JUDGMENT : Master O'Hare, Costs Judge Supreme Court

1. In this case the Claimant suffered severe head injuries in a road accident which occurred in January 1998. Because of her injuries she is now a patient and the proceedings were brought on her behalf by her husband. Ultimately, an order was made by Mr Justice Gray approving terms of settlement which provided compensation exceeding £600,000 and costs, including the costs of mediation, subject to detailed assessment on the standard basis if not agreed. In fact all the costs were later agreed save three items, the premium paid by the Claimant in respect of after the event insurance cover (£7,469), insurance premium tax thereon (£373.45) and the costs of the detailed assessment. This is my judgment in respect of the first two of those items.

DETAILS OF THE INSURANCE IN THIS CASE

2. The road accident occurred on 6 January 1998. The solicitors who first acted for the Claimant were Messrs Lawfords. Their instruction was funded by before the event insurance cover the Claimant obtained as a member of the Civil Service Motoring Association. That cover took the form of insurance provided by Eastgate Assistance, who later became Capita Assistance, which had a limit of indemnity of £50,000. Clause 4 of that insurance provided for the payment of the solicitors costs and expenses of dealing with the proceedings. I am told by Mr Mistri for the Claimant that under that policy, the insurer paid profit costs and also disbursements the nature and amount of which had been agreed in advance.

3. Although I have not been told the dates of the early proceedings, I am told that the Defendants made a full admission of liability on 20 September 1999 and that the claim form in this matter was issued on 5 January 2001. Within the next year the litigation friend decided to instruct new solicitors and, to this end, the insurer wrote to Messrs Harris & Cartwright in December 2001. That firm was instructed in the matter in December 2001 and notice of change of solicitors was served on the Defendants in January 2002.

4. At about Easter 2002 concern was expressed on the Claimant's side that the before the event cover was being exhausted. Enquiries were made of the DAS group in respect of additional before the event cover the Claimant had in a Nat West legal expenses policy. That produced a letter from DAS to the solicitors dated 23 April 2002 which gave several reasons why that cover would not assist and continued:

   "We are however prepared to give you details of our after the event insurance department and you may wish to contact Mr Philip Bellamy who is the underwriting manager of our 80e department at the same address. We suggest that you write to him separately concerning this matter."

5. The solicitor's further enquiries with DAS led to a letter dated 24 June 2002. That letter regretted that DAS were unable to provide the solicitors with details of their direct scheme because that was only available to panel solicitors who had signed an agency agreement with DAS. The letter continued as follows:

   "We do, however, underwrite schemes for two providers of ATE insurance and you may wish to contact them to see whether or not they would be prepared to accept this case."

6. That letter gave details of two insurance providers, Greystoke Legal Services Ltd and Litigation Protection Ltd. The Claimant's solicitors contacted both of those companies on the day they received the DAS letter. The position as it then appeared to the solicitor is clearly set out in an attendance note dated 26 June 2002, the full text of which I set out below:

   "Brief initial consideration of possible funding options in Litigation Protection or Greystoke.
   Difficult to say what premiums might be but the reasonable way to proceed seems to be on the basis that we enter into a CFA with the client which is backed by an insurer to cover the potential liability for the costs of the other side. We need the premium to be funded also and we need insurance to cover the premium as well in so far as shortfall is concerned.
   It is highly likely that a payment in will be made here in the near future. We need to get cover in place quickly."

7. The solicitors later received proposal forms from both Litigation Protection Ltd and Greystoke. They completed the Greystoke proposal and this eventually led to the insurance cover in respect of which the premium is claimed.

8. A letter to the litigation friend dated 9 July 2002 repeated the information stated in the attendance note I have just referred to but in much more detail. It explained why the solicitors thought that, by that stage the Claimant's solicitors costs alone exceeded the limit of indemnity of the before the event cover. It also stated that, for the future, it might be appropriate to enter into a conditional fee agreement (CFA) with the solicitors, that the solicitors would also want to enter into CFA terms with counsel in relation to his future fees, that the insurance cover offered by DAS (Law Assist insurance) had been agreed in principle and that the limit of indemnity the solicitors recommended was in the region of £50,000 to £60,000. The letter anticipated that the parties may enter into mediation later in the year, and that, if the mediation was not successful they were likely to incur further substantial costs and disbursements if the case went on.

9. Subsequently a proposal form was completed and sent to Greystoke together with a covering letter dated 22 July 2002 which makes plain the desire to obtain insurance comprising £10,000 in respect of own cover and £50,000 in respect of the opponent's costs and disbursements. It is clear from the proposal form and the covering letter that the solicitors were intending to act on CFA terms.

10. A CFA was entered into between solicitor and client dated 22 July 2002 and a CFA was entered into between solicitor and counsel dated 23 August 2002. The Defendants were given separate notices of funding in respect of each CFA. Those notices were dated 22 July 2002 and 27 August 2002. On 2 September 2002 an insurance policy was entered into with Greystoke Legal Services and two notices of funding were given to the Defendants in respect of it. Both notices were dated 9 September 2002. The first one mentioned also the solicitor's CFA and the second one mentioned also counsel's CFA.

11. There are several decisions I must make as to the terms of the Greystoke policy. The first concerns the type of insurance bought. The Insurance Schedule names the litigation friend as the Insured and both Defendants as the Named Opponent and describes the policy cover as follows:
"The Policy covers the action between the Insured (Claimant) and the Named Opponent (Defendant) subject to the Policy Wording."

12. The Schedule also defines the premium (£7,469), the insurance premium tax payable (£373.45) and the Nominated Representative (the Claimant's current solicitors).

13. The Policy Wording is divided into four main sections: Definitions, Insured Expenses, Conditions and Exclusions. It starts with two introductory paragraphs, the first of which gives some names and addresses on the insurers' side and the second of which is as follows:
"In consideration of the Insured having submitted a Proposal Form to the Insurer, which is incorporated in and forms part of this policy, and the Insured having paid the premium, the Insurer hereby agrees to indemnify the Insured in accordance with the Terms and Conditions of this Policy in relation to the Proceedings stated in the attached Schedule of Insurance (hereinafter referred to as the Schedule)."

14. The "Definitions" section of the Policy Wording states as follows:
"The Proposal Form, the Cover Note, the Policy and the Schedule shall be read together."

15. In the "Insured Expenses" section of the Policy Wording, clause 1 refers to "legal costs and fees incurred by the nominated representative" and "legal costs and fees payable by the Insured to the Named Opponent". In respect of both of them clause 1 states:
"Subject to any contrary agreement the Insurer shall indemnify the Insured."

16. Clause 2 deals similarly with disbursements and counsel's fees incurred by the Nominated Representative or payable by the Insured to the Named Opponent. Of these also it states:
"Subject to any contrary agreement the Insurer shall indemnify the Insured."

17. There being no contrary agreement recorded in the Policy Wording or in the Schedule, it appears from these documents that the type of cover provided by this policy is both sides cover with a limit of indemnity of £67,900. However, it is crystal clear from the proposal form completed by the solicitors and their covering letter dated 22 July 2002 which accompanied it that it was intended that the solicitors and counsel for the Claimant would act on CFA terms and that therefore the own costs cover was limited to £17,900 (ie, the costs of the premium and £10,000 in respect of future experts' fees).

18. In this case the Defendants have seen the Policy Wording and the Insurance Schedule but not, I think, the proposal form which led to the insurance. A major part of the Defendants' case is based upon a submission that the Claimant has the advantage of both sides insurance cover. If that were so the notices of funding given to the Defendants were misleading and the Claimant had no need to pay (and therefore no need to claim from the Defendants) any success fee in respect of solicitors or counsel. I am told that the Defendants have in fact agreed to pay success fees of approximately £12,000. The Defendants say the Claimant cannot have both the success fees and the insurance premium.

19. Having seen the proposal form which led to this insurance and having observed that it is incorporated into the terms of the policy obtained I am in no doubt that the policy is intended to cover a claim which is largely funded on CFA terms. In answer to a question about CFA terms the proposal form states:
"Not yet but CFA is being prepared and will be entered into shortly. CFA now entered into as at 22/7/02."

20. In answer to a question about the level of cover required to take this case to trial the proposal forms states:
"Own costs and disbursements only partial cover required see letter – approx £10,000. Opponent's costs and disbursements £50,000."

21. In the letter referred to in the proposal form the solicitors explained that the parties had been ordered to enter into mediation to commence within the next few months and pointed out the possibility that some solicitors' fees and counsel's fees incurred in the mediation process might not be recoverable from the Defendants. The letter asked the insurers to consider increasing the own costs cover to cover irrecoverable base costs and success fees incurred in the mediation but continued:
"If our request represents a major stumbling block to you providing insurance generally, then we anticipate that we will have to forego our request in this respect."

22. For completeness I should record that the insurers did not grant the solicitors' request. Their undated letter acknowledging receipt of the proposal form and setting out several different offers of premium according to the cover selected (see later) stated as follows:
"8. Please note that cover is limited to the costs and disbursements of the opponent and the disbursements of the Nominated Representative (to exclude Counsel's fees) only..."

NON COMPLIANCE WITH CPR 44.3B(1)(c)?

23. CPR 44.3B (so far as is relevant in this case) states as follows:
"(1) A party may not recover as an additional liability -
...
(c) 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..."

24. Paragraph 32.7 of the Costs Practice Direction provides that, in a case such as this, a party serving a bill of costs must also serve "documents giving relevant details of an additional liability listed in paragraph 32.5". Paragraph 32.5 provides that the relevant details of an insurance premium are as follows:
"A copy of the insurance certificate showing whether the policy covers the receiving party's own costs; his opponent's costs; or his own costs and his opponent's costs; and the maximum extent of that cover, and the amount of the premium paid or payable."

25. In my judgment the Claimant did not fully comply with the requirements of the Costs Practice Direction when serving the bill in this case. The Insurance Schedule they then served did not show "whether the policy covers the receiving party's own costs: his opponent's costs; or his own costs and his opponent's costs …". The schedule merely describes the cover as being in respect of this action "subject to the Policy Wording". The Claimants did not serve the Policy Wording with the bill and the Defendants saw it only after they had agreed most of the items in the bill. Even if the Policy Wording had been served earlier (I have already quoted the paragraph and the Policy Wording which refers to the Schedule as being "attached") the Schedule plus Policy Wording would not provide the information required by the Practice Direction. The Policy Wording describes the cover as being both

sides' cover (subject to any contrary agreement). The contrary agreement appears only in the proposal form, a document which I think has never been copied to the Defendants.

26. The "period in the proceedings during which [the Claimant] failed to provide" the relevant information runs from the date of service of the bill (which was in September 2003) to the present day. In my judgment the insurance premium for that period is the full premium payable even though that is also the insurance for every other relevant period in these proceedings. Insurance premiums, unlike success fees, do not accrue on a daily basis. It is worthy of note that CPR 44.3B(1)(d) disentitles a receiving party to recover any success fee at all if he fails to provide the relevant details of the success fee as required by paragraph 32.5 of the Costs Practice Direction.

27. At the hearing before me Mr Mistri, for the Claimant, made an oral application for relief from sanctions under CPR 3.9 and both sides made submissions as to the circumstances of this case including the nine circumstances set out in that rule. I do not accept that the omission of the type of cover from the Insurance Schedule misled the Defendants as to the type of cover which this policy in fact provided. Despite the omission from the schedule the Defendants have at all times correctly assumed that the insurance cover was limited to supporting a claim largely funded on CFA terms. In my judgment I should grant the Claimant full relief from the sanction imposed by CPR 44.3B. The Claimant's failure to comply with the Costs Practice Direction was caused largely by the insurer not the Claimant or his legal representative. Since the failure has had no harmful effect at all on the Defendants it is a technical breach only. A refusal to grant relief in respect of it would, I think, serve only to award the Defendants an unmerited windfall.

WAS THE INSURANCE COVER ILLUSORY ANYWAY?

28. Mr Swallow, for the Defendants, drew my attention to two aspects of the terms upon which this insurance was granted which, he said, rendered the insurance cover of no value or of minimal value. Condition 1 of the policy states as follows:
"A claim under this Policy may only be made if the Proceedings are Wholly Unsuccessful."

29. The term "Wholly Unsuccessful" is defined in the Policy Wording so as to include cases in which:
"The insured fails to … (b) beat a relevant payment or offer to settle made by any Named Opponent in circumstances where the Insurer has agreed to continue to indemnify the Insured in respect of that Offer to Settle or Relevant Payment."

30. Accordingly, and somewhat strangely, "Wholly Unsuccessful" is defined to include cases in which the Claimant is in fact only partially unsuccessful. However, the Defendants submitted that this wide definition provides no comfort for the Insured because of the terms of condition 2 which are as follows:
"If the Insured is awarded costs and/or damages by the Court as against the Named Opponent in respect of the Proceedings, but is also ordered to pay costs and/or damages to the Named Opponent, in respect of any claim or counterclaim, then the Insured may not make any claim under this Policy."

31. Given that liability had been admitted before the policy was issued the proceedings covered by this policy were never going to wholly fail unless the admission was first withdrawn. The only real risk faced by the Claimant was the danger of not beating a payment into court. If that danger occurred, all claims under the policy would have been blocked by condition 2 whatever meaning is attached to the words "Wholly Unsuccessful" in condition 1.

32. The second way in which the policy cover was said to be illusory concerns condition 11 which states as follows:
"In respect of any proposed rejection by the Insured of any Offer to Settle or Relevant Payment … the Insurer may decline to continue to indemnify the Insured if the insurer considers the proposed refusal to be unreasonable …"

33. The Defendants say this clause places too much control in the hands of the Insurer. In this case it was anticipated that a "Relevant Payment" (ie a Part 36 payment) would be made in the near future. It was argued that this policy did not insure the Claimant against the risk that the case might be lost but only against the risk that the insurer might make a mistake when agreeing with the Claimant that the

Relevant Payment should be rejected. The Insurer would never have to pay out if, in all cases, it put pressure on the Claimant to accept a Relevant Payment however small it was. I have already set out condition 1 of the Policy Wording which prevents any claim being made except where the proceedings are "Wholly Unsuccessful". I have also set out the definition of "*Wholly Unsuccessful*" which, in the context of Part 36 payments, includes only a failure to beat a payment *"where the Insurer has agreed to continue to indemnify the Insured in respect of that … Relevant Payment."*

34. On both of these points of construction I find against the Defendants. I accept that there is a possible conflict between condition 1 (which permits of claims following a failure to beat a Part 36 payment) and condition 2 which appears to prevent any claim where a split order for costs is made. However the construction the Defendants rely on involves treating the definition of "Wholly Unsuccessful" as being meaningless. In my judgment the more preferable construction is to limit the effect of condition 2 so as to avoid conflict with condition 1. In order to achieve this I would read the words "any claim or counterclaim" which appear in condition 2 as meaning "any claim or counterclaim brought by a Named Opponent". Under this Policy Wording the "Named Opponent" does not have to be a defendant. He could be a claimant and the proceedings covered by the insurance might be a counterclaim brought against him.

35. I see no merit at all in the submissions made by the Defendants in respect of condition 11. The policy terms do not permit the insurer to decline cover in every case in which a Part 36 payment is rejected. The second half of condition 11, which I shall now set out, expressly requires the insurer to act reasonably in relation to Part 36 offers and payments:

"... In addition:

(a) the insurer shall have the right, unless otherwise agreed, to request the insured to obtain Counsel's Opinion as to the reasonableness of any Offer to Settle or Relevant Payment at the cost of the Insured, and

(b) if a dispute arises thereafter the matter shall fall to be determined in accordance with the provisions of condition 18 of the policy."

36. Condition 18 of the policy provides for disputes between the insured and the insurer to be referred to a single arbitrator whose decision shall be final and binding upon both sides. It also provides that the *"Party against whom the decision is made shall meet the costs of resolving the dispute in full".*

37. Properly understood the terms of this insurance policy do not entitle the insurer to act unfairly or unreasonably in relation to Part 36 payments.

INSURANCE PREMIUM TOO EXPENSIVE?

38. The total insurance premium (including insurance premium tax (IPT) amounting to £373.45) is £7,842.45. The insurers' undated letter acknowledging receipt of the proposal form explains how this total was arrived at. In addition to the basic cover up to £60,000 the policy also covers two other benefits: insurance against a failure to recover the premium itself (this is referred to as the premium insurance option); and the right to purchase further cover later, so topping up the limit of indemnity (this is called the automatic increase option). The undated letter indicates the costs of these three ingredients plus IPT which adds a further 5%. The basic cover was allowed at 10% of the limit of indemnity. Thus, if the limit of indemnity were £60,000, the basic premium would be £6,000 plus IPT (£6,300 in total). The premium insurance option was offered at the same rate, 10% of the premium, but rounded up by over £100. In the undated letter the premium required for a policy with a limit of indemnity of £67,100, including premium insurance, is given as £7,045.55, some £745.50 more than the cost of a similar policy without premium insurance. The automatic increase option was offered at 10% of the premium otherwise payable. To obtain this benefit the Claimant would have to pay a further £630 if no premium insurance was taken or a further £796.95 if they were intending also to pay the extra for premium insurance.

39. Having considered all of these matters I have reached the conclusion that the amount charged by the insurer, and therefore claimed against the Defendants, is not unreasonable. My reasons for this decision are set out below.

The Premium Insurance Option

40. The Defendants' supplementary points of dispute challenged the recoverability of this item on the question of quantum only. The recoverability of premium as a matter of principle was confirmed by the Court of Appeal in **Callery v Gray (No.2)** [2001] 1 WLR 2142; para 63 of that judgment states as follows:
"The cover provided by the Temple policy, as is usual, includes cover against the risk of being unable to recover the premium as a consequence of losing the action ... We can see no reason, in principle, why this should not form part of the cover provided under insurance that falls within section 29, provided always that any part of the premium attributable to it is reasonable in amount."

The Basic Cover

41. The Defendants did not challenge the amount of basic cover purchased, £60,000, but did challenge the premium rate which the Claimant agreed to pay, 10%. Reliance was placed on the fact that liability in this case had been admitted well before the insurance was taken out. That meant that the Claimant was at risk of an adverse order for costs only if the admission was withdrawn and the case later failed or if a Part 36 payment was made and was not beaten. In their submission the slenderness of these risks was sufficient to render unreasonable any premium rate exceeding 1% of the limit of indemnity. On this basis, if the limit of indemnity was £60,000, a premium in excess of £630 would be unreasonable.

42. The Defendants also placed reliance on various search results obtained from the website entitled The Judge.co.uk. The searches were in respect of RTA claims allocated to the multi track and mainly funded on CFA terms where the amount of cover required did not exceed £100,000. The results are limited to policies which were available on 2 September 2002. The search gives details of ten providers offering such insurance at premiums ranging from £205 to £1,470. Five further search results were produced giving details of individual policies: Solus Plus (Amicus Legal Ltd), Accident Care (Multi Track) (Mike Young Legal Associates), Justice Solutions (Lawinsure), Equity (Alliance Cornhill, formerly Lawclub) and AEI Insurance and Disbursement Funding (NFL). The Defendants also criticised the Claimant's solicitors' failure to obtain more than one estimate.

43. For the Claimant, Mr Mistri relied upon the contents of a letter dated 30 January 2004 which was written by the insurers to the Claimant's solicitors specifically for the purpose of being used in this detailed assessment. The relevant passage of the letter states as follows:
"The premium was calculated by charging the level of indemnity required at the premium rate of 10%, which at the time was the lowest rate that we could have charged for this type of case."

44. As to the failure to obtain more than one estimate, Mr Mistri explained that the Claimant's solicitor had taken the view that most insurance providers would be unwilling to offer insurance in a case which had already commenced and which had already been funded by before the event insurance.

45. The search results relied upon by the Defendants in this case do not persuade me to limit the premium I should allow to a figure between £205 and £1,470. The general search which sets out this range of premiums states that they are indicative only and may vary depending on a number of factors which might include the stage the case has reached, whether liability is in dispute, the prospects of success and so on. The Solus Plus search states that the premium shown (£265 to £367.50) may be significantly higher if proceedings have been issued, if a Part 36 has been made and if the quantum is over £50,000. There is also an additional premium payable of 20% of the gross premium on each anniversary of the case. The Accident Care (Multi Track) search states a premium of £275 but also states that higher premiums are likely to apply to multi track cases. The Justice Solutions search states that all CFA cases must be insured through this scheme. The Equity search makes the same point and also requires that only firms handling a minimum number of cases (possibly 200 per year) will be accepted. The AEI Insurance and Disbursement Funding search states that the premium indicated (£577.50) is only for cases where proceedings have not been issued.

46. The Defendants were, I think, upon stronger ground when challenging the Claimant for failing to obtain more than one estimate The Claimant did not produce any evidence proving the assertion that most ATE insurance providers are unwilling to issue policies in connection with cases previously

funded by BTE cover. On the other hand the Defendants also have failed to produce any evidence proving that comparable insurance was available from an alternative source at cheaper cost.

47. In the absence of reliable evidence on this point one way or the other I have done the best I can drawing upon the report I prepared which was annexed to the Court of Appeal decision in **Callery v Gray (No.2) [**2001] 1 WLR 2142.

48. Bearing in mind the fact that liability in this case had been admitted I have assumed the frequency of loss in cases such as this to be 5%. Most cases similar to this which produce a loss will do so because the Claimant, with the insurer's consent, refused to accept what turned out to be a good Part 36 payment. In most such cases I assume that the insurer will have to pay out the maximum limit of indemnity. Even where the payment is made at a fairly late stage the Defendant's likely costs of trial and preparation for trial, plus the cost of expert evidence for both sides at the trial, could easily exceed £60,000.

49. If five out of 100 similar cases were unsuccessful the sum paid out by insurers would be £300,000. Given that the insurers will not receive premium income in these five cases, the average loss per 100 cases should be divided by 95, not 100. This produces a burning cost for each policy of £3,158. That burning cost can be turned into a premium amounting to £6,710 before IPT by adding a risk/profit cost of 35% and then allowing administrative costs and distribution commission at 57% of the aggregate (which amounts to 36% of the gross premium).

50. If the average loss per lost case was lower, £45,500, a premium amounting to £6,710 before IPT could be justified if the risk/profit cost was 40% and the administrative costs and distribution commission was 100% of the aggregate (which amounts to 50% of the gross premium).

51. The allowances I have suggested here fall easily within the calculations described in my report (see paragraphs 35, 36, 54 and 55). Sketchy as the information was when I made that report it was much greater than the information before me in this case.

52. By way of cross-check I have considered what the average loss per case would be if I deconstructed the Equity premium (£660 including IPT) which is one of the alternative policies listed in the search made at The Judge.co.uk. Taking a risk/profit cost of 35% and administrative costs and distribution commission of 36% of the aggregate would indicate an average loss per lost or dropped case of £4,265.

53. Taking a risk/profit cost of 40% and administrative costs and distribution commission of 100% of the aggregate would indicate an average loss per lost or dropped case of £5,662.

54. These notional loss averages, like the premium upon which they are based, are less than a tenth of the loss average I have assumed and the premium I have allowed in this case. I have, of course, already expressed the view that the Equity policy is not a fair comparable for the policy the Claimant reasonably required in this case. A solicitor recommending these policies to a litigant was required to register with the insurer and take out policies in all qualifying CFA cases. It is necessary to bear in mind also the Fenn and Rickman research commissioned by the Civil Justice Council which indicates that most failed RTA claims fail before proceedings are issued (see "Calculating Reasonable Success Fees for RTA Claims", October 2003, page 3, Civil Justice Council website). Such failures do not give rise to any adverse orders for costs thereby greatly reducing the average loss per failed or dropped case. In this case the ATE insurance was taken out long after proceedings had commenced.

55. The rudimentary calculations which I have made corroborate the evidence given by the Insurer in the letter dated 30 January 2004 which states that a premium rate of 10% was at the time the lowest rate they could have charged for this type of case. Bearing in mind its self-serving nature, I would not have accepted the Insurers evidence on this point unless it had been corroborated.

THE AUTOMATIC INCREASE OPTION

56. Some guidance notes published by the insurer explains the automatic increase option as follows:
"We realise that it is not always possible to put a figure on exactly how much insurance cover is going to be required, especially at the outset when it is not known whether the matter will indeed proceed all the way to Trial. This has a direct effect on the recoverability of premiums, which have to be seen as being "reasonable". Therefore, so that your client does not purchase more cover than is necessary, it is possible to reserve the right to

increase their Limit of Indemnity as the case progresses. Subject to the continuing merits of the case, and provided it is not within 30 days of trial, cover can be "topped-up" at the original rate of premium. This Option costs 10% of the initial premium payable.
Your client is under no obligation to exercise the entirety of the option but is free to choose any further amount of cover up to 100% of the original indemnity ...
Cover cannot be increased unless the Automatic Increase Option has been selected."

57. In this case 10% of the initial premium payable is 1% of the limit of indemnity, a figure which was increased to £67,100 so as to include the premium insurance option.

58. The Defendants complain that, whilst top-up cover may be appropriate in some cases, the terms upon which it was provided in this case are so unfair and unreasonable as to make it worthless. Although described as a right to increase the limit of indemnity, the Insured can exercise that right only if the merits of the case have either remained the same or improved. This is likely to come about only in cases which were no more than borderline to start with. The normal progression of case merits is that, although cases may appear strong at the start they fall nearer to the borderline the closer they approach trial. The defence also complain that the option was not in fact used and, even so, no part of it is refundable.

59. For the Claimant, Mr Mistri sought to justify the purchase of this option as being based upon a genuine pre-estimate of the total cover the Claimant was likely to need. He relied again upon the solicitor's letter to the insurers dated 22 July 2002 (which accompanied the proposal form) the last part of which states as follows:
"In summary therefore, you will see that we have stated that we think we need cover for the opponent's costs and disbursements of £50,000.00 and we suggest a further £10,000.00 on top of this to cover our own disbursements from now to the end of the case and, if applicable, the element of our own costs which relate to the mediation aspect.
You will see that we have indicated that we wish to reserve the right to increase the total level of cover initially purchased at a later stage. This is on the basis that if settlement cannot be reached after mediation takes place in this case, there are likely to be substantial further costs and disbursements incurred by both sides in resolving this matter."

60. The Defendants' response to this is that, given the admission of liability, there was no real risk of an adverse order for costs unless the Defendants later withdrew their admission of liability (which they never did) or unless they made a Part 36 payment which was not accepted(which did not happen).

61. Although I acknowledge that there is much force in the Defendant's arguments, I have nevertheless reached the conclusion that the sum spent on top-up cover in this case is reasonably recoverable from the Defendants. The risk of incurring a liability for costs in excess of the original limit of indemnity, although slight, was a real risk and, in all the circumstances, the costs of insuring against it were not disproportionate. In my judgment the Claimant could reasonably have purchased insurance cover up to £80,000 from the outset. The cost of such insurance would have exceeded the cost which was actually incurred. I accept that, in the generality of cases, the merits of a claim are more likely to fall as the case progresses rather than stay the same or rise. However, in my judgment, on the terms of this insurance policy, the insurers would still have been required to grant increased cover so long as the merits had not fallen to zero. A case may still have merits even after its prospects of success have weakened.

NEXT STEPS

62. For the reasons given above I allow the insurance premium and the insurance premium tax thereon in the amounts claimed. My provisional view is that it would not be appropriate to grant permission to appeal any of these decisions and that the costs of these proceedings should go to the Claimant on the standard basis and, unless they are agreed, I should assess them when this judgment is formally delivered. However, I will hear argument on any of these points if either party so wishes.

Mr Mistri (instructed by Harris Cartwright) for the Claimant
Mr Swallow (instructed by Keelys) for the Defendant