England and Wales High Court (Senior Courts Costs Office) Decisions

BAILII Citation Number: [2017] EWHC B1 (Costs)

Case No: HQ14X01468
SCCO REF: PHW 1604049

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice, Strand
London, WC2A 2LL

17 January 2017

B e f o r e :

MASTER HAWORTH

Between:

(1) SAVINGS ADVICE LIMITED **(2) ZINC CONSUMER LIMITED**	**Claimants**
- and -	
EDF ENERGY CUSTOMERS PLC	**Defendant**

Mr B Williams QC (instructed by Steeles Law Solicitors) for the Claimant
Mr P J Kirby QC (instructed by Lewis Silkin LLP) for the Defendant

Hearing date: 21 October 2016

HTML VERSION OF JUDGMENT APPROVED

Master Haworth, Costs Judge :

Background

1. A claim was brought against the Defendant (EDF) by the Claimants Savings Advice Ltd (SAL) and Zinc Consumer Ltd (Zinc) for sums allegedly due for damages and/or compensation pursuant to Regulation 17 of the Commercial Agents (Council Directive) 1993. A claim form was issued on 3rd April 2014. The total claimed by the First and Second Claimant was £1,063,372.90.

2. An unsuccessful mediation took place in May 2015 with the claim settling in December 2015 upon the Claimants accepting EDF's Part 36 offers of £200,000 for each claimant. On 16th December 2015 upon acceptance of the Part 36 offers the Claimants became entitled to their costs of the action on the standard basis. At the time of acceptance of the Part 36 offers the only step taken in the proceedings had been service of Statements of Case. There had been no Case Management Conference, the case had not been budgeted, and no directions had been given. There had been no disclosure or exchange of witness or expert reports or trial preparation. On 16th March 2016 the Claimants served a Bill of Costs totalling £587,598.56. Of this there was a claim for an After the Event insurance premium (ATE) of £181,537.86 in respect of SAL and £74,426.02 in respect of Zinc. ATE premiums in total of £255,963.88.

3. Excluding the ATE premiums the Claimants costs and disbursements have been agreed in the sum of £218,500.00 which has been paid by the Defendant to the Claimants.

Issues

4. The sole remaining issue in this detailed assessment relates to the recoverability and quantum of the ATE premiums. The Defendant's Points of Dispute state:

   i) It was unreasonable for the Claimants to obtain ATE cover;

   ii) The Claimants did not give adequate notice of funding;

   iii) The premium is disproportionate to the settlement achieved;

   iv) Burford (the ATE Insurer) used the wrong figures in calculating the opponent's cost element of the multiplicand; the lower figure supplied by the Defendant's solicitor on 1st March 2016 should have been used and the not the higher figure estimated by Burford.

5. Issues i) and ii) were not pursued at the hearing, leaving me to determine the issues of the quantum of the Defendant's costs for purposes of calculating the premium multiplicand and the overall proportionality of the ATE premiums in this case. A separate and discrete issue arose as to the admissibility of the evidence of Mr Philip Burbury contained in two witness statements dated 6th October and 17th October 2016.

Facts

6. A Pursuit policy from FirstAssist Legal Expenses Ltd was issued to each Claimant. FirstAssist later became Burford Capital. The policy was underwritten by Great Lakes Reinsurance. The policies are in standard terms and cover own disbursements and opponents' costs. In each case the Claimant's own disbursements were insured to a limit of £23,090.00. Cover of opponent's or Defendant's cost was covered by a Long Stop provision of £2,000,000 applicable to the aggregate of Adverse Costs and Expenses. Premiums are

claimed in relation to both SAL and Zinc. In relation to SAL, the premium is £181,549.93. The premium in relation to Zinc is £74,426.02. The aggregate is £255,975.95. It was common ground that the difference between the two premiums results from the insurer attributing liability for opponent's costs in a 75/25 ratio between SAL and Zinc respectively.

7. In the definitions of the Pursuit policy, 'opponent's costs' is defined thus:

> "The figures used for the calculation of the Premium in respect of the Opponent's Cost should be the total cost the opponent may have sought to recover under an order for costs or other entitlement to costs had the opponent been successful as certified by the opponent's solicitor if appropriate."
>
> "In the event that the opponent enters into a Conditional Fee Agreement and could seek to recover a success fee on the solicitor's profit costs or Counsel's fees or the opponent obtains legal expenses insurance in respect of which the opponent could seek to recover an insurance premium these additional liabilities will be included in the opponent's costs."
>
> "If and to what extent the opponent would be liable to pay Value Added Tax on these monies and is unable to recover Value Added Tax as input tax, the opponent's costs would similarly include Value Added Tax."
>
> "In the event that the opponent refuses to provide us with the value of the opponent's costs then for the purposes of the calculation of the premium, we reserve the right to make an approximation as to the quantum of the opponent's costs using the best information available."

8. On the 26th May 2015 Mr Thomas Bailey, the Claimant's solicitor, emailed the Defendant's solicitor in the following terms:

> "Without prejudice save as to costs"
>
> Gagan
>
> Further to our exchange of Mediation statements, I note that your client has not included its costs to date (or to mediation). Aside from being part of the ordinary exchange of information to facilitate settlement as you know, our client's claims are backed by a policy of ATE insurance and the premium is calculated by reference to your client's costs.
>
> In order to be able to settle the dispute effectively on Friday, I would be grateful if you could let me have a figure in respect of your client's costs.
>
> I look forward to hearing from you."

9. On the 28th May 2015 the Defendant's solicitor emailed a response to the Claimant's solicitor in the following terms:

> "Without prejudice save as to costs
>
> Dear Tom,
>
> Our client's costs up until and including the mediation (referable to SAL alone) are £155,000 (approx). Our client's costs estimate to trial remains at £400,000."

10. A short time later in a further email the Defendant's solicitor wrote as follows:

> "Without prejudice save as to costs
>
> Tom,
>
> The figure stated in my email below for our client's costs up until and including the mediation is incorrect. The correct figure is £140,000 (ex VAT)."

11. The parties entered into a mediation agreement on 29th May 2015 which contained the following clauses:

> "15. All documents or other material (including any form of electronic record) produced for or brought into existence for the mediation will be subject to without prejudice or negotiation privilege and together with evidence of meetings and other oral proceedings in the mediation will be inadmissible as evidence and not be disclosable in any litigation or arbitration connected with the dispute so long as and to the extent that such privilege applies.
>
> 16. The Parties, their representatives and advisors and the Mediator agree in relation to all information statements whether written or oral disclosed or made to them in the mediation including any preliminary steps:
>
> a) to keep them confidential (save only as may be required to report to the Court or an arbitrator or arbitrators whether or not has been resolved to professional advisors, HM Revenue and Customs, relevant regulatory bodies or as may be required by law)
>
> b) not to use them for a purpose other than the mediation
>
> c) that the obligation ……
>
> d) that no notes taken by the parties or by the Mediator and no other evidence concerning the conduct of the mediation including oral submissions, oral statements, concessions or admissions of law or fact will be adduced in evidence in any subsequent proceedings in Court or before an Arbitrator or Arbitrators in connection with the Dispute (provided that if they would otherwise and independently of the Mediation have been admissible for such proceedings they should not be rendered inadmissible by reason of having been made during the course of the Mediation)."

12. On the 5th January 2016 the Claimant's solicitors wrote to the Defendant's solicitors in the following terms:

> "2. Our clients are entitled to payment of their disbursements which include the relevant ATE insurance premium. In order to calculate each 'pursuit' ATE premium in respect of each of our clients please would you provide us with details of your client's costs up to the date of the settlement being the costs that your client may have sought to recover under an order for costs or other entitlement to costs had it been successful. Please provide these figures by way of a breakdown between your costs, Counsel's fees and other disbursements. Indicative hourly rates applicable to those costs would also be helpful."

13. On the 19th February 2016 the Defendant's solicitors provided the details requested in the letter of 5th January 2016 in the form of the following schedule:

Claimant	Profit Costs	Counsel's Fees	Other disbursements	Total
Savings Advice Limited	£40,212.27	£8,325	£29,448.73	£77,986.00
Zinc Consumer Limited	£21,675	£8,325	N/A	£30,000.00

14. In response to a further letter from the Claimant's solicitors dated 22nd February 2016 the Defendant's solicitors replied on 1st March 2016 as follows:

> "3. We have provided with the assistance of a costs lawyer details of our "actual costs" which for these purposes are synonymous with the actual exposure of insurers, i.e. the reasonable and proportionate costs that are recoverable on an interparty basis (as opposed to solicitor/own client costs which are not relevant in this regard). It is a matter for insurers whether they wish to charge an inflated premium to your clients based on some other flawed method of calculation however any such inflated and/or flawed premium will not be recoverable from our client on assessment. Our client will be challenging the ATE premium on assessment in any event including (and not limited to) the methodology employed and the reasonableness of choosing this particular type of premium."

15. In his first witness statement dated 6th October 2016 Mr Philip Nicholas Burbury, the Claims and Settlements Manager with Burford Capital (UK), refers to the letter dated 1st March 2016 from the Defendant's solicitors which he took to be a refusal to disclose the costs the Defendant would have claimed had it succeeded in this litigation. In paragraph 24 of his witness statement he contends that in those circumstances he was entitled under the terms of the policy to elect to make "an approximation" of the Defendant's total costs pursuant to the "Opponent's Costs" definition referred to in paragraph 7 above. In relation to that approximation he says this:

> "25. In the instant case, my approximation was made from various different sources of information and documentation;
>
> a) from the Claimant's own base costs, disbursements and Counsel's base fees as provided to Burford by Steeles; and
>
> b) from costs information provided by Lewis Silkin during the proceedings, and for the purpose of the mediation between the parties and from the defendant's proposed application for security for costs.
>
> 26. Here, it was necessary to calculate the premiums due under two policies, one for each insured. Although Lewis Silkin had not provided their true costs figure, there had previously been an apportionment between the costs attributable to the First and Second Defendant's, both for their costs at the point of the mediation (apportioned 78%-22% (i.e. £140,000 Savings Advice and £40,000 Zinc Consumer)) and from the post settlement declaration (apportioned 72%-28% (£77,986 Savings Advice and £30,000 Zinc Consumer)). It was not imperative that there be an apportionment "down to the last penny" because the rating for each policy was the same and therefore the premiums, in aggregate, would be the same to the Defendant however they were apportioned.

Considering this, I therefore applied a notional 75%-25% apportionment between the Defendant's costs attributable to Savings Advice and Zinc Consumer.

27. My approximation also took into account the following factors:

a) The Defendant's own estimate of its total costs to trial was £400,000.

b) That the Defendant had incurred legal costs and disbursements with Lewis Silkin over a period of approximately three and a half years to settlement, from July 2012 to December 2015.

c) That in a letter dated 21 January 2013 Lewis Silkin's costs (excluding VAT) to that point were already £12,000 for the Savings Advice matter alone. It did not state its costs for the Zinc Consumer case at this point, but I assumed that they would have been at a similar level.

d) For the purposes of the proposed security for costs application the Defendant's total "unavoidable costs of and incidental to proceedings" were estimated by Lewis Silkin to be "in the region of £400,000" (excluding VAT).

e) The Claimant's own basic costs for the same period totalled £143,315.84 (excluding VAT).

f) The Claimant's paid disbursements, including Counsel's fees, for this period totalled at £59,090 (excluding VAT).

g) That the Defendant was likely to have been VAT registered and therefore in the event of a loss VAT would not have been claimed by the Defendants in their costs claims. VAT was therefore excluded from the approximation.

h) Burford's past experience of the level of the defendants' costs when defending litigation of this type and nature.

i) Burford's past experience of the levels of solicitors' costs on many tens of thousands of both won and lost cases.

28. In addition to the above factors I explain my considerations and analysis of the approximation of the likely and reasonable Opponent's Costs as follows. I looked at taking a proportion of the estimated total Defendant's costs and disbursements which was repeatedly estimated by Lewis Silkin at £400,000. I recognised the legal action had progressed for quite some time, but had not reached a CMC (which had been put back to allow exchange of some witness/expert witness evidence and for a mediation). I concluded the legal action might be a bit more than halfway through its course, so the Defendant's costs were likely to be more than £200,000, but probably less than £250,000. If the parties were perceived to be charging similar rates, I would automatically utilise the two-thirds guide widely used when comparing claimant's to defendant's costs. But it is clear in this case Lewis Silkin's costs would be much more than Steeles', due to their City location. But my approximation utilised

only £400 per hour (less than the City guideline rate), so 40% higher as against Steeles at an average of £250 per hour. So at settlement Steeles' base costs/disbursements included, 30% on top produced circa £290,000. This was then compared with the known figure of £180,000 as at May 2015 and I considered that £110,000 of incurred costs over seven months was unlikely and did not reflect the circa £200-£250,000 anticipated costs figure.

29. I then looked at applying the average monthly incurred costs/disbursements figure. £180,000 was said to have been incurred in the 34 months up to the mediation, which equated to £5,294 per month. Applying this to the actual 41 month duration of the case produced a total of £217,054 (£5,294 x 41). Allowing for the passage of a further seven months, this figure appeared to me to bear a reasonable relationship to the figure of £180,000 declared for the purposes of the mediation on 28 May 2015.

30. Taking all these into account, I made an approximation of total Opponent's Costs as at the date of settlement of £215,972 – apportioned £161,979 (75%) to Savings Advice and £53,993 (25%) to Zinc Consumer."

16. In a witness statement dated 17th October 2016 Mr Philip Edward John Foster at the Defendant's solicitor at paragraph 4 says this:

"4. I make this witness statement to deal with a number of points arising from the Claimants' evidence. I first refer to Mr Burbury's witness statement. From paragraph 25 to paragraph 30 Mr Burbury sets out in detail the process of calculation, he now says that he undertook to determine an "*approximation*" of my firm's costs because he considered the figure certified in Lewis Silkin's letter of 1 March 2016 (found at **Exhibit "PNB 8"**) in the sum of £107,986 to constitute a refusal to disclose our costs. Through the process he identifies Mr Burbury reached a figure of £217,054. He then says he made an approximation as at the date of settlement of £215,972, but he does not explain why one would round a precise figure of £217,054 down to an equally precise figure of £215,972.

9. There is no inconsistency between the figures in the inadmissible evidence and the costs certified by my firm on 1 March 2016 following inspection of our files by an independent costs draftsman. Apart from matters such as the inflation of our hourly rates by up to 65% (£242 up to £400) at the time of settlement of the proceedings there could be no costs payable in respect of the mediation because there had been no order for the payment of those costs.

The Mediation Agreement ……..."

17. In response the second witness statement of Mr Philip Nicholas Burbury dated 17th October 2016 at paragraph 4 states the following:

"My first statement details numerous factors which were taken into account when reaching the overall approximation of the total Opponent's Costs – as are detailed in paragraphs 25-30. With regard to the assertion regarding the "doubling" of £107,986, it will be noted that my calculation actually produced an estimated approximation of the Opponent's Costs of £217.054. This is the Insurer's approximation of the Defendant's total Opponent's Costs/disbursements (the lower figure marginally benefits the paying party)."

Submissions

Admissibility

18. Mr Kirby on behalf of the Defendant submitted that the evidence of Mr Philip Burbury in support of the calculation of the premiums and the explanation why the certificate provided by the Defendant's solicitors that was deemed to be a refusal to provide a certified statement of Opponent's Costs was inadmissible. Mr Burbury's evidence in arriving at an approximation of the Defendant's costs made use of various information including that provided to the Claimants for the purpose of mediation between the parties. The use by Mr Burbury of the information derived from documents within the mediation was contrary to the clear terms of the mediation agreement. The Claimants had no permission to divulge or refer to this privileged information and the Court should not permit that information to be used for the purpose of calculating the premium nor should the same be referred to in evidence. He further submitted that although the insurer (Burford) was not a party to the mediation, it could not ignore the fact that Mr Burbury was making a statement on behalf of the Claimants in relation to their costs. It was argued that even when the breach of confidentiality and privilege was pointed out to Mr Burbury he maintained his stance and did not pretend to be able to justify the figure or calculation of the premium without reference to the confidential information. Mr Kirby submitted that in those circumstances Mr Burbury's evidence should not be admissible and the consequences were that the Claimants could not demonstrate that the premiums they seek to recover were reasonable in amount. Furthermore Mr Burbury's conduct was such that it amounts to unreasonable conduct in the assessment proceedings, a consequence of which should be that the ATE premium elements of the Claimants' costs should not be allowed pursuant to CPR 44.11

The calculation of premiums

19. It was submitted that the letter dated 19th February 2016 from the Defendant's solicitors provided a detailed schedule of costs. That figure had been identified by a costs lawyer and was subsequently certified by a partner at the Defendant's firm making it quite clear that they had excluded solicitor and own client costs which could not have been claimed from the Claimants. Furthermore, it was clear from paragraph 9 of Mr Foster's witness statement that the costs incurred in respect of the mediation had been excluded by reason of the wording of the Mediation Agreement. Neither the Claimants nor Defendants were entitled to claim any costs in connection with the mediation in the absence of a Court order. The action settled some seven months after the mediation and no such order had been made. It was submitted that the certificate provided by the Defendant's solicitors should not be lightly disregarded and that the allegation made by Mr Burbury that the Defendant "*hired costs lawyers on a brief deliberately to limit their costs*" is a serious allegation with no evidential basis. As a secondary argument it was submitted that even if Burford had been entitled to make their own approximation using the best information available there had to be a rational and reasonable procedure in order to reach that approximation. In that regard Mr Burbury had provided no detailed explanation as to how he arrived at his particular approximation. The figure of £215,972 was a precise figure albeit that the calculation he used resulted in yet another equally precise figure of £217,054 with no explanation why the approximation was £1,082 less than the calculation. It was submitted that the approximation used by Mr Burbury was exactly double the figure certified by the Defendant's solicitors. His evidence was self contradictory and could not be relied upon. The Defendant's solicitor had given an estimated figure of £400,000 for the costs of the action as a whole. It was submitted that it was wholly unreasonable to suggest that more than half of that sum would be a reasonable approximation of the costs incurred following the close of pleadings before

the action had even reached the stage of a Case Management Conference, disclosure, exchange of witness statements and the like.

Proportionality

20. The total costs claimed in the Claimants' bill were £587,738.56 in respect of claims that settled at an early stage for a total sum of £400,000 were, it was submitted, disproportionate. The Claimants' costs and disbursements had been agreed at £218,500 but even that reduced total when including the ATE premiums total £474,463.88 rendered them wholly disproportionate. It was submitted on behalf of the Defendant that the proportionality test referred to in CPR 44.3(5) should be applied to the costs in this case on a global basis and that the ATE premium should not be considered separately from the base costs agreed by the parties. It was argued that no further sum should be allowed other than that agreed between the parties or alternatively only such sum in respect of the ATE premiums as is proportionate to both the early stage at which the claims settled and the amount for which the claims settled in any event.

Claimant

Admissibility

21. Mr Williams for the Claimants submitted that the Mediation Agreement referred to the documents relating to mediation being without prejudice. He argued that '*without prejudice privilege'* exists to protect the disclosure of admissions or concessions made in negotiations not to protect statements of pure fact. He submitted that the relevant statement of the Defendant's costs was just such a statement of pure fact and nothing more. This distinction was recognised in Clause 16(d) of the Mediation Agreement. Furthermore the separate obligation of confidence imposed by Clause 16 was irrelevant. He submitted that if the obligation of confidence is broken it may give rise to a remedy in other proceedings but cannot be used to suppress relevant information in this assessment. The use of confidential information is in any event permitted for the purposes connected to the mediation. The whole purpose in this case of the mediation was to achieve settlement. Costs information given in mediation was admissible in order to work out the consequence of any subsequent agreement. In support of this submission the costs information referred to during the mediation was specifically headed '*without prejudice save as to costs'* demonstrating its admissibility for that purpose. Also '*without prejudice privilege'* cannot protect impropriety. Here, the Defendant stated in May 2015 that its costs referable to SAL alone were £155,000 (reduced shortly thereafter to £140,000). It then stated in the certificate referred to in paragraph 13 that they were just £107,986. This strongly suggests that the figures had been manipulated in a self serving way and called for an explanation.

The calculation of the premium

22. Mr Williams submitted that as the Defendant had asserted their costs were £107,986, it was open for Burford to perform its own estimate resulting in the figure of £215,972. The policy did not oblige the Claimants to accept the Defendant's figure. The key point was the index figure of "*the total costs the Opponent may have sought to recover*". He argued that this was not the figure which the Defendant had supplied. The Defendant's solicitor's calculation was based on undisclosed assumptions by a costs lawyer and not the figure the Defendant would have claimed had it won, but the amount it thought it might recover on standard basis assumptions. He submitted that this was not what the Pursuit policy provided for and was contrary to Burford's established premium model.

Proportionality

23. For the Claimants it was submitted that although the settlement was £400,000 the key figure to determine proportionality was the realistic value of the claim which had been pleaded in the region of £1,000,000. The settlement achieved of £400,000 discounted for the risks of litigation. The liability to pay the Pursuit premium was incurred in January 2013, as such, it pre-dated the change to the Civil Procedure Rules which occurred on 1st April 2013 and thus the effect of CPR 48.1 was to preserve the pre-LASPO costs regime in respect of those premiums. It was argued that in those circumstances a premium is proportionate if it bears a reasonable relationship to the risk the insurer faced and cannot be disproportionate if the insured needed to incur it.

Discussion

Admissibility of evidence

24. The first question that I have to decide is the admissibility of the evidence of Mr Philip Burbury in support of the calculation of the premiums including information that was provided to the Claimants for the purposes of the mediation between the parties. Were I to rule his evidence inadmissible, it would have a significant impact on the calculation of the multiplicand relating to the Opponent's Costs.

25. Clause 15 of the Mediation Agreement signed by the parties on 29th May 2015 makes clear that "*all documents or other material produced for or brought into existence for the mediation will be subject to without prejudice or negotiation privilege ... not be disclosable in any litigation or arbitration connected with the dispute so long as and to the extent that such privilege applies*". The Defendant's solicitors made clear their objection to the Claimants, and Mr Burford making use of privileged and confidential information in their letter dated 1st March 2016.

26. Ramsey J in *Farm Assist Limited – v – Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 (TCC) at paragraph 44 stated:

> "Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principle in relation to mediation is generally as follows:
>
> (1) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
>
> (2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
>
> (3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

27. The fact that Mr Burbury states as he does in his second witness statement at paragraph 2 that Burford who was not a party to the Mediation Agreement cannot simply disregard information which suggests that the costs figures advanced by the Defendants were a

distortion is, in my judgment, immaterial. In making that statement Mr Burbury ignores the fact that he is acting on behalf of the Claimants in their claim for costs. As such, absent waiver of privilege it was argued that the Claimants could not avoid their obligations of confidentiality and the privilege residing in the information and disclosure of that information is in breach of the Mediation Agreement irrespective of whether it is a third party making a statement in support of the Claimants' costs.

28. I find as a fact that the information relied on by Mr Burbury and contained in the exchange of emails referred to in paragraphs 9-10, were documents produced for or brought into existence in relation to the proposed mediation. I also find as a fact that the statements referred to in the exchange of emails relating to the extent of the Defendant's costs were purely factual.

29. In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent's costs. The amount of the costs of litigation condition any subsequent negotiations or mediation that may follow. Documents that are brought into existence for the purpose of a mediation or settlement in order to settle the substantive claim should in my judgment be treated as inadmissible in any subsequent litigation in accordance with the judgment of Ramsey J in *Farm*. It seems to me that "without prejudice privilege" exists to protect the disclosure of admissions or concessions made in negotiations, not to protect statements of pure fact. There is no suggestion in this case by the Defendant that Burford was supplied with the cost information in breach of contract. It is important to separate out the obligation of confidence from privilege. If the obligation of confidence is broken it may give rise to a remedy in other proceedings. However in my judgment it cannot be used to suppress relevant information in an assessment relating to the costs of the substantive claim. Use of confidential information for the purposes connected with the Mediation is permitted by virtue of Clause 16(d) of the Mediation Agreement. The documents referred to in the emails in paragraphs 9-10 headed "without prejudice save as to costs" illustrate in my judgment their admissibility for that purpose. It follows that the statement relating to the Defendant's costs referred to in the email correspondence was a statement of pure fact and not protected by "without prejudice privilege". I am reinforced in that view by Clause 16(d) of the Mediation Agreement which states:

> "(d) That no notes taken by the parties …… (provided that if they would otherwise and independently of the Mediation have been admissible in such proceedings they should not be rendered inadmissible by reason of having been made due in the course of the mediation)."

30. The whole purpose of the mediation was to achieve a settlement. In those circumstances any costs information given in mediation is and must be admissible in order to work out the consequence of any subsequent settlement. In that sense in my judgment, costs information in the form of statements of facts can be separated out from documents or other information that comes into the domain of either party for the purposes of negotiating a settlement of the substantive claim.

31. For those reasons I am satisfied that the evidence of Mr Burbury in both his first and second witness statements is admissible for the purposes of this assessment.

The calculations of the premiums

32. It is common ground that the basic methodology for fixing the premiums in this case and the multiplier set at 90.196% of the sum insured excluding the premium itself, was not disputed. Accordingly this is not a case where it can be said that the insurers have overstated the risk

that they face nor claimed excessive overheads, profits or brokerage. The argument centres on whether Burford were contractually liable to approximate 'Opponent's Costs' and if so whether that approximation was flawed.

33. I was told during the course of the assessment that the Defendant's solicitor had a copy of the Pursuit policy and would therefore be well aware of the definition of 'Opponent's Costs' and in particular the following wording:

> "The figures used for the calculation of the premium in respect of the Opponent's Costs shall be the total costs the opponent *may have sought to recover under an order for costs*." [my italics]

34. The calculation of premiums in relation to Pursuit policies rely on the parties communicating with each other and providing information concerning the level of their costs. The policy wording deals with this issue in the following way:

> "In the event that the opponent refuses to provide us with the value of the Opponent's Costs then for the purposes of the calculation of the premium we reserve the right to make an approximation as to the quantum of the Opponent's Costs using the best information available."

35. The relevant costs information as supplied by the Defendant was initially contained in two emails to which I have referred to on 28th May 2015, timed respectively at 14:44 and 17:14. They provide details of the Defendant's costs up to and including the mediation which were referable to SAL alone at £155,000 (approximately) with an overall cost to trial of £400,000. That figure was revised downwards some two hours later to £140,000 (excluding VAT). To my mind that must mean that in the intervening two hours the Defendant's solicitors put some thought into the level of their costs. The statements made in those emails are bald figures. They simply refer to "*our client's costs*". They do not refer to costs specifically by reference to the Pursuit policy or make reference to whether any of those costs were solicitor and own client costs as opposed to those recoverable in the course of litigation.

36. Post settlement there is further correspondence with regard to the costs on the basis that the Claimants' solicitors now require formal details of the Defendant's costs to calculate the premium in accordance with the policy terms. Those costs are set out in the schedule referred to in paragraph 13. That schedule was subsequently certified by a partner at Lewis Silkin in the following form:

> "I certify that the figures stated above represent our best assessment of the adverse costs to which the Claimants were potentially exposed."

That schedule records that the total costs in relation to both SAL and Zinc including profit costs, Counsel's fees and other disbursements totalled £107,986.

37. Mr Foster in his witness statement at paragraph 9 makes it clear that the difference between the costs referred to in the emails of 28th May 2015 and the schedule of costs in February 2016 was that the costs incurred in respect of the mediation had been excluded by reason of the wording of the Mediation Agreement. Neither the Claimants nor the Defendant were entitled to claim any costs in connection with the Mediation in the absence of a Court order. The action had settled some seven months after the mediation and no such order had been made. It was said by the Claimants that the Defendant's solicitors had refused to provide the Claimants' solicitors with the real extent of their costs. The Defendant claimed that the Claimant and Burford may have disagreed with the figure but one had been provided and

furthermore certified. As a consequence the primary submission of the Defendant was that Burford had no basis for making their own approximation of the Defendant's costs.

38. The Claimants' submitted that this disparity between the level of the Defendant's costs calls for an explanation. I agree. Absent a cogent explanation in my judgment it seems to me that it is entirely appropriate for Burford, the insurer, to exercise the term in their policy to make an approximation of the quantum of the Defendants costs using the best information available. That approximation has of course got to be a reasonable and rational one.

39. The onus here was on the Defendant's solicitors to provide as the Claimants' Pursuit policy set out '*the total cost the opponent may have sought to recover under an order for costs or other entitlement to costs'*. There is a danger it seems to me where reliance is placed on the losing party to provide evidence as to their costs to the winning party in order to calculate the premium for an ATE policy that a self-serving estimate of costs is given. In my judgment the evidence in this case points to that being the situation here. It is clear from the letter from the Defendant's solicitors dated 1st March 2016 that they had obtained the assistance of a costs lawyer who detailed their '*actual costs'* which it was said were synonymous with the actual exposure of the Defendant. In other words the reasonable and proportionate costs that are recoverable on an interparty basis. The letter makes it clear that any solicitor and own client costs had been disregarded and on the evidence of Mr Foster the costs of Mediation. In my mind costs calculated on this basis are flawed when set against the costs that the opponent may have sought to recover under an order for costs or other entitlement to costs. For example, the costs of mediation may have included substantial costs that may have related to the main action in any event and not simply relate to the actual mediation process itself. The matter could have been put beyond doubt by a witness statement from the Defendant's costs lawyer setting out the assumptions and the basis on which he had arrived at the bald figures contained in the Schedule of Defendant's Costs set out in paragraph 13. Similarly the Defendant could have exhibited redacted interim bills of costs submitted to their clients in relation to the matter and/or other documentation to demonstrate how the exact calculation of £107,986 was arrived at. Furthermore, the fact that a partner of the Defendant's solicitors firm has certified that schedule does not assist. Providing as the certificate does '*our best assessment of the adverse costs to which the Claimants were potentially exposed'* is to my mind somewhat different from the provisions of the Pursuit policy which would have been available and known to the Defendant, namely the costs *'the opponent may have sought to recover under an order for costs or other entitlement to costs'*.

40. For those reasons I prefer the submissions of the Claimants to those of the Defendant and, accordingly, Burford were entitled in my judgment to make their own approximation of the Defendant's costs.

41. So far as the approximation is concerned, I accept the Defendant's submission that this has to be a rational and reasonable procedure. Mr Burbury in paragraph 25-30 details how he carried out his approximation and the documents that he used to calculate the premiums due in relation to the two policies. In particular at paragraph 27 he took into account nine specific factors. At paragraph 28 he analyses the Defendant's overall costs, their hourly rate and in paragraph 29-30 explains how he arrives at his approximation of the total costs at the date of settlement and his apportionment between SAL and Zinc.

42. The Defendant's principal objection referred to by Mr Foster at paragraph 5 of his witness statement is that the approximation used by Mr Burbury was exactly double the figure certified by the Defendant. When taken with his second witness statement his evidence is self contradictory and gives no explanation for the fact that the precise figure he has chosen

for his approximation is exactly double the certified figure. Also the assertion that the action was more than half way through its course was extraordinary bearing in mind the matter had not got beyond the pleading stage. When set against the Defendant's overall costs of £400,000 to trial, it was wholly unreasonable to suggest that more than half of that sum would be a reasonable approximation of the costs incurred following the close of pleadings but before any other step in the proceedings had taken place.

43. I reject the argument that the approximation used by Mr Burbury was exactly double the figure certified by the Defendant's solicitors. The Defendant had every opportunity to put in witness evidence to counter the careful analysis of Mr Burbury set out in paragraphs 25-30 of his first witness statement but chose not to do so. Their argument that he has simply doubled their costs as certified in their schedule is to my mind over simplistic. Mr Burbury in my judgment has carried out a careful analysis of the Defendant's costs in this case and has come up with an approximation, purely that and no more. To my mind it is cogent, rational and has been carried out in an ordered way with the information available to him. I am satisfied that his witness statement deposes and provides sufficient evidence as to how the premiums were calculated and for those reasons I do not intend to interfere with his approximation.

Proportionality

44. The Defendant claims that the Claimants' costs and disbursements agreed at £218,500 together with the ATE premiums giving a total of £474,463.88 are wholly disproportionate.

45. It is common ground that the ATE policies were incepted prior to 1st April 2013. Accordingly the provisions of section 46(3) Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) apply:

> "**46 Recovery of insurance premiums by way of costs**
>
> (3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force."

46. The transitional provisions in relation to recovery of pre-1st April 2013 ATE premiums are to be found at CPR 48.1 and its associated Practice Direction which at paragraph 1.2 states:

> "Sections 44(6) and 46(3) of the 2012 Act makes saving provisions to the effect respectively these changes do not apply so as to prevent a costs order including such provision where the conditional fee agreement in relation to the proceedings was entered into (or in relation to a collected fee agreement services were provided to a party under the agreement) or the costs insurance policy in relation to the proceedings taken out before the date on which the changes come into force."

47. After the hearing of this matter but before delivery of judgment Master Rowley handed down judgment in the case of *King v Basildon and Thurrock University Hospitals NHS Foundation Trust* on the 30th November 2016 which concerned funding arrangements entered into before 1 April 2013. He decided that base costs should not be aggregated with additional liabilities for the purpose of determining proportionality. He found that proportionality should be dealt with under the old rules in particular CPR 44.4(2) and the

guidance in Costs Practice Direction Section 11(as it then was). I adopt his reasoning in particular the following paragraphs:

> "20. In my view, the reforms arising from the reports of Sir Rupert Jackson, enshrined in LASPO 2012 and the recasting of CPR as of April 2013, sought to produce a completely new regime from that date. No longer would success fees and ATE premiums be recoverable from the opponent save for very limited cases such as in BNM itself. Costs incurred by the parties would be subject to the more stringent proportionality test and elsewhere in the rules, cases would be subject prospective cost control through budgeting. Part 48 sought to preserve, as if in aspic, the pre-April 2013 regime for cases which had begun before that date until such cases concluded.
>
> 26. Furthermore, the purpose of the Jackson reforms in initiating sea change could have resulted in Parliament disallowing the recoverability of success fees and ATE premiums from 1 April 2013. But it did not do so and has allowed the run off of recoverable success fees and premiums in the main and the continued recovery of success fees or premiums in particular instances. It seems to me that the fact that additional liabilities are still allowed for by the provisions of CPR Rule 48.1 simply means that they remain in existence. It does not mean that they have to be assessed in aggregate with the base fees using a test which has no recognition of additional liabilities. This is particularly so when aggregation will render those additional liabilities effectively irrecoverable in practice."

48. Accordingly in my judgment the law relating to the recovery of insurance premiums is governed by the pre-April 2013 costs rules and costs practice directions will continue to apply. Consequently I must assess proportionality on the basis of the law as it applied prior to 1st April 2013.

49. In *Home Office –v– Lownds* [2002] EWCA Civ 365 Lord Woolf CJ (as he then was) said this:

> "39. Turning to the specific points of principle …
>
> Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus
>
> (i) The proportionality of the costs incurred by the Claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim."

50. In *Rogers –v– Merthyr Tydfil CBC* [2006] EWCA Civ 1134 it was said that the approach to be adopted was that a premium is proportionate if it bears a reasonable relationship to the risk that the insurer faced and cannot be disproportionate if the insured needed to incur it. Brook LJ (as he then was) said this:

> *21. Evidence justifying the ATE premium claimed*

> 117. If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District Judges and Costs Judges do not, as Lord Hoffman observed in *Callery v Gray (Nos 1 and 2)* [2002] 1 WLR 2000, para 44, have the expertise to judge the reasonableness of a premium expect in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges."

51. In this case I have been provided with no evidence from the Defendant with regard to any alternative policies or levels of premium. Based on the test in *Lownds* where, as was the case here, the Claimant's pleaded case was significantly greater than the sum recovered of £400,000. There is no evidence before me for me to come to the conclusion that based on the law as it stood prior to 1st April 2013 that the premiums sought to be recovered in relation to both SAL and Zinc of £255,963.88 are disproportionate.

52. If I am wrong in relation to the test of proportionality to be applied in this case I will deal with the submissions made by Mr Kirby on behalf of the Defendant that the new test of proportionality pursuant to Part 44.3(5) applies. That test states:

> "(5) Costs incurred are proportionate if they bear a reasonable relationship to:
>
> a) the sums in issue in the proceedings;
>
> b) the value of any non-monetary relief in issue in the proceedings;
>
> c) the complexity of the litigation;
>
> d) any additional work generated by the conduct of the paying party; and
>
> e) any wider fact involved in the proceedings such as reputation or public importance."

53. Furthermore rule 44.3(2) also states:

> "(2) where the amount of costs is to be assessed on the standard basis the court will:
>
> a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred;
>
> b) resolve any doubt… in favour of the paying party."

54. The Defendant submitted that I should follow the judgment of the Senior Cost Judge in *BNM –v– MGN Ltd* 2016 Costs LO441 in which the Claimant recovered agreed damages of

£20,000, the Defendant undertaking not to use or disclose confidential information. Detailed assessment costs of £241,817 had been sought in the Claimants' bill. Following a line by line assessment the reasonable and necessary costs to be allowed were £167,389.45. However, those costs had all been incurred post 1st April 2013 and CPR 44.3 in force on that date applied. The Senior Cost Judge ruled that the test of proportionality applied both to additional liabilities as well as to base costs. Given that the sum in issue in the proceedings was always going to be modest, the non-monetary relief not substantial and absent wider factors involved in the proceedings, the assessed costs were disproportionate and he allowed the sum of £83,964.80. At paragraph 30 of the judgment he said this:

> "30. The old test of proportionality applied to additional liabilities but rarely had an impact on assessment. If the base costs were reasonable and necessary the reasonable success fee would also be necessary. An After the Event insurance premium, if reasonable, would rarely not be necessary; although greater enthusiasm developed for disallowing disproportionate or unreasonable premiums;…
>
> 31. A consequence of the reduction of the base costs to a proportionate figure will be that the success fee a percentage of those base costs also reduces. It would be absurd and unworkable to apply the new test of proportionality to the base costs but the old test of proportionality to the success fee.
>
> 32. Ring-fencing and excluding additional liabilities from the new test of proportionality would be a significant hindrance on the court's ability to comply with its obligation under CPR 44.3(2)(a) to allow only those costs which are proportionate."

55. It seems to me that I can distinguish the case of *BNM* on the facts of the present case. In this instance I did not have the luxury of assessing on a line by line basis the Claimants' costs. It has been left to me simply to determine the issue of what is recoverable in respect of the ATE premiums. The parties themselves have agreed the costs and I have been provided with no evidence upon the basis of which the agreed sum of £218,500 was arrived at. It may be that had I dealt with the detailed assessment of the Claimants' costs I may have concluded that the sum of £218,500 was in itself disproportionate irrespective of my findings in relation to the ATE premiums. In those circumstances it seems to me that it is difficult if not impossible for me to deal with the issue of proportionality on a piecemeal basis. Simply to say that costs of £218,500, agreed by the parties, coupled with a premium of £200,000 in respect of an ATE premium is globally disproportionate, is both unfair and unjust to the receiving party. To my mind it smacks of double jeopardy in the sense that the Claimant has already agreed his costs, save for the ATE premiums which both parties in the absence of any evidence to the contrary may have considered to be entirely proportionate. That being the case I do not intend to follow the judgment in *BNM*. Consequently applying the proportionality of the ATE premiums of £255,963.88 solely in the light of the factors contained in CPR 44.3(5) and not globally with the costs already agreed the relevant factors in this case would appear to be:

> "44.3(5)
>
> (a) the sums in issue in the proceedings and
>
> (c) the complexity of the litigation"

The remaining three factors appear not to be relevant in the context of this case. I have already referred to the fact that the sums in issue in the proceedings do not equate to what

was recovered. The sum claimed was considerably in excess of what was recovered and I must bear that in mind. Secondly, whilst I have not seen the Claimants full file of papers I have been provided with a copy of the Bill of Costs, together with Points of Dispute and Replies. To my mind this was complex commercial litigation. The fact that it settled relatively early in the course of proceedings does not allow me the luxury of using hindsight in determining whether it was appropriate for the Claimants to take out the ATE policies they did. Applying the new test of proportionality to the ATE premiums sought I have formed the conclusion that the premium for both SAL and Zinc, totalling £255,963.88 is not disproportionate.

56. Accordingly, I allow ATE premiums of £181,537.86 in respect of SAL and £74,426.02 in respect of Zinc.

57. At the hearing on 21st October 2016 I did not hear argument from either party as to the incidence or quantum of the costs of assessment and give permission for either party to seek further directions consequent upon this judgment.
