Proportionality and ATE Premiums

West & anr -v- Stockport NHS Trust

The Court of Appeal has handed its decision in two conjoined appeals concerning the level and proportionality of ATE insurance premiums in clinical negligence cases. The Court also gave guidance on the test of proportionality in CPR 44.3(2)(a) and the approach that should be taken to assessing proportionality in detailed assessment. This is the first time these issues have been canvassed in the Court of Appeal since the changes made in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

The Facts

The Claimants in both cases had settled claims against the Defendant for clinical negligence. Their bills of costs each included a claim for an ATE insurance premium in the sum of £5,088 in respect of the fees they had incurred for liability experts (although s.58C of LASPO generally proscribes recoverability of such premiums *inter partes*, there is an exception for liability expert reports in clinical negligence, as set out in the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (Number 2) Regulations 2013). The premiums claimed were for block-rated ATE insurance set by reference to a wide "basket" of cases, rather than being individually assessed. In both cases the claimants' solicitors were obliged through their contract with the ATE insurer to offer the policy to their client.

The Defendant challenged the level of the premium, and provided a copy in each Points of Dispute a policy from an alternative provider (which by the time of the appeal was insolvent) which had a lower premium. At first instance, the district judges in each case reduced the premium. In the first case, the district judge reduced the figure by about 50%, to what he considered was a 'reasonable' figure, and in the second case, by reference to a 'proportionate' figure, the judge reduced the sum by about 88%. Both decisions were upheld on first appeal to circuit judges.

The Assessors' Report

In advance of the appeal hearing, Irwin LJ gave directions for assessors to prepare a report concerning the origins and characteristics of the premiums in issue, the approach to setting the premiums, and an analysis of the operation of the post-LASPO ATE market for recoverable premiums, including the likely effect of any reduction in the level of the premiums on the availability of policies generally.

The assessors were Kerr J and Master Leonard. In their report they found that the claimed premiums were "fairly typical" for the ATE market. The alternative policies contended for by the defendant would not have been available to the claimants in question, and indeed other policies from that insurer could be significantly higher. They noted criticism from the alternative insurer's CEO that schedules of its policies were regularly produced by paying parties at detailed assessments, out of context and without reference to availability or scheme specifics.

The assessors noted that the limit of the indemnity played a marginal role in the setting of recoverable clinical negligence ATE insurance premiums. The premium was primarily a function of the average cost risk. They observed that assessment of recoverable clinical negligence ATE premiums, particularly in small cases, will typically take place within a short timeframe in county court level, without expert evidence and without proper information as to the wider workings of the ATE market. They warned that a judge in that situation considering whether to reduce a premium was effectively "flying blind".

The Court of Appeal's Decision – ATE Premiums

The Court of Appeal stressed that, as per *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134; [2007] 1WLR 808 (the leading authority on pre-LASPO ATE premiums), access to justice must be the starting point for any debate about the recoverability of ATE premiums. The recoverable element of the ATE premium in clinical negligence was key to enabling access to justice. In most cases, expert's liability reports could not be funded except with the benefit of ATE.

The Court held that disputes about the reasonableness and recoverability of the ATE insurance premium were not to be decided on the usual case-by-case basis, but settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market (citing in this regard *McMenemy v Peterborough and Stamford Hospitals NHS Trust* [2017] EWCA Civ 1941, [2018] 1WLR 268 and *Kris Motor Spares Limited v Fox Williams LLP* [2010] EWHC 1008 (QB), [2010] 4 Costs LR 620). They reitered the warning in *Rogers* that the viability of the ATE market would be imperilled if costs judges regarded themselves, without the assistance of expert evidence, as better placed than an underwriter to determine the appropriate financial risk.

The Court expressly disagreed with the dicta of Foskett J in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2016] EWHC 1598 (QB), [2018] 1WLR 499 that *Rogers* was outdated and that costs judges could consider ATE insurance premiums by engaging in a robust analysis.

The Court gave guidance as to the correct approach to follow when challenging the reasonableness of an ATE premium. To a large extend this would depend on the nature of the policy. In a bespoke policy, it would be open to the respondent to challenge the premium on the basis that the risk had been wrongly assessed. In a block-rated premium, however, the majority of challenges would require expert evidence to resolve. The Court noted that alternative block-rated policies may not have been available to the claimant in any event by reason of the insurer's contractual terms, and thus any challenge would raise difficult questions of reasonableness. The Court warned against making a simple comparison between the value of the claim and the amount of the premium, as this would ignore the way in which premiums were rated.

The Court stated that challenges to block-rated ATE premiums should only happen if the assessing judge considered that a genuine point of substance, usually requiring expert evidence, had been raised.

The Court further held that where a block-rated ATE premium in a clinical negligence case had been assessed as reasonable, it could not reduced by any further assessment of proportionality (more on which below).

The Court of Appeal's Decision – Proportionality

The Court was required to resolve a dispute between the parties as to whether a proportionality challenge was limited to the circumstances of the particular case set out in CPR 44.3(5), or whether it was to be assessed by reference to all the circumstances including the matters in CPR 44.4, not necessarily relating to the particular case in question. The Court held that proportionality was 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.

The Court then gave guidance on the approach that should be adopted when assessing proportionality of costs under CPR 44.3(2)(a). The Court held that items of costs which were fixed, unavoidable, or which had an irreducible minimum, should be left out of account. This would include court fees, VAT, and the ATE premium where recoverable. Accordingly, on detailed assessment, the assessing judge should undertake a line-by-line assessment of the reasonableness of each item of cost. The judge, if appropriate and convenient, could assess the proportionality of each item at the same time. At the conclusion of the line by line exercise, he judge should then assess the proportionality of the total figure with reference both to CPR 44.3(5) and 44.4(1). If the overall figure remains disproportionate, then a further assessment is required. This should not be line-by-line, but should instead consider various categories of cost, for example costs relating to disclosure, or costs over a specific period of time. Any reductions should, however, exclude unavoidable elements of costs such as court fees or the reasonable ATE premium. After this exercise is concluded, there is no need for the judge to stand back and make a further assessment.

Applying the principles above, the Court of Appeal allowed the claimants' appeals in both cases. They advised that if further argument was raised as to the reasonableness of such premiums as the market changed, this ought to be addressed by way of a group of test cases.

Implications for Practice

It is clear from the Court of Appeal's judgment that the courts will no longer countenance challenges to the level of block-rated ATE premiums merely by reference to a different policy. Any paying party wishing to challenge such premium would be strongly advised to obtain expert evidence which analyses the premium with reference to the conditions of the marketplace and the costs risks to the insurer. It would be extremely difficult to challenge a block-rated premium without substantial evidence that it was unreasonable for the market as a whole. Even then, the Court would be entitled to take into account that the receiving party's solicitors had a contract with the insurer and that an alternative premium may not have been available.

In considering the test of proportionality in CPR 44.3(2)(a), the Court has confirmed the general practice of costs judges in undertaking a line-by-line assessment, followed by standing back and looking at the overall costs. They have also confirmed previous decisions such as *Malmsten v Bohinc* [2019] EWHC 1386 that VAT, as an inevitable cost, should be excluded from this assessment. To this must now be added further unavoidable items such as court fees and ATE insurance in clinical negligence (ATE in mesothelioma cases would also be excluded).

The Court's confirmation that proportionality includes not only the case-specific factors listed in CPR 44.3(5) but also the wider factors in 44.4 opens the possibility that a court could find the CPR 44.3(5) factors not met but still find costs proportionate. Receiving parties facing an argument on proportionality will wish to address all the circumstances in their Replies, including where relevant matters that reach beyond the case in question.

Lastly, despite the paying party's request, the Court expressly did not deal with the self-insurance of premiums, their failure rate, or commissions paid. These matters may be yet form contentious issues in future costs cases concerning ATE premiums.