

### **Fast Track Hearings – Recovering Premiums**

This note is intended to assist an insured's legal representative in making appropriate submissions where the insured has been successful; his costs are being assessed summarily; and no notice has been given of the nature of any challenge to the premiums recoverability.

(In cases where an intended challenge has been notified in correspondence or via a skeleton argument. Temple will expect to be notified so that we may be able to assist in answering the specific challenge.)

A copy of the Court of Appeal's judgment in the leading case of *Rogers –v- Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134* should be considered and references to relevant paragraphs of this judgment are set out below.

#### **The Relevant CPR / Costs PD**

In assessing the recoverability of the premium the court will have regard to the factors set out in Rule 44.5 and the accompanying Section 11 of the Costs Practice Direction, in particular, 11.10 which states that the following factors are relevant to the cost of an insurance premium.

- (1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
- (2) the level and extent of the cover provided;
- (3) the availability of any pre-existing insurance cover;
- (4) whether any part of the premium would be rebated in the event of early settlement;
- (5) the amount of commission payable to the receiving party or his legal representatives or other agents.

At paragraph 8 of *Rogers* the Court indicated that “all the circumstances” in s44.5(3) specifically includes “the financial risk faced by the insurer.” For the particular relevance of this comment regarding quantification please see question no.7 below.

### **Specific Challenges and Our Responses**

**1. *The policy was taken out too soon.***

*Callery –v- Gray (no.1) EWCA 2001* determined that a policy could be taken out at the outset of the claim. In *Rogers* the Court says that it does not criticise the claimant’s solicitor for delaying the purchase of the policy but otherwise confirms its decision in *Callery*.

**2. *The policy should be a single premium / it would have been cheaper to take out a policy with a single premium rather than have to pay this Stage 3 premium.***

Paragraph 107 of *Rogers* confirms that the use of a staged premium is as legitimate a choice as a single premium. Paragraph 111 states clearly that it is not appropriate to challenge the level of a third stage premium by comparing it with a single stage premium (which almost certainly would have been more expensive if compared to the first stage premium should the case have settled rather earlier.)

**3. *The Defendant was unaware of the existence of any ATE insurance.***

A Notice of Funding in form N251 should have been filed and served on the commencement of court proceedings. In the absence of notice the claimant may be caught by rule 44.3B (1) (c) which states that a party may not recover...

*“any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order”*

If notification was merely delayed it can be argued that the level of the insurance has not been altered by the delay in notification (unlike delay in notifying a success fee where the amount payable by the defendant continues to increase.) If the delay means that a trigger point for an increased premium has passed, see the answer to Question 4 below.

(If there have been no court proceedings prior to settlement the Practice Direction to the Pre-Action Protocol (4A) does not require notification, but merely recommends that notification should be given. Reference in a letter to the existence of a premium in correspondence (i.e. without a formal N251 notice) will almost always be sufficient.)

**4. *The Defendant was unaware of the points at which the later stages of the policy were triggered.***

There is no requirement to notify the defendant according to the CPR / Costs PD but it is expected that the latter will be altered with effect from April 2007. Paragraph 116 of *Rogers* indicates that such notification ought to be given and so arguably this should have been done since *Rogers* was handed down on 31 July 2006.

Even if no notification has been given the court will need some material to conclude that the Defendant would have acted differently if it had known of the trigger point(s). Given that the case which is subject to this note will have reached a hearing it will be extremely difficult to show this. Even if this note is referred to prior to attending a detailed assessment hearing (where the case settled without a trial) the Defendant will be hard pressed to show that its tactics would have altered in most cases.

**5. *The limit of indemnity / level of coverage is greater than was reasonably required.***

The cost of the upper levels of indemnity is comparatively little. The comfort that it gives the claimant to know that he is fully covered should not be ignored.

**6. *The premium is too high.***

The decision to use an ATE policy cannot be criticised; indeed the use of such insurance is described as “necessary” (see no. 7 below). Therefore in order to advance any argument on the quantum of the premium convincingly the defendant will need to prove that an alternative policy could have been purchased at a lower cost.

In *Callery –v- Gray (no.2)* the Court of Appeal suggested that reference should be made to alternative premium figures in the *Litigation Funding* magazine and the *Judge* website. Time has shown that such comparables have not proved to be useful and the Court of Appeal revised its suggestion in *Rogers* (paragraph 111) to accept the Senior Costs Judge’s view, as expressed in the *RSA Pursuit Test Cases*, that the comparisons were of no value.

(See also no. 2 in relation to the choice of a staged premium as against a single premium.)

**7. *The premium is disproportionate to the value of the claim***

The test for proportionality is set out in *Home Office –v- Lownds* and is dealt with in relation to ATE premiums in detail in *Rogers* (especially paragraphs 102 to 106.) Litigation in a “post Legal Aid world” makes ATE insurance “necessary.”

Consequently, even if the court concludes that a premium appears disproportionate according to the *Lownds* test it will still be recoverable if the amount is reasonable in itself. The size should be proportionate to the risk to the insurer (see the final comments under the heading “Relevant CPR / Costs PD”) and that means the extent of the exposure to the defendant’s costs and the claimant’s disbursements. (In *Rogers* see paragraph 109 this is described as the Estimated Maximum Loss or EML).

Since the case has reached a hearing, the insurers were entitled to assume that it was a 50/50 case. Consequently in two similar cases the insurers could expect to win one and lose one. The income from the winner therefore needs to pay for the loser (not to mention produce a profit element etc.) Accordingly, so long as the premium is no more than 100% (and this does not allow for overheads or profit) of the EML figure in a case which went to a hearing the reasoning in *Rogers* can be followed to recover the premium as claimed. (Do not forget that the defendant should have served a costs schedule prior to the hearing which will allow you to make the necessary calculation.)

**8. *The policy covers additional benefits that go beyond s29 Access to Justice Act 1999.***

The issue arose in the *Claims Direct* and *The Accident Group Test Cases*. The defendant would need to show that some of the policy benefits do not come within the definition of an insurance policy as defined in s29 (and which is set out in *Rogers* at paragraph 98.)

It is unlikely in practice that such arguments would be advanced without prior notice, although given that Temple’s policy can be downloaded from the web, it is possible that it might be raised.

The court would not be equipped to deal with the point unless copies of the relevant Court of Appeal judgments in the *Test Cases* were available.

In the unlikely event that they were available then the court will probably want to adjourn it to a much longer hearing and that sentiment should be supported (using e.g. Section 14.8 Costs PD in support of a detailed assessment of the additional liability whilst summarily assessing everything else.)

9. *The defendant should not have to pay for the part of the premium that covers the cost of insuring the premium itself.*

This argument was dismissed in *Callery –v- Gray (no.2)* and the point is reiterated at paragraphs 97 and 118 of *Rogers*.

**General points in support of the Temple Insurance Policy**

- The security behind the policy is UK based
- Temple's premium is payable at the conclusion of the case
- Temple's premiums are competitive (see evidence given in *Rogers*)

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