is the subject of vigorous debate (see Lord Justice Jackson's Final Report at §4.4); and this judgment should not be seen as discouraging challenges to ATE premiums on the basis of unreasonableness, for so long as such premiums may be

> recoverable in principle. However such challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion. The issue should be identified promptly and, where necessary, there should be directions for the proper determination of specific issues. This may involve the costs judge looking at the Proposal; and in the Receiving Party providing a note for a one-off ATE premium and not just for a staged premium."

54. We agree with that analysis.

55. Although the decision of this court in *McMenemy*, referred to above, addressed proportionality, Lewison LJ, with whom the other judges agreed, summarised the courts' approach to the recovery of ATE insurance premiums and reasonableness by reference to *Callery v Gray (Nos 1 & 2)* [2002] UKHL 28, [2002] 1 WLR 2000, as follows:

> "26. It is, however, clear that the departure from the usual case-by-case assessment of costs was deliberate on the part of this court and upheld by the House of Lords, despite serious reservations by Lord Hoffmann and a powerful dissent by Lord Scott. In effect, therefore, the question was settled at a macro level by reference to the general run of cases and the macro economics of the ATE insurance market, and not by reference to the facts of any specific case."

56. We derive the following principles from these authorities:

i) Disputes about the reasonableness and recoverability of the ATE insurance premium are not to be decided on the usual case-by-case basis. Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case [*McMenemy*].

ii) Issues of reasonableness go beyond the dictates of a particular case and include the unavoidable characteristics of the ATE insurance market [*Rogers*].

iii) District judges and cost judges do not have the expertise to judge the reasonableness of a premium except in very broad-brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces [*Rogers*].

iv) It is for the paying party to raise a substantive issue as to the reasonableness of the premium which will generally only be capable of being resolved by way of expert evidence [*Kris*].

57. Those are the relevant principles applicable to any consideration of the reasonableness of an ATE insurance policy. They must be applied in every case because the ATE insurance market "is integral to the means of providing access to justice in civil

disputes [now limited to clinical negligence cases] in what may be called the post-legal aid world": see paragraph 105 of *Rogers*.

58. In the course of argument, we were referred to a number of first instance decisions. We mention some of them below. To the extent that they depart from the principles that we have set out at paragraph 56 above, they should not be followed.

59. In particular, we do not agree with the suggestion of Foskett J in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2016] EWHC 1598 (QB), [2018] 1WLR 499, at paragraph 116, that *Rogers* is in some way out of date, and that costs judges can consider ATE insurance premiums by engaging in a robust analysis and entering the arena (paragraph 118). That significantly overstates the legitimate role of the costs judge in dealing with such premiums, and is contrary to the principles that we have identified in paragraph 56. To that extent, therefore, we endorse the observations of Langstaff J in *Pollard v University Hospitals of North Midlands NHS Trust* [2017] 1 Costs LR 45, where, at paragraph 40, he expressed reservations about Foskett J's approach and said, at paragraph 41, that, when dealing with a block-rated policy, "a judge should be very hesitant before concluding that the premium is in error, and should have good reasons for doing so".

60. In addition, we note that Martin Spencer J in *Percy v Anderson-Young* [2017] EWHC 2712 (QB), [2018] 1WLR 1583, and Stewart J in *Murray v Oxford University Hospitals NHS Trust* [2019] EWHC 539 (QB), [2019] 1 Costs LR 177, found various ways to distinguish the approach taken by Foskett J in *Surrey*.

8.2 The Assessors' Findings

61. We consider that the principles set out in paragraph 56 above are supported by the Assessors' Report in **Annex 1**. In particular, the effect of their report is that:

    i) Expert evidence would be required in order to reach a view that a particular premium was unreasonable;

    ii) for a block-rated policy, the premium is unconnected both to the risk of success and the level of cover in any particular case; and

    iii) the workings of the ATE market are complex, with a number of inter-locking elements which make it unsuitable for broad-brush or generalised submissions.

8.3 The Correct Approach

62. None of this is to say that a paying party (which in clinical negligence cases will usually be the respondent) is automatically bound to accept the reasonableness of whatever premium has been paid. The fact that ATE insurance provides access to justice does not mean that the relevant premium must automatically be regarded as reasonable.

63. The practical issue is how and in what sorts of cases can the reasonableness of the premium be challenged. We set out our guidance below.

64. The first point to make is that, if the ATE policy is a bespoke policy, then the grounds of challenge of the amount of the premium are relatively wide. For example, it would

be open to the respondent to challenge the bespoke policy premium on the basis that the risk had been wrongly assessed.

65. As regards a block-rated policy, such as the policies in the present appeals, the ability of the paying party to mount a sustainable challenge will be much more restricted. The majority of challenges to block-rated premiums must relate back to the market in one way or another, and would therefore require expert evidence to resolve. In particular, it will not usually be enough for the paying party simply to give evidence that another policy was cheaper. It is not for district judges or costs judges to have to plough through the detail of allegedly comparable policies, still less to be required to assess the effect of any differences in content. An expert's report would be required to the effect that the other policy was directly comparable to the policy under review.

66. Moreover, by reason of the contract terms commonly agreed between insurers and solicitors, an alternative block-rated policy may not in fact have been available to the receiving party in any event. That may not of itself rule out consideration of that policy as a comparable, but the challenge would involve difficult issues as to reasonableness to be resolved on the facts of the particular case.

67. Finally, a simple comparison between the value of the claim (either the claim made or the settlement sum) and the amount of the premium paid is not a reliable measure of the reasonableness of the ATE insurance premium. That would ignore the way in which the premium payable for a block-rated policy is fixed taking into account a basket of a wide range of cases. It is similar to the "swings and roundabouts" comments associated with fixed costs. In *Sharp v Leeds City Council* [2017] EWCA Civ 33, [2017] 4 WLR 98, for example, Briggs LJ (as he then was) said:

> "41. … The fixed costs regime inevitably contains swings and roundabouts, and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall."

68. If the district judge or costs judge decides that there is substantive evidence which genuinely puts in issue the reasonableness of a premium, then he or she can require the claimant to address that evidence and decide the resulting debate on the evidence in the usual way. We stress, however, that that should only happen if the judge considers that a genuine point of substance, usually requiring expert evidence, has been raised by the paying party and not otherwise.

69. On the basis of the Assessors' Report in this case, we consider that the issue of the reasonableness of ATE insurance premiums has, at least for the foreseeable future, been settled. That ought, therefore, to resolve the issue of their reasonableness in all or almost all of the other cases apparently waiting for the outcome of these appeals. We appreciate, of course, that in the future things may change. We offer a way forward in **Section 13** below.

9) Proportionality

9.1 The Civil Procedure Rules

70. There was a threshold debate between the parties as to whether a proportionality challenge was limited to the circumstances of the particular case ("the narrower interpretation"), or whether it was to be assessed by reference to all the circumstances, and so encompass matters which were not necessarily related to the case in question ("the wider interpretation").

71. CPR 44.3 (2) is in the following terms:

> "2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> (Factors which the court may take into account are set out in rule 44.4.)…"
>
> "5) Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party; and
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance."

72. Part 44.4 (which is expressly signposted in r44.3(2)) is in the following terms:

> "1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

2) In particular, the court will give effect to any orders which have already been made.

3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget."

73. We consider it is clear that, on the basis of these rules, questions of proportionality are to be considered by reference to the specific matters noted in 44.3(5) and, if relevant, any wider circumstances identified under r.44.4(1). Accordingly, the wider interpretation is correct. There are several reasons for that conclusion.

74. First, r.44.4 is expressly signposted in r.44.3(2).

75. Secondly, r.44.4(1) expressly states that it is dealing with assessments of both proportionality and reasonableness.

76. Thirdly, r.44.3(5) is easily reconciled with the signposting in r.44.3(2) to r.44.4 on the basis that proportionality is sufficiently established by satisfaction of r.44.3(5) but failure to satisfy r.44.3(5) does not preclude establishing proportionality by reference to other circumstances under r.44.4.

77. Fourthly, as Mr Mallalieu accepted in an answer to a question from the Master of the Rolls during argument, his interpretation was to the effect that r.44.3(5) should be read as saying "costs incurred are proportionate if and only if they bear a reasonable relationship to …". Not only is that not what the rule says, but those words comprised the original formulation proposed by Sir Rupert Jackson, which was not adopted by the Civil Procedure Rule Committe.

78. Finally, in this context, it is clear that r.44.3(2)(a) was intended to give effect to the recommendation of Sir Rupert Jackson in his Review that Lownds should be overturned by rule change.

9.2 Is Proportionality Applicable At All?

79. We consider, first, proportionality and the recoverable part of a block-rated ATE insurance premium which has been assessed as reasonable, either because there was no challenge to it or, where there has been a challenge, the paying party has not demonstrated a sustainable challenge in view of the nature of the threshold addressed at **Section 8.3** above.

80. Such a premium cannot, in our judgment, then be assessed as disproportionate. Any attack on proportionality would be, as it was in the *Demouilpied* appeal, based on the difference between the amount recovered and the amount of the recoverable element of the premium, when considered as part of the overall costs. There are two reasons why a discount for proportionality is inappropriate. Firstly, being a block-rated policy, the amount of the reasonable premium bears no relationship to the value of the claim, much less the amount for which the claim was settled. Secondly, ATE insurance is critical to access to justice in clinical negligence claims, as was made clear by the Court of Appeal in *Rogers* and by the Government both in its formal response to Sir Rupert Jacksons's recommendations and in the Explanatory Memorandum accompanying the Regulations (see paragraphs 5 and 10 above).

81. This last point raises the wider issue as to whether, when considering proportionality, the judge needs to have regard to every item of cost, or whether there are some costs which ought to be removed from that part of the assessment. We consider that, when the judge comes to consider proportionality, there are some elements of costs which should be left out of account.

82. The exceptions are those items of cost which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed. Court fees are perhaps the best example.

83. We note that this approach is commonly adopted in costs assessments. So, in *May v Wavell Group Limted* [2017] 12 WLUK 679, a decision of HHJ Dight CBE and Master Whalan, at paragraph 72, when considering proportionality, the court left out of the exercise court fees and the costs of drawing the bill itself. Similarly, in *Malmsten v Bohinc* [2019] EWHC 1386 (Ch), Marcus Smith J, sitting with Master

Rowley, left out of account both VAT and the costs of drawing the bill when considering the question of proportionality. The judge explained this at paragraphs 60-61, as follows:

> "60. In my judgment, the Master was entirely right to leave both VAT and the costs of drawing the bill out of account when considering the question of proportionality. These are no more than distorting factors, when considering the overall proportionality of costs. The fact is that, when considering proportionality, one is seeking to determine whether there is a proper – a proportionate – relationship between the overall costs and the action or the application giving rise to those costs. Self-evidently, the costs of any detailed assessment – which are costs entirely unrelated to the nature of the action or application whose costs are being assessed – must be left out of account. I do not consider the contrary to be seriously arguable, given the definition of "proportionality" in CPR 44.3(5).
>
> 61. Equally, the inclusion of VAT confuses rather than assists. The fact is that VAT is – when payable – not an option, but an inevitable cost to the receiving party..."

84. This ought not to disadvantage the paying party. Take as an example a claim that was settled for £10,000 but where the costs were £50,000, of which £5,000 was made up of the recoverable element of the ATE insurance premium. In those circumstances, when working through the various categories of cost to assess proportionality, the judge may have some overall figure in mind that would be proportionate. That figure will remain unchanged: the reductions to achieve it will simply be by reference to other elements of cost, not the ATE insurance premium. Plainly, a different approach may well apply to a bespoke insurance arrangement.

85. We recognise that this means that, when undertaking the proportionality exercise, it is those elements of cost which are not inevitable or which are not subject to an irreducible minimum which will be vulnerable to reduction on proportionality grounds in order that the final figure is proportionate. Such costs are, however, likely to be costs which have been incurred as a result of the exercise of judgement by the solicitor or counsel. Those are precisely the sorts of costs which the new rules as to proportionality were designed to control.

86. As should be apparent, leaving particular items out of account when considering proportionality because they are both reasonable and an unavoidable expenditure does not re-introduce the *Lownds* test, by which necessity always trumped proportionality. Most costs will still be subject to the proportionality requirement.

10) The Right Approach To Costs Assessment

87. We are anxious not to restrict judges or force them, when assessing a bill of costs, to follow inflexible or overly-complex rules. One of the matters, however, which is apparent from the many cases cited to us, and from the submissions of counsel on the hearing of these appeals, is that there is an absence of consistency in the way in which

costs bills are assessed. Taking the various points made above and drawing them together, we give the following guidance on an appropriate approach.

88. First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

89. At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.

90. The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.

91. At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.

92. The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.

93. Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting.

11) The Appeal in *West*

94. Applying the principles set out above to the facts in the *West* appeal, we conclude that the appeal must be allowed. The evidence in the Assessors' Report is that the ATE insurance premium paid by Ms West was "fairly typical" and "reasonably competitive". The evidence therefore demonstrated that it was a reasonable figure; there was no evidence, and nothing in the Assessors' Report, to suggest that it was unreasonable.

95. The LAMP policies, which comprised the only justification for the reduction of the premium in the *West* case, were the "pregnant albatross" as noted by the assessors and mentioned at paragraph 41 above. For the reasons given in the Assessors' Report it is highly doubtful that such policies could properly be described as fully comparable. Moreover, they were contractually unavailable to Ms West because of the arrangement between her solicitors and ARAG. That last point may be relevant to any assessment of reasonableness. Our decision to allow the appeal does not turn, however, on that issue.

96. As in *Demouilpied*, the district judge in *West* undertook his own calculation based on his own figures. That was wrong in principle. There was nothing to support the figure of £2,500.

12) The Appeal in Demouilpied

97. Applying the principles set out above, the appeal in *Demouilpied* must also be allowed. First, there should not have been any reduction to the amount of the premium on the grounds of proportionality. It was not suggested that the premium was unreasonable, and it was an unavoidable cost of the litigation.

98. Further, and in any event, the district judge embarked on a freestanding calculation process. That was, as Judge Smith rightly described, both inappropriate and impermissible.

13) The Way Forward

99. Subject to any points which do not arise from the Assessment, or are not addressed in this judgment, the position in respect of the recoverability of block-rated ATE insurance policy premiums is settled, at least until there are identifiable changes affecting the matters considered.

100. We recognise, of course, that in the future points may arise as to the reasonableness of such premiums as they and the market change. If and when they do, they ought to be addressed by way of a group of test cases. This imposes no burden on the respondent, since it is usually the paying party in clinical negligence cases. There can be a cost-sharing agreement organised between the relevant claimants so as to ease the burden on them. In that way, there will be a control mechanism exercisable by the court in respect of the ongoing amounts of such premiums, but any future debate will not be dealt with in an uncontrolled and unmanageable way.

101. This will also allow the court to deal with and resolve real disputes. Experience shows that this is more helpful to the court user than rules or guidance given in the abstract. As we understand it, it was precisely for that reason that the Civil Procedure Rule Committee declined to set up a regulatory mechanism to monitor and review the amount of ATE insurance premiums.