Costs Law Brief

The costs team at **Kings Chambers** in Manchester and Leeds focus on recent judicial developments in costs capping

THE RSA PURSUIT TEST CASES

On 27 May 2005 Master Hurst handed down his judgment in the RSA Pursuit Test Cases. The judgment is a mighty 486 paragraphs long.

The judgment deals with a bespoke ATE insurance policy called "Pursuit". This policy was provided by a subsidiary of Royal and Sun Alliance (RSA) called First Assist. The policy was aimed at claimants whose claims were not suitable for "mass-market" or "delegated" ATE policies.

The essence of the policy is that it is paid for by a premium that increases in line with the accrual of costs as the litigation progresses and is only payable if the case is successful. The premium payable can be very expensive as can be seen from the table.

The problem faced by First Assist was that in offering "Pursuit" it was offering a new insurance product. Accordingly, the statistics often relied upon to make sure that overall premium income would cover calls on the policies (a level called the "burning cost") did not exist. It was therefore impossible to set the premium with reference to past experience.

First Assist proceeded on the basis the premium would be calculated as a multiple of the claimant's costs (as claimed, rather than as assessed). This method of calculation was based on the assumption that the ratio of defendant's costs to claimant's costs would remain largely unchanged throughout the litigation. Put another way, the premium would be set with reference to exposure rather than experience.

First Assist asked the prospective insureds' solicitors to provide the best estimate they could of their costs and their opponent's costs and disbursements to trial. The premium was then calculated in the following way:

- The opponent's estimated fees and disbursements and the claimant's solicitor's own disbursements were added together (this sum represents what might have to be paid out under the policy);
- that sum was then divided by the anticipated basic fees of the claimant's solicitors to produce an exposure multiplier;
- a multiple that was inversely proportionate to the percentage prospects of success of the case at the time cover was taken out was selected as a multiplier reflecting the risk of the policy being called upon;
- the risk multiplier and the exposure multiplier were then multiplied together to give a premium rate that would cover the burning cost;
- to that was then added an allowance for profit, administration and (if applicable) broker's commission resulting in the premium rate before insurance premium tax;
- the resulting figure gave a multiplier to apply to the claimant's solicitor's actual base costs (irrespective of assessment) as at the conclusion of the claim.

The premium rates in the five test cases, expressed as percentages of the claimant's solicitor's basic costs were:

- *Baker v Addenbrookes* 172%;
- *Baker v Euromark* 74%;
- *Clarke v Tom James* 123%;
- *Sandiford v Price's Patent Candles* 160%;
- *Farr v Kerslake* 257% (but the calculation was based on incorrect figures).

It was clear from the evidence that the method of calculation of the premium had been devised before the Access to Justice Act 1999 came into force, and as such recoverability of the premium was not (at the time the scheme was devised) at the forefront of the insurer's minds. There was evidence that some claimant's solicitors were anxious that the premium was so expensive that it would not be recoverable.

Many of the claimants had little choice, however, as they had few if any alternative funding options. In *Baker v Addenbrookes* the claimant could not afford to pay a premium up front. The ATE broker approached only First Assist because a deferred premium was required. In *Clarke*, the broker approached four insurers but ultimately only First Assist provided a quotation. In *Sandiford*, the only insurer on the broker's panel who was prepared to quote was First Assist. In *Baker v Euromark*, the claimant had two BTE policies, but their terms were such that he could not avail himself of an indemnity for

legal expenses. The claimant's union would not support the claim. Approaches were made to three ATE insurers and the only one prepared to provide insurance was First Assist. In *Farr*, the limit of indemnity of a BTE policy provided by First Assist was insufficient to pursue the litigation. First Assist was only prepared to offer top up insurance on CFA terms.

The parties identified a number of issues for the court to decide. Those issues and the judgment on it are set out below

Is the contract of insurance void for uncertainty because at the time the contract is made the amount of the premium is insufficiently certain and is the said contract accordingly unenforceable by RSA against the claimant and if so what is the consequence?

There was no uncertainty. The method of calculation of the premium was at all times clear. At any moment in time the premium was calculable. The decision on this issue is unsurprising and the point was only pursued by one of the five defendants.

Is the insurance arrangement between the client, the insurer and/or the solicitors unlawful on the grounds of champerty and if so what is the consequence?

The arrangement is not champertous. The circumstances were not such that it could reasonably be feared that RSA would be tempted to inflame damages, suppress evidence, suborn witnesses or otherwise undermine the ends of justice in the pursuit of greater or any insurance premiums. Nor was there any officious and wanton intermeddling in the disputes of others with a view to sharing the proceeds.

Is the method of calculation of the premium inherently flawed and if so what is the consequence?

It will be recalled that the method of calculating the premium was based on estimated costs and the claimant's costs as claimed, rather than on actual costs and costs as assessed. At para 260 of the judgment, Master Hurst came to the following conclusion: "In my judgment the condition that the premium will not be affected by assessment or agreement which reduces the insured's solicitors normal fees, or the level of the success fee, can operate to produce a premium which is unreasonable and disproportionate in all the circumstances… Provided that the premium rate has been calculated by a method which is not flawed ... I can see no reason why the calculation of the premium in itself should not be based on the claimant's actual, reasonable and proportionate costs as assessed or agreed with the opposing party".

In para 265, Master Hurst dismissed the submission that if it was necessary for the claimants to take out a First Assist policy, then the premium should be allowed. He said that: "[t]he purpose of assessment is not merely to ensure that the receiving party recovers reasonable and proportionate costs but also to ensure that the paying party is not required to pay more than an amount which is reasonable and proportionate". To an extent it would seem that Master Hurst felt that arguments on necessity and hindsight are to be subjugated to this objective.

In para 346, Master Hurst found that a calculation based upon costs estimates is inherently likely to be arbitrary. In para 347 he continued: "In my judgment it cannot be reasonable to require the paying party to pay a premium based on costs claimed which may be higher than those which the court has found to be reasonable and proportionate. It must follow that if the costs claimed have been found to be unreasonable and disproportionate, the premium calculated on the basis of those costs must itself be unreasonable and disproportionate".

In four out of five of the test cases the estimated proportions of costs at risk to own costs were at least double the actual proportions at the time of settlement. Further, it was accepted that the risk to the ATE insurer is normally lower than the risk identified in a CFA risk assessment and that the use of such an assessment as a starting point for setting a premium might be flawed.

At this point in the judgment, it looked as if there was a rubicon to be crossed. Hindsight could reveal the true ratio between claimant costs and defendant costs. Not to apply that knowledge could lead to unfairness. The matter was dealt with at para 355: "In my judgment the need for some contractual provision allowing for adjustment with the benefit of hindsight is essential where the methodology of premium calculation is exposure related (as here) rather than experience related (as with most other ATE policies)". In other words, the reasonable thing to do at the time the ATE was taken out was to arrange for a deferred premium that depended upon actual costs ratios.

Should the amount of the recoverable premium be reduced on the grounds that an insurance policy ought reasonably to have been taken out at an earlier stage in the proceedings?

No. The policies were all taken out about after proceedings were issued. On the facts of each test case it was reasonable to take out the policy when it was.

Has the claimant acted reasonably in taking out the RSA Pursuit policy, and if not what are the consequences?

Only one of the five test case claimants was found to have acted unreasonably in taking out the policy. That was the claimant in *Baker v Euromark* who was advised that his maximum potential damages were £5,000 before the policy was incepted. The judgments on this issue depend on the facts of the cases and do not have wider implications.

What if anything is the recoverable amount of the premium against the defendant pursuant to s 29 of the Access to Justice Act 1999?

Master Hurst allowed amounts he adjudged reasonable and proportionate (see the table). For all the cases except *Baker v Euromark* and *Sandiford*, Master Hurst used the premium calculation method devised by First Assist, but inserted actual costs figures in order to derive the exposure multiplier rather than estimated figures. In *Sandiford*, the estimated figures produced a lower premium than the actual figures and the premium was allowed as claimed. It should be noted that in that case the estimate of defendant's costs had been provided by the defendant itself. So far as *Baker v Euromark* is concerned £750 plus IPT was allowed on the basis of proportionality.

Does the claimant's claim for the RSA Pursuit premium breach the indemnity principle because the claimant's purported liability to pay the premium is not a genuine liability but purely a device to enable recovery of the premium between the parties?

No, there was a binding contract of insurance. The fact that the payment of a premium was contingent upon success did not constitute a breach of the indemnity principle.

Conclusion

To a large extent, the RSA Pursuit Test Cases are relevant only to the assessment of Pursuit premiums, but there are some points of general principle that will have wider applicability.

The first is the level of detail that might be needed in putting comparators before the court. Master Hurst had the following to say about published tables of policies and premiums: "As to the information contained in Litigation Funding and The Judge website, this is no more than an indication of policies which might be available in certain circumstances. [The premiums on the Judge website are] 'indicative only' and the website contains further warnings. Litigation Funding has similar warnings and reservations. I can derive no firm data from these sources.

There are those who might argue that Master Hurst was indicating a general disapproval of such data. We would suggest that the better view is that Master Hurst was saying that generic data such as that in Litigation Funding was not sufficiently detailed to assist him in deciding the cases that he had before him. Nonetheless, it is clear that if a case is beyond the normal, then reliance on generic data might not be sufficient. Rather than a paying party proving that a particular comparative policy might have been available, he might in future be expected to prove that it actually was available.

As to the burden of proof, Master Hurst had the following to say: "If, however, the paying party can demonstrate that a cheaper policy or policies were available, the burden is then upon the claimant to justify why the claimant, or legal representatives, selected a more expensive one."

It should be borne in mind that Master Hurst was dealing with a series of test cases in which the parties were willing to invest in six counsel and nearly a dozen witnesses. In these circumstances, it is not surprising that Master Hurst expected a high level proof. The extent to which a high level of proof will be required in more mundane cases remains to be seen.

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NAME OF TEST CASE	OUTCOME	PREMIUM CLAIMED (including IPT)	PREMIUM ALLOWED (including IPT)
Baker v Addenbrookes (clinical negligence)	£400,000 settlement	£54,787.37	£13,695
Baker v Euromark (civil claim for assault)	£1,250 settlement	£8,962	£787.50
Clarke v Tom James (PI RSI claim – tennis elbow)	£20,000 settlement	£32,392.38	£11,666
Sandiford v Prices Patent Candles (stress at work PI claim)	£44,000 plus CRU settlement	£16,986	£16,986
Farr v Kerslake (PI claim - pedestrian hit by bus)	£250,000 settlement (on first day of trial)	£161,047.69	£41,708