IN THE COUNTY COURT AT CHESTER

Claim No. A01CH564

Appeal No. A35/15

BETWEEN

Mr DANIEL AXELROD — Appellant/Claimant

and

UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST — Respondent/Defendant

JUDGMENT OF HIS HONOUR JUDGE PEARCE HANDED DOWN ON 28 JANUARY 201

Representatives:

Appellant/Claimant: Mr Mallalieu, instructed by Just Costs Soilcitors

Defendant/Respondent: Mr Smith, instructed by Acumension Ltd

Background

1. In this matter, the Claimant[1], Mr Daniel Axelrod, appeals against the decision of Deputy District Judge Johnstone made on 24th August 2015 in a costs assessment hearing following a successful claim by the Claimant for damages for clinical negligence. In the

[1] Throughout this judgment, the Claimant/Appellant is described as the Claimant and the Defendant/Respondent as the Defendant.

course of the assessment hearing, the Deputy District Judge disallowed a claim for the costs of an insurance premium. It is that aspect of his decision which is challenged.

2. The original claim arose from a leg fracture suffered by the Claimant during the course of a football match. He underwent surgery at the Defendant's hospital during which screws were used to stabilise the fracture. It was accepted on behalf of the Defendant that, in breach of its duty to the Claimant, one of the screws was too long, causing cartilage damage.

3. The claim settled by the Claimant accepting a Defendant's offer made pursuant to CPR Part 36 in the sum of £3,000.

4. Other than noting that this was a claim for damages for clinical negligence exceeding £1,000, nothing relating to this appeal turns upon the original claim or its settlement, though the Defendant asks me to note that the insurance premium in issue exceeds the amount of damages recovered.

5. On the provisional assessment of the Claimant's bill of costs pursuant to CPR 47.15, the Court allowed recovery of an insurance premium in the sum of £5,088 in respect of an "After the Event" Insurance policy, that is to say an insurance policy in respect of the risk of a party incurring legal costs taken out after the cause of action arises.

6. In the Points of Dispute relied upon by the Defendant in challenging aspects of the Claimant's costs, an issue was raised as to recoverability of the insurance premium, on the ground that it did not insure against any costs liability to which the Claimant was in fact exposed. In its skeleton argument for the purpose of the detailed assessment, the Defendant refined the argument, referring to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 (which I shall hereafter refer to as "the second 2013 Regulations"), citing Regulation 3(2) (which is set out below) and submitting that *"the Defendant has serious concern regarding whether the level of the premium claimed breaches Regulation 3(2), when the actual risk of incurring a liability to pay for one or more reports in this case is calculated"*. The Defendant further submitted that the premium was disproportionate.

7. In advance of the detailed assessment hearing, the Defendant's submissions related to the amount of the premium. However, it did not, either in the points of dispute or in the skeleton argument for the detailed assessment hearing, take the point now argued namely that the premium is irrecoverable because the terms of the policy did not bring it within the category of recoverable premium under the 2013 regulations and/or the primary statute (section 58C of the Courts and Legal Services Act 1990, which I shall hereafter refer to as "the 1990 Act").

8. In oral argument before the Deputy District Judge on the detailed assessment hearing, the question of compliance with the provisions in the 2013 Regulations and section 58C of the 1990 Act as to the terms of the policy was raised by the Defendant. The Defendant also argued that the premium was disproportionate. The Claimant argued that the policy was a perfectly normal block policy and provided adequate information.

9. The Judge's decision to disallow recovery of the premium of the policy was based on a finding that the policy did not insure against a relevant risk rather than that the terms of the policy did not comply with the statutory requirements. He considered the competing arguments and concluded:

"The question is, does the costs insurance policy insure against the risk of incurring a liability to pay for an expert report relating to liability or causation in respect of negligence or against that risk or other risk. It seems to me that I have to say, Mr Patterson[2], unfortunately from where your client sits that that is not made out in this policy. It is not, I do not think, adequate simply to stick on a pro forma at the front that says it is a clinical negligence case. It tells you what the limit of indemnity is; it tells you what the policy is; it does not tell you what the policy is supposed to cover, it does not specifically say it is to get reports in relation to liability or causation in respect of negligence. The set conditions, the standard conditions to which it refers do not help, it is just a pamphlet effectively, they are set standard essentially ATE conditions. They make no reference to clinical negligence at all...For those reasons it seems to me that the claim for the after the event premium in this particular case, because of the

[2] The costs draftsman representing the Claimant.

inadequacy of the wording on the policy which fails to make it clear what the policy is for, does not comply with section 58 and therefore that premium is not recoverable."

10. It was common ground before me that the insurance policy in question, a "Complete Recourse Policy" issued by ARAG plc, did in fact insure the Claimant in respect of the risks contemplated by the 1990 Act and the 2013 Regulations, namely *"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 that risk and other risk)"* and that this is a case where the financial value exceeded £1,000. It was therefore common ground between the parties that the decision of the Deputy District Judge could not be maintained on the grounds set out in his judgment, though the Defendant sought to uphold the judgment on different grounds. It was therefore agreed that I had to consider the matter afresh, rather than by simple review of the reasoning of the lower court.

The relevant facts

11. The relevant facts, which are not in dispute, can conveniently be taken from Paragraph 2 of the Defendant's skeleton argument.

14.9.13	Claimant undergoes original surgery
2.10.13	Claimant undergoes revision surgery
17.10.13	Claimant enters into CFA with solicitors
9.7.14	ATE insurance policy taken out
28.7.14	Letter of claim sent by Claimant's solicitors to Defendant
6.8.14	Letter of claim acknowledged by Defendant
29.8.14	Defendant admits breach of duty
30.9.14	Claimant accepts Defendant's Part 36 offer in the sum of £3,000

12. The policy of insurance between the Claimant and ARAG is contained in a schedule at page 244 in the appeal bundle and the policy wording appears at pages 245 to 251. The schedule provides that the policy starts on 9 July 2014 and that the "opponent" (a term defined in the policy wording as meaning *"the party or parties against whom you are*

claiming compensation or other remedy...") is the University Hospitals of Leicester NHS Trust, the Defendant to this claim. It describes the case type as *"clinical negligence"* and refers to a conditional fee agreement dated 17 October 2013. It states the premium, inclusive of insurance premium tax, to be £6,042. The Limit of Indemnity is stated to be £100,000. The Schedule states that *"it is designed to be read in conjunction with, and is subject to, the terms and conditions set out in ... the Recourse Complete policy wording."*

13. The policy schedule also includes the following words: *"£5,088 (inc IPT) is recoverable from your opponent while the remainder is to be paid out of your damages."*

14. The Recourse Complete policy wording includes the following:

14.1 In a box headed *"Let's make it happen with Recourse complete"*, the passage:

> *"Without Recourse Complete you may be exposed to the legal costs if you lose or abandon your claim or fail to obtain damages greater than those formally offered by the other side. Recourse Complete is designed to assist you with certain legal issues; you will only have to pay the premium from your damages if your claim is successful but the premium cannot be recovered from your opponent."*

14.2 Under the heading *"Key Facts"*, the passage:

> *"The insurer will pay*
>
> *(1) your own reasonable disbursements and where applicable your opponent's legal costs if*
>
> *(a) you lose or fail to beat a Part 36 offer, or*
>
> *(b) you win but the court orders you to pay costs or your opponent cannot pay what the court orders them to pay or the court makes no order as to costs,*
>
> *(c) your claim is discontinued with our agreement."*

14.3 In paragraph 2 under the heading *"What is Insured"*, the passage:

"The insurer will pay your reasonable disbursements, other than barrister's fees, reasonably, proportionately and properly incurred by your solicitor on the Standard Basis:

(a) following a judgment made against you by a court where such disbursements have been incurred directly in relation to the action or part thereof for which judgment has been given against you;

(b) if your claim is discontinued by written agreement between us, you and your solicitor; or

(c) your claim is successful but the damages you are awarded are less than or deemed by the court not to be more advantageous than any Part 36 offer or payment into court made by your opponent provided any disbursements claimed were incurred after the Part 36 offer was rejected."

14.4 In paragraph 3 under the heading "*What is Insured*", the passage:

"The insurer will pay your reasonable disbursements, reasonably, proportionately and properly incurred by your solicitor on the Standard Basis, reasonable barrister's fees (where the barrister is not acting under a conditional fee agreement and[3] damages based agreement) if a court makes a final judgment or a consent order is granted in your favour, except as under 1(c) or 2(c) above, but (a) your opponent cannot pay what the order orders them to pay; or (b) the court makes no order as to costs."

The Relevant Law

15. As originally enacted, section 58 of the Courts and Legal Services Act 1990 permitted parties to enter into conditional fee agreements for the funding of litigation of certain circumstances, but did not provide for the potential recovery from the other party of insurance premiums in respect of liabilities either for the Claimant's own costs or for the Defendant's costs. The Access to Justice Act 1999 ("the 1999 Act") significantly amended Section 58 of the 1990 Act and added section 58A and 58B. Those amendments and insertions did not themselves give a right to recover insurance

[3] Sic – presumably this should read "*or.*"

premiums but section 29 of the 1999 Act for the first time introduced the possibility of the recovery of such premiums. The terms of the section were wide:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

16. This situation was substantially reversed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act"), which, as part of the introduction of one-way qualified costs shifting ("QOCS"), repealed section 29 of the 1999 Act[4] and inserted a new Section 58C into the 1990 Act[5] as follows:

"(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 liability 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..."

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[4] See section 46(2) of the 2012 Act.
[5] See section 46(1) of the 2012 Act.

(The Section goes on to enable the making of regulations to deal with the amount of any premium.)

17. In paragraph 297 of the Explanatory Note to the Act, it is stated, *"The effect of Section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings..."* Thus, the previous wide circumstances in which insurance premiums could be recovered were hugely curtailed.

18. The first set of Regulations under Section 58C, the Recovery of Costs Insurance Premiums in Clinical Proceedings Regulations 2013, SI 2013/92 ("the first 2013 Regulations"), contained the following provisions in regulation 2:

"(1) Subject to paragraph (2), a costs order made in favour of a party to clinical negligence proceedings may include provision requiring the payment of an amount in respect of the relevant part of the premium of a costs insurance policy taken out by that party which insures against the risk of incurring liability to pay for one or more expert reports in connection with the proceedings (or against that risk and other risks).

(2) A costs order may not require the payment of an amount in respect of the relevant part of the premium which relates to the liability to pay for the reports if

(a) the report was not obtained;

(b) the report did not relate to liability or causation;

(c) the cost of the report is not allowed under the costs order."

19. The first 2013 Regulations were the subject of a Report from the House of Lords and House of Commons Joint Committee on Statutory Instruments[6], which concluded:

"In the Committee's view, the wording of Section 58C(2) [of the 1990 Act] at least arguably requires any regulations under that section to relate only to specified descriptions of proceedings and policies. Even if that view is found to be stricter than justified, the wording of the Explanatory Notes appears to create a clear expectation that the coverage of the Regulations in respect of proceedings will be less than comprehensive. **The Committee**

[6] The Twentieth Report of Session 2012-13.

accordingly reports these Regulations for appearing to be of doubtful *vires* and (to the extent that the *vires* exist) making an unexpected use of the power under which they were made[7]."

20. The Defendant notes that, in a memorandum to the Joint Committee, the Ministry of Justice submitted:

"The Regulations apply to any costs insurance policy, as defined by section 58C(5) of the 1990 Act which insures against the risk (or that risk and other risks) of incurring liability to pay for one or more expert reports in connection with clinical negligence proceedings. It will be of a 'prescribed description' if it meets that criterion. Again, the intention was not to reduce the breadth of that definition. The Ministry considers that the wording of Regulation 2(1), when read with the relevant definition in Section 58C(5), adequately describes those policies to which the Regulations apply."

21. Thereafter, the Second 2013 Regulations were introduced, replacing the first 2013 Regulations and providing as follows:

"(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:

21.1 The financial value of the claim for damages in respect of clinical negligence is more than £1,000; and

21.2 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."

The Judgment below

[7] Highlighting in the original.

22. As noted above, it is common ground that the reasoning of the Deputy District Judge cannot be upheld. The Judge clearly and correctly identified the issue as to the wording of the policy, but concluded that the premium could not be recovered not because there was not compliance with the requirements as to the terms of the policy, but rather on the ground that the policy did not clearly cover the risk in respect of which the 1990 Act permits recovery of the premium, namely *"the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence..."*

23. The parties agree that this policy did in fact insure against the risk of incurring a liability to pay for expert reports and that therefore it does come within the category of policies in respect of which recovery may be allowed subject to compliance with the other requirements. It is compliance with those other requirements (including as to the wording of the policy) which the Defendant challenges.

24. I have considerable sympathy with the Deputy District Judge since he was dealing with a difficult argument of interpretation which was not identified still less fleshed out in the written arguments before him. Further, it seems to me that, in the concluding part of his judgment cited in paragraph 9 above, he was addressing the meat of the Defendant's argument that the policy wording rather than the policy cover was insufficient to comply with the statutory requirements. Nevertheless, Counsel, rightly in my view, agreed that I could not interpret the whole of the judgment as to exclude from the reasoning of the Judge the element that the policy cover was non-compliant and thus the reasoning could not stand.

25. Thus, as identified above, it was agreed that I should consider this issue afresh, rather than by way of simple review of the reasoning of the Judge below.

26. The original Grounds of Appeal and the Respondent's Notice were prepared without sight of the transcript of the hearing and judgment below. When these were obtained, it became clear that both parties were under misapprehensions about the reasoning of the Deputy District Judge. This led to the Claimant filing amended grounds of appeal and the Defendant, in its skeleton argument, arguing different reasons for upholding

the decision than those set out in the original notice. Each consented to the other proceeding in this way.

27. Given that the District Judge's reasoning below cannot be sustained, it is helpful to start with considering the Defendant's arguments as to why the premium was not recoverable before turning to the Claimant's arguments.

The Defendant's case - generally

28. The Defendant's case is that the premium should be held to be irrecoverable on three grounds:

    28.1 That, by reason of the failure to state the amount of the recoverable premium, the Claimant has not complied with the statutory regime for recovery of the premium.

    28.2 That the policy does not on its face charge a recoverable premium.

    28.3 That, in the exercise of the court's discretion, recovery should not be permitted.

29. In oral submission, counsel for the Defendant confirmed that, in the event that I rejected his arguments above and found the premium to be recoverable, he was not taking issue as to the proportionality of the premium nor otherwise as to the amount of the premium.

The Defendant's first argument – the failure to state the amount of the recoverable premium

30. The Defendant contends that, in order to comply with the statutory regime, the insurance policy must state how much of the premium relates to the liability to pay for expert report(s); and that this policy fails to do so.

31. As regards the first part of this argument, the Defendant acknowledges that the second 2013 Regulations do not contain any such requirement. However, Section 58C(2)(d) of the 1990 Act does so require. The Defendant contends that compliance with the

statutory requirements cannot be achieved without compliance with that Section, relying on the following:

31.1 Since Section 58C(2)(d) limits the Lord Chancellor's power to make regulations for the recovery of the premium to those cases where the policy states how much of the premium relates to the liability for experts' reports, then, if the secondary legislation permitted recovery where the policy does not so state, it would be *ultra vires.*

31.2 Secondary legislation should be interpreted, so far as possible, to be *intra vires.*

31.3 The secondary legislation can here be interpreted as *intra vires* by importing into it the requirement of compliance with Section 58C(2)(d) as to stating how much of the premium relates to liability for experts' reports.

31.4 The Lord Chancellor must have intended the Second 2013 Regulations to be read together with Section 58C because, as Secretary of State of Justice, his Ministry so submitted in respect of the first 2013 Regulations in its memorandum to the Joint Committee referred to at paragraph 20 above.

32. In his skeleton argument, Counsel for the Defendant acknowledged that compliance with the literal terms of Section 58C(2)(d) would be pointless, since that Section refers to a wider class of reports than that in respect of which recovery is allowed under the second 2013 Regulations. The Act covers <u>any</u> expert report in respect of clinical negligence, but the Regulations only permit recovery of the premium for experts' reports relating to *"liability or causation."* If a Claimant took out a policy which covered the costs both of liability/causation reports and quantum reports, the Claimant could seemingly comply with the implied requirement of Section 58C(2)(d) if the policy stated the total amount of the premium for cover in respect of the risk of incurring liability for all of the reports, whereas the Defendant would only be interested in (but on this scenario would not know) the only part of the premium which it might have to pay, namely the amount of the premium relating exclusively to liability/causation reports.

33. In oral submission, Mr Smith for the Defendant argued that this apparent illogicality is solved by the second 2013 Regulations being read as to subject to Section 58C, such that the only part of the premium which the policy needed to state was that recovery of which as permitted under the Regulations.

34. The Defendant went on to deal with the question as to whether, if the premium was only recoverable in the circumstances for which it contended, namely that the policy identified the part of the premium relating to the risk of incurring a liability to pay for expert report(s) relating to liability or causation, there had been compliance with that requirement here.

35. The Defendant's skeleton argument notes Hollins v Russell [2003] EWCA Civ 718, dealing with the question of the sufficiency of compliance in the context of other aspects of the old Conditional Fees regime. The Defendant contends that it cannot be said that the policy here sufficiently complied with the requirement for which it contends:

    35.1 The Claimant, through his insurer, was uniquely placed properly to state what part of the premium related to the relevant risk;

    35.2 In fact, the policy does not state which part relates to the relevant risk. The words *"£5,088 (inc IPT) is recoverable from your opponent while the remainder is to be paid out of your damages"* cannot be said to be such a statement. The reader has to look to the remainder of the policy documents to begin to understand what risk is being covered. Even then, there is no clear statement of the risk to which this element of the premium is said to relate.

    35.3 Compliance with the requirement is straight-forward. The Defendant cites the judgment of Master Leonard Noakes v Heart of England NHS Foundation Trust SCCO CL 1404886, in which at paragraph 4, 5 and 6 the Master sets out the material parts of a policy from another insurer which sets out the breakdown of a premium in a clear fashion. The Defendant contends that it would have been open to the Claimant's insurers in this case to word the policy in similar clear fashion.

The Defendant's second argument - the policy does not on its face charge a recoverable premium

36. The Defendant contends that wording of the policy does not enable the court to conclude that the figure of £5,088 claimed by the Claimant is in fact a recoverable premium under the statutory regime. In contrast to the clear wording in Noakes, referred to above, the wording of the policy is ambiguous. As the Defendant puts it at paragraph 51 of the skeleton argument *"...what premium does the client have to pay from damages? What can he recover from the other side and what is self-insured so that the client in reality does not have to pay anything?"*

37. In his oral submissions, Mr Smith for the Defendant took me through the policy documentation, pointing out that it contains some degree of inconsistency such that a Claimant reading this policy documentation would be left in confusion as to what he was required to pay. In such circumstances, he asks rhetorically, how can the paying party be satisfied that the sum of £5,088 stated in the schedule relates only to the costs of experts' reports on liability and/or causation?

The Defendant's third argument - discretion

38. The Defendant draws the court's attention to the proper basis of assessment. The Claimant was seeking costs on the standard basis and accordingly the costs should only be recovered if reasonably and proportionately incurred and reasonable and proportionate in amount, resolving any doubt in respect of whether costs are reasonably incurred or reasonable in amount in favour of the paying party, the Defendant (see CPR 44.3(2)).

39. The Defendant does not advance an argument of proportionality in this case, but contends that the costs were not reasonable because of the failure clearly to state the amount of the premium which relates to the risk of incurring a liability for experts reports on liability/causation and because the Court can have no confidence that the sum claimed of £5,088 in fact relates to that risk.

The Claimant's case - generally

40. Given the Defendant's concession that the policy does in fact insure against the relevant risk, the Claimant contentions are limited to the following:

    40.1 That it is not a prerequisite for recovery that the policy identifies the amount of the premium that relates to the risk of incurring liability for experts reports on liability/causation.

    40.2 That, in any event, there was sufficient compliance with that requirement.

The Claimant's first argument – the policy does not need to identify the part of the premium relating to the relevant risk

41. The Claimant draws a distinction between Section 58C(2) of the 1990 Act on the one hand and the Regulations on the other. Section 58C(2) is an enabling provision. It is directed at the Lord Chancellor not the Claimant. It empowers him to make regulations but does not dictate the requirements with which the Claimant must comply – that is the role of the regulations themselves. This is demonstrated by Section 58C(1) which makes compliance with the Regulations, not compliance with Section 58C(2) the prerequisite to recovery of the premium.

42. Insofar as the there is apparent inconsistency between the Regulations and the Statute, the Claimant concedes that I must endeavour to read the subordinate legislation in manner consistent with the primary legislation but that if that cannot be done then the fact that the secondary legislation may go beyond the power conferred by the primary legislation does not render it void or ineffective – rather it remains valid unless until it is declared invalid by a court of competent jurisdiction (see Bennion on Statutory Interpretation, section 58). Nobody suggests that I should declare the Regulations invalid (even if I have the power to do so), so I should give effect to those Regulations without seeking to read into them a further requirement that the policy should state the amount of the premium relating to the relevant risk.

43. Further, the Claimant draws attention to an alleged illogicality of the Defendant's position, the point noted at paragraphs 32 and 33 above. The Claimant points out that,

in order to "read into" the second 2013 Regulations a sensible obligation to comply with Section 58C(2)(d), the words that must be read in are different to the wording of Section 58C(2)(d) – a requirement that the policy state *"how much of the premium relates to liability for an expert report or reports relating to liability or causation in respect of clinical negligence"* rather than, in the words of Section 58C(2)(d), *"how much of the premium relates to liability for an expert report or reports in respect of clinical negligence."* But since the secondary legislation could not amend the primary legislation, then if it is right that the policy terms must comply with the statute in order to comply with the Regulations in the manner alleged by the Defendant, the only obligation that could be implied would be to state the amount of the premium relating to expert reports generally, a piece of information which it is agreed is of no assistance to the potential paying party.

44. From this illogicality, the Claimant draws the secondary argument (which in fact agrees with the Defendant's first argument) that if any requirement as to the statement of the premium arises because of the terms of the 1990 Act, it can only sensibly be that to state *"how much of the premium relates to liability for an expert report or reports relating to liability or causation in respect of clinical negligence."* But the Claimant goes on to submit that it is not open to me to read the Regulations in a manner which in fact amends their terms and which in any event is not consistent with the wording of the statute which (the Defendant says) should cause me to read this requirement into the Regulations.

The Claimant's second argument – there is sufficient compliance with the requirement to identify the part of the premium relating to the relevant risk

45. If contrary to its primary submission, the policy is only recoverable if it states the amount of the premium relating to the relevant risk, the Claimant contends that on a proper reading of the terms of the insurance policy, there is a sufficiently clear statement of that sum here.

46. The Claimant draws attention to paragraphs 105 to 107 of the judgment of the Court of Appeal in Hollins v Russell [2003] EWCA Civ 718.

"105. ...In approaching the meaning of the words "satisfies the conditions..." we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements which is immaterial in the context of the other two purposes of the statutory regulation.

106. The question whether something is "satisfied" inevitably raises questions of degree. What is enough to satisfy? There can be different degrees of satisfaction. A court may be satisfied beyond reasonable doubt or on the balance of probabilities but it is still satisfied. Different things can be satisfied in different ways. Hunger is satisfied by enough to eat. Greed may only be satisfied by more than enough. Sufficiency produces satisfaction. Conditions are satisfied when they have been sufficiently met. How sufficiently must depend upon the purpose of the conditions. It is not impossible to imagine conditions which would only be sufficiently met if they were observed in every minute particular: the specifications for precision machinery might be an example. But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required.

107. The key question, therefore, is whether the conditions applicable to the CFA by virtue of section 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Costs judges should accordingly ask themselves the following question: "Has the particular departure from a regulation pursuant to section 58(3)(c) of the 1990 Act or a requirement in section 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?" If the answer is "yes" the conditions have not been satisfied. If the answer is "no" then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied."

47. In support of its contention, the Claimant draws attention to the statement in the policy schedule that *"£5,088 (inc IPT) is recoverable from your opponent while the remainder is to be paid out of your damages."* Since the 1990 Act and the second 2013 Regulations only allow recovery of a premium from an opposing party in so far as it relates to the relevant risk, the Claimant contends that the only sensible reading of the passage in the policy schedule is that the sum of £5,088 relates to that risk. The alleged breach is purely

technical and not of a kind that parliament would have intended should prevent a successful Claimant form recovering the premium.

Discussion

48. In my judgment, the starting point in looking at the requirements for the recovery of the policy premium must be Section 58C of the 1990 Act. The Act itself permits recovery where the Regulations made under that section are complied with. Hence one must turn to the second 2013 Regulations to determine whether recovery is permitted.

49. The terms of the 2013 Regulations are clear. There is no requirement in those Regulations that the policy state the amount of the premium that relates to the relevant risk. To that extent, it may be argued that the Regulations go beyond that which is permitted by the terms of Section 58C(2) and that the Regulations are *ultra vires.* But that is not a declaration that I am asked to make – in any event I would doubt that I have jurisdiction so to rule.

50. Whilst I should endeavour to read the secondary legislation in a manner which is consistent with the primary legislation, there is in my judgment no basis for a finding that the words of Section 58C(2)(d) are imported into the second 2013 Regulations, for the following reasons:

    50.1 There is no provision in the Regulations which relates to the terms of the policy as to the insurance premium. Hence, in order to read in the words of Section 58C(2)(d), I would in effect have to import a whole new sub-paragraph into the regulations.

    50.2 In any event, simply to adopt the wording of Section 58C(2)(d) as a term of the Regulations, compliance with which was a condition of recovery of the premium would (as identified above) create a nonsense, since the the wording of Section 58C(2)(d) does not correspond with the circumstances in which the 2013 Regulations permit recovery. Accordingly, any new sub-paragraph would have to be worded in different terms to the Act that is said to require that term to be imported. Yet how could the terms of Section 58C(2)(d) compel the Court to read

into the Regulations a sub-paragraph which is in different terms from the primary Act?

50.3 In his submissions, counsel for the Defendant said that the Court sometimes has to do *"some degree of violence"* to secondary legislation in order to avoid it being *ultra vires.* If violence is ever permitted in interpreting secondary legislation, it would in my judgment be going too far for me to read into the Regulations a requirement that goes way beyond what the Regulations deal with and in terms different than are used in the primary statute in order to achieve a proper interpretation of those Regulations in the light of the primary statute.

51. In those circumstances, I find that the Claimant is not limited to recovering the insurance premium only where the policy states the amount of the premium that relates to the risk of incurring liability for expert reports on the issues of liability and causation.

52. In the light of my ruling on the primary issue, it is not necessary for me to deal in detail with the secondary argument that, if the policy is required so identify the part of the premium relating to the relevant risk, there was sufficient compliance here. In deference to counsel's arguments on this issue however I will indicate my conclusion on this point.

53. It seems to me that the terms of the policy cannot be said to be literal compliance with an obligation to state the part of the premium that relates to risk of incurring a liability to pay for experts' reports relating to liability or causation. Nowhere in the policy is there reference to that specific risk, merely to the generic disbursements that may be incurred. Further, I accept the Defendant's argument that it would have been easy for the Claimant's insurers to comply with such a requirement. The terms of the policy in Noakes illustrate how it can be done.

54. But in my judgment, the statement *"£5,088 (inc IPT) is recoverable from your opponent while the remainder is to be paid out of your damages"* can in fact only be taken as a reference to the amount of the premium that relates to the relevant risk. There is no other basis upon which there might be recovery from a third party.

55. In looking at the purpose of the (putative) requirement for such a statement it seems to me that it is fourfold:

55.1 To allow the Claimant to know what sum may be deducted from his damages if it is not recovered from the opposing party.

55.2 To allow the Claimant and his representatives to know which part of the premium may be recoverable from the other side so that that sum can be included in any costs claim.

55.3 To allow the Defendant to see how the premium is apportioned so that it has the means to challenge the claim for recovery of the sum.

55.4 To allow the Court on an assessment hearing to know how the Claimant's insurers apportion any premium between the various risks that are being insured.

56. In my judgment, the terms of the policy in this case allow each of these purposes to be achieved. In the context of this kind of premium, the difference between the words in fact used and those contended for by the Defendant is entirely technical. In those circumstances, I would have ruled that the non-compliance was technical.

57. I turn to consider whether in fact the sum claimed of £5,088 is a recoverable premium. The Defendant is in my view correct to say that the paying party cannot know from this policy of insurance whether that sum is in fact a proper premium to charge for the risk of incurring a liability for expert reports on liability/causation. It is one of the problems in the recovery of insurance premiums generally that the paying party is at a considerable disadvantage in judging whether it is properly calculated.

58. But that does not in my judgment undermine the conclusion that this is the premium that is in fact being charged for that risk. So much is clear from the insurance documents for the reasons set out above. It follows therefore that, subject to the rules of assessment, including as to proportionality and reasonableness, the sum is recoverable as the premium under the second 2013 Regulations.

59. Finally, I consider the Defendant's argument that I should exercise my discretion to disallow the premium. In my judgment, the Defendant's arguments in this regard are unpersuasive. In reality they amount to saying that, because the Claimant's insurers could have worded the policy more clearly, recovery of the premium should not be allowed. Whilst I have some sympathy with the Defendant's argument that it lacks the material properly to assess premium claimed, it seems to me that such an argument can only be addressed on a challenge as to the quantum of the premium, with evidence as may be appropriate on the rates charged by other insurers and analysis of the risk that the particular insurer was indemnifying. That is not, for understandable reasons, how the case was addressed before me, but it leads me to the conclusion that, having ruled that the premium is recoverable in principle, there is no proper reason not to allow recovery on generally grounds of reasonableness.

Conclusion

60. For the reasons set out above, I find that the Claimant's policy of insurance falls within the category of policy in which recovery is allowed under Section 58C(1) of the Courts and Legal Services Act 1990 and Regulation 3 of the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 and that there is no reason not to permit recovery in this case.

61. I therefore allow the appeal from the decision of Deputy District Johnstone by varying paragraph 1 of the order dated 24 August 2015 to read: *"The Claimant's costs be paid by the Defendant in the assessed sum of £9,679.28."*

62. I invite the parties to agree the final terms of the order and any consequential orders. In the absence of agreement, the matter will need to come back in front of me for determination of any outstanding issues.

Richard Pearce