Is it acceptable to transfer the method of funding from Public to under a CFA?

Whilst the recovery of additional items was abolished for most claims post April 2013 we still see very many matters where the agreements pre-date the shut off point and the issues remain relevant.

The Defendant would argue that it was unreasonable to switch as this meant that additional liabilities would be claimed against them – success fees and often a significant premium for ATE. The Defendant began to argue that by switching the claimant lost out on the 10% uplift on damages.

On three separate occasions Costs Judges found the arguments compelling resulting in the disallowance of the additional liabilities on assessment.

The three cases – **Kai Surrey, AH and Yesil** – all involved medical negligence victims who were switched from legal aid to conditional fee agreements shortly before 1 April 2013, when LASPO restricted the right to recover success fees and after-the-event (ATE) insurance premiums.

On appeal Mr Justice Foskett, sitting with the Senior Costs Judge Master Gordon-Saker as assessor, was clear that he wanted to avoid a return to the "bad old days" of the costs wars in the early 2000s, and ruled that in each case staying on legal aid and claiming the 10% would only have achieved a marginal gain.

Foskett J ruled that while the 10% issue should have been mentioned to the litigation friends in each case, "the failure to do so should, save in very exceptional cases, be a matter for discussion and consideration between the claimant and/or his litigation friend and the solicitors: it is not a matter that should be of concern to the paying party".

He said that each of the costs judges involved – Master Rowley, Deputy Master Campbell and District Judge Besford, a regional costs judge – paid too much attention to the Supreme Court ruling over informed consent to medical treatment, ***Montgomery v Lanarkshire Health Board***, and by analogy the extent to which a reasonable litigation friend would attach significance to the 10% uplift.

Further, he noted that had the claimants signed up to a CFA-Lite from the outset, there would have been no complaint from the defendants – so why should "changing to a CFA-Lite at some stage down the line be any different?" Also, had Parliament wanted to prevent solicitors from switching in this way, it could have included some kind of 'anti-avoidance' provision in LASPO.

Foskett J ruled that the 10% must be considered in relative, rather than absolute, terms: "A costs judge is perfectly entitled, possibly using his or her experience of other cases or their experience from days in practice, to ask and, in most cases, answer the question of whether the omission to refer to the 10% uplift would have made any difference to a reasonable claimant or his litigation friend in the circumstances prevailing in that case without receiving evidence on the issue.

"However, this question should be seen from the perspective of asking whether a reasonable claimant or reasonable litigation friend, in the circumstances prevailing in the case, would see the possibility of obtaining X +10% of X rather than X in the context of the overall global settlement [his emphasis] as a matter that would prevent the change to a CFA.

"In Surrey, taking £19,000 as the value of the 10% uplift and the capitalised value of the settlement as £7,165,255, the question is whether a reasonable claimant or litigation friend in that situation would hold out for obtaining an increase of 0.026% of that sum rather than to have the uncertainty of the possible effect of the statutory charge, the possible effect of part 36 offer and possible delays that might be overcome by being answerable to an insurer rather than the LSC.

"Whilst it would be possible to try to quantify those matters, the reality is that a solicitor would almost certainly put them forward in a broad way and invite the claimant or the litigation friend to approach the issue accordingly.

"When looked at in that way, I do not believe that any reasonable claimant or litigation friend would hold out for such a marginal improvement on the overall settlement. In Yesil the percentage increase would be just under 0.4% (taking £24,000 as the 10% uplift). In AH it would be somewhat higher at 5%.

"However, that case was, as I have said, extremely tragic and I cannot believe that the claimant's litigation friend would have wanted anything other than a quick and simple resolution and would not have seen an additional £17,500 as worth pursuing."

The judge emphasised "the need to ensure that detailed assessments of costs do not become an arena for a wide-ranging inquiry into the decision-making processes as between the claimant (usually, through his or her litigation friend) and his or her solicitors…

"Without sacrificing entirely the possibility of a proper challenge to a changed funding arrangement that is demonstrably improper or seriously prejudicial to a defendant for no good reason, any return to such [cost war] days must be resisted strongly."

Foskett J laid out a four-step procedure for dealing with cases where the 10% issue is live: stating in the bill whether advice was given; the court only going behind this if there is a "genuine issue" as to whether this is accurate, to be resolved by production of either the claimant's solicitor's attendance note or a short witness statement from the solicitor; where the advice was not given the argument over reasonableness must be raised in the points of dispute; and finally the costs judge should try and reach a decision based on the arguments raised in the points of dispute and replies without any need for further evidence.

In 2 of the 3 cases (***Surrey and AH***) the Judges had stated that had the premiums not been disallowed significant reductions would have been made to the premiums for ATE - £50 odd thousand reduced to a shade under £32 thousand and one close to £19,000 reduced to £15,000

The costs judge's decision regarding ATE in Kai Surrey?

Master Rowley in the SCCO [2015] EWHC B16 (Costs) ruled that ATE block cover of £500k was excessive and a more appropriate amount was £250k. Applying a ruling of RCJ Ian Besford in ***Finney v Department of Health*** (unreported – 4 February 2015) which was on all fours on this point, the Costs Judge reduced the amount of ATE premium recoverable by 37% to £31,800.

The costs judge's decision regarding ATE in *AH?*

Deputy Master Campbell in the SCCO [2016] EWHC B3 (Costs) ruled that no ATE premium was recoverable because it was not an objectively reasonable choice for the receiving party to switch from legal aid funding as she would be giving up her right to a £17,500 *Simmons v Castle* uplift.

However the Master noted that the receiving party had legal aid protection for 3 years and that the ATE premium should be reduced to reflect that. He ruled that an ATE limit of cover of £500,000 was too high.

On this basis he ruled that even if the ATE premium was recoverable he would have reduced it by 20% to £15,000.

The Claimants sought to uphold the ATE premiums by reference to the well-known 2006 Court of Appeal ruling in *Rogers v Merthyr Tydfil* CBC [2006] EWCA Civ 1134 where Lord Justice Brooke considered that Judges/Costs Judges did not have:

"the expertise to judge the reasonableness of a premium except 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.'

Accepting that costs judges do have the necessary experience of ATE premiums and that matters had moved on in the 10 years since Rogers, the judge ruled:

"*the application of any broad brush must not be a capricious exercise, but the experience gained by Costs Judges over the years must, if they are to retain the ability to engage in a robust analysis of competing arguments at costs assessment hearings, be permitted to enter the arena*.'

He labelled the £500k of ATE cover in *Kai Surrey* as '*disproportionate*' and agreed that:

There was ample scope for an adjustment and Master Rowley used his own experience and that offered in the case of Finney to arrive at what he considered an appropriate recovery. I would not interfere with that assessment.'

Foskett J accordingly upheld the 37% ATE premium reduction in *Kai Surrey*.

As to *AH*, Foskett J said: '*On that basis it is arguable that there was less justification for intervention than in Surrey, but it would not be right for me to interfere simply because others might have reached a different conclusion. The decision was made by an experienced Costs Judge who will have a much better "feel" for this matters than a judge who deals with this kind of issue intermittently*.'

So whilst Foskett J over-ruled the judge below on the ATE recoverability issue, he did agree with him that the ATE premium must be reduced by 20% in *AH*.

At the time of these appeals an unrelated appeal was before HHJ Walden-Smith in Central London County Court with DJ Lethem as assessor - *Banks v London Borough of Hillingdon* (unreported) who had been asked to consider the issue of a premium reduced on assessment by some 60%.

An ATE policy was taken out with DAS Legal Expenses with a premium of £24,694.25 in what was referred to as a very routine 'tripping and slipping' case. The most the adverse costs would be £17k. The case went to a 1 day fast track trial and damages of only £6890 were awarded. The paying party challenged the ATE premium as disproportionate.

On a paper assessment Master Gordon-Saker (sitting as a deputy district judge of the county court) reduced the ATE premium by 60% to £9,375. This figure was upheld at an oral hearing before him with evidence from the ATE insurer on premium calculation not persuading him to change his mind.

The paying party were unable to provide any evidence in support of the challenge to the premium and the judge found that the fact that an ATE premium was large compared to damages did not necessarily mean the premium was disproportionate.

It may be recalled that *Kris Motor Spares* heard by Judge Simon, included the view that where an issue was raised as to the size of a premium there was "*an evidential burden on the Paying Party to advance at least some material in support of the contention that the premium was unreasonable*" adding "*challenges must be resolved on the basis of evidence and analysis, rather than by assertion and counter-assertion*".

Judge Walden-Smith overruling the Senior Costs judge said it was not for him to re-calculate the premium as he was without access to the whole basket of risk. She also added:

*'The fact that a party has the benefit of a staged ATE insurance premium does not mean that the court is prohibited from intervening and determining the reasonableness of the costs of such instances however, as is clear from the judgment of Simon J …… it is necessary for there to be some evidence upon which the District Judge or Master can rely**.'***

The appeals were allowed in each case save that the sums allowed by way of recovery in respect of the ATE premiums in *Surrey* and *AH* will be in the sums the respective Costs Judges said they would have allowed had recovery in principle been permitted.

In summary switching funding is permitted but an explanation must be provided – Premiums can be recovered subject to reasonableness.

Sanctions for failing to comply with Court directions or orders continue to be the subject of appeals

Clearway Drainage Systems v Miles Smith- June 2016,

The Court declined to grant relief from sanction where a solicitor had served his statement two months late. Whilst the court agreed that the late service had not imperilled the trial date or caused any particular prejudice – late service a month before the trial should be viewed as serious of significant as it affected the efficient progress of the litigation. The test was broader than whether the trial date could be kept. In addition there was no good reason for the breach the claimant's solicitor had referred to a number of urgent matters requiring his attention however the court

considered he should have ensured that the statement was dealt with as a priority notwithstanding his other commitments.

The Court noted there was delay in applying for relief; the solicitor could have applied at a pre trial review held on 26 May but did not until 9 June which was less than 3 clear days before the adjourned hearing was to be held 14 June which in of itself was a breach.

Finding the claimant had done nothing wrong but that its representative had chosen to ignore the rules and had caused disruption and expense the application for relief was refused.

Suriaya Jamadar v Bradford Teaching Hospitals

The Claimant received negligent treatment that led to the amputation of one of his legs; proceedings were issued, the Trust denied liability and the Court sent the parties the N149C: Notice of proposed allocation to the multi-track.

Shortly afterwards the Trust admitted liability and a Judge revoked the form and entered judgment for liability with damages to be assessed.

The parties received notice for a case management conference and the Defendant provided its costs budget but despite requests the claimant did not produce a budget therefore at the CMC the district judge gave directions which included provision for 5 experts for each party leading towards a five-day trial on quantum. The Defendant's budget was approved and in light of the Claimant's failure to provide a budget his recoverable costs were to be limited to court fees the DJ finding the facts of the case to be so factually close to *Mitchell* that he was bound to follow it.

The Claimant applied unsuccessfully to vary that order or for relief from sanctions. His appeal was refused by a circuit judge who held that the case was self evidently a multi-track case to which R 3.13 applied and with reference to both *Mitchell* and *Denton* concluded that the judge had been correct to refuse to grant relief from sanction.

The matter came before the Court of Appeal (Lord Justices Jackson and Lindblom) in July 2016.

It was held that the order revoking form N149C had been made because liability was no longer defended however the case was self-evidently a multi-track case with an extensive list of experts and quantum in the region of £3million – the fact that it was quantum only did not take it out of the costs management regime. Quantum trials could be very expensive particularly one with 5 experts for each party. The automatic sanction in Rule 13.4 came into operation. The Circuit Judge had been right to uphold the District Judge's decision however the DJ had been wrong to find that this case was factually close to *Mitchell* that he was bound to follow it as that was the wrong approach however the COA was satisfied that the Circuit Judge had properly applied the three part test in Denton –there was clearly a serious breach which would have resulted in there having to be a further CMC, which would be costly and demanding of court time; both the DJ and the Circuit Judge had rejected the application in strong terms the reasons provided for the breach and the instant court would not overturn their assessment; whilst accepting other judges may have been more lenient the Circuit Judge's decision was within the ambit of his discretion therefore the appeal was dismissed.

Various Claimants v MGN Ltd

As Recently as 9 November this year Senior Costs Judge Master Gordon-Saker was required to consider an application for relief from sanctions brought on behalf of two (of a large number of) Claimants – Mr Yentob and Mrs Horlick in respect of their failure to serve Notice of Funding within proceedings.

For Mrs Horlick her solicitors had provided Notice of Funding for the ATE policy but they failed to provide Notice of Funding in respect of the CFA entered on 24 June 2014 with proceedings issued 13 August 2014 until 20 November 2014.

For Mrs Horlick it was argued that the Defendant was aware that all Claimants were pursuing the claims under CFAs.

Mr Yentob had entered into a CFA 30 September 2013; letter of claim sent 18 March 2014 however Notice of Funding was not given until 17 April 2014.

Pre-action conduct and protocols provide for notice to be given as soon as possible about a funding arrangement entered into before proceedings commenced.

In both cases sanction was automatic and could be disapplied only by an order of the court.

The Claimants' by their instructed QC, submitted that neither default was serious nor significant whilst accepting there was no good reason for either default; in the circumstances it was just to grant relief.

Master Gordon-Saker stated: "*These were specific rules which required a party who had entered into funding arrangements to give notice of those arrangements to the other party. The reason for that is obvious: the funding arrangements may well have a significant impact on the amount of that other party's liability for costs" adding ""These rules were well understood. Notice had to be given at the earliest opportunity if the arrangements were entered into before the start of proceedings and, otherwise, when proceedings were issued. It seems to me that a failure to give the required notice must always be serious and significant unless it is given within a very short time after the time at which it should be given; having regard to the requirements of the rules generally a failure to serve a document until one month or three months after it should have been served is not likely to be treated as insignificant, particularly where the rules provide for an automatic sanction for default. The failures to give notice in time would appear to have been the result of oversight and no good reason for the failures was advanced*."

He continued that the failures did not "*prevent the parties from conducting the litigation efficiently or at proportionate cost but nor would the interests of justice be imperilled if relief were not granted*".

The master considered the sanction proportionate to the breach. "*If relief is not granted, the solicitors would be denied success fees on the value of their work done over the one and three-month periods respectively. The claimants would still be entitled to their reasonable and proportionate base costs for work reasonably done over those periods. The sums lost are likely to be relatively insignificant; because of the failure to comply with the practice directions, court time and the parties'*

resources have been spent on an application to dis-apply the sanction. Accordingly the applications for relief from sanctions are refused."

Master Gordon-Saker was also asked to deal with other issues around success fees, ATE premiums and hourly rates.

On the latter, he had "*no hesitation in concluding that, in the present case, rates higher than the guideline rates were reasonable*". This was on several grounds: the damages were substantial being in many cases, "*significantly more than the previous highest award in a privacy case*"; the claims involved, he added "*some complexity and required specialist skill, not only because of the nature of the case but also because of the nature of the opponent; and, more than anything, because of the importance to the claimants; It seems to me that some of the rates claimed are nevertheless too high. Taking into account all of the circumstances and based on my experience of comparable (though not similar) cases, in my judgment a reasonable rate for a grade A fee-earner undertaking this work would be £400. For a grade B fee-earner, £280 would be reasonable; £230 would be reasonable for a grade C fee-earner and £140 would be reasonable for the grade D fee-earners*."

The issue of proportionality

After 1 April 2013 the relevant paragraphs of CPR 44.3 in force are:

Where the amount of costs is to be assessed on the standard basis the court will-

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

The court will resolve any doubt which it may have as to whether costs were reasonably and proportionality incurred or were reasonable of proportionate in amount in favour of the Paying Party

Therefore even if work undertaken was NECESSARY it may not be allowed; an advice from Counsel considered NECESSARY or report from an Expert necessary to the presentation of the claim may be struck out against the opponent.

Sir Rupert Jackson as part of his review of Civil Costs at a public seminar said in an assessment of costs on the standard basis proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis with the court first making an assessment of reasonable costs having regard to the individual items claimed in the bill and then stand back and consider if the total figure allowed is proportionate and if the total figure is not proportionate make a further reduction.

Quite recently Senior Costs Judge Master Gordon-Saker decided to grasp the nettle when undertaking an assessment of costs.

In *BNM v MGN Ltd* the Costs Judge undertook a detailed assessment in a matter involving a lost mobile phone containing private and personal information which was later found with certain information regarding a relationship between claimant and a footballer offered to a newspaper.

A claim ensued with the Claimant advised under a CFA with provision for a 100% success fee and ATE providing for £165,000 adverse costs and own disbursements.

The claimant sought and obtained an injunction, the Defendant made substantial admissions, provided an undertaking and agreed damages of £20,000.00

The Claimant's bill was submitted seeking £241,817 – this included a success fee of 60% for solicitors, 75%for Counsel and a premium of £58,000 plus IPT.

There was a lengthy issue in respect of the Defendant's argument that payment of additional liabilities would be incompatible with its rights to freedom of expression – the Costs Judge decided the additional liabilities were recoverable and by the end of day two the only issue was that of proportionality which the costs judge indicated would be dealt with on a line by line assessment and the matter was adjourned part heard to resume in April 2016.

Subject to Proportionality success fees were allowed at 33% (both Solicitors and Counsel) the ATE premium was allowed as claimed and the parties were able to agree base costs for solicitors at £46,321.00 which together with success fee and agreed disbursements meant the claimant's costs were £167,389.45

It was argued by the paying party that the costs were disproportionate and should be further reduced.

The Costs Judge concluded that the costs following the line by line assessment were disproportionate being "*twice the sum which would be proportionate*" and costs were further reduced to approximately £84,000.00 which included base profit costs of **£24,000.00** plus success fee.

In his judgment the Costs Judge stated that he had taken in to account that the matter was low value; non-monetary relief whilst not easy to quantify was not "*substantial*"; it was not a complex case (whilst accepting that a privacy case was more complex than the run of the mill); was one involving little additional work generated by the conduct of the Defendant and there were no "*wider factors*" involved. Given that the matter settled at a relatively early stage the Costs Judge stated that the allowance of £46,000 for solicitors base costs with £14,000 for counsel's base fees "*must be disproportionate*" being over 3 times the amount of agreed damages.

With regard to the ATE premium the Costs Judge considered this also to be disproportionate noting that had the matter proceeded to trial the same would have risen to £112,500 – the Costs Judge finding the premium did not "bear a reasonable relationship" to a claim that settled at £20,000.00 allowed half of the claim of £58,000 plus IPT.

Costs Judge Master Rowley also made a significant reduction to a claim for costs applying the test of proportionality; ***Brian May v Wavell Group Limited*** - involved a private/noise nuisance claim and resulted in the recovery of £25,000.00 damages prior to Defences being served.

The Claimant's bill came in at £208,236.54 – all work post dated 1 April 2013 thus the "new" test was to apply, there was no claim for additional liabilities.

An item by item assessment by the Costs Judge brought the bill down to £99,655.74

The Costs Judge summarised the matter as being a modest claim with £25,000.00 damages recovered with the modest prospect of an injunction early in the case; the case had no noteworthy

complexity; no additional costs by reason of the Defendant's conduct and there were no wider factors to be considered therefore his allowance of £99,655.74 was "*undoubtedly disproportionate*".

Standing back the Costs Judge arrived at a figure of £35,000.00 plus VAT

Both decisions are to be the subject of consideration by the Court of Appeal later this year.

Other cases that may be of interest:

Group Seven Ltd & Ors v Notable services & Ors

The court made a costs management order in proceedings to recover losses from alleged fraud

The case is of interest as some guidance was given as to rates of solicitors and counsel.

Mr Justice Morgan in the Chancery Division in March 2016 was presented with 6 budgets from the various parties involved. The Claimant's budget was in excess of £3.5 million the total of all budgets over £13 million

The Judge was required to consider whether the costs budgets were reasonable and proportionate.

In his consideration he had regard to the rates sought for the solicitors – The Claimant was represented by City of London Solicitors with Grade A seeking £425.00 per hour Grade C fee earners £250- £285 and Grade D £180.00

The matter was conjoined with a claim brought by Equity Trading Systems (ETS) who's solicitors rates ranged from £550 -575 Grade A £275 Grade C and a range of rates for Grade D from £125 - £265

Swiss Bank was involved as a Defendant instructing Solicitors at Grade A 450 - £575.00 Grade C £300- £365.00 and Grade D £100 – 200.00

Details of the other rates sought by various other parties to the dispute are set out in the judgment

Mr Justice Morgan decided that the matter was not one to justify the instruction of City of London based solicitors finding the matter did not involve complicated matters – though he did consider Swiss Bank's employment of City Solicitors "more understandable" as a foreign bank.

The judge stated he would apply rates reflecting Central London and for those parties that had instructed Central London Solicitors he would increase the guideline rates

Both Claimants and certain a Mr Nasir were allowed A - £365,00 C £210.00 and Grade D £132.00

Notable Defendant s – A £255, c £185 and D 125.00

Whilst the Swiss Bank recovered A - £409, B £296.00 C at £226 and D @ £138.00

One other party who had employed outer London solicitors was allowed uplifted rates to reflect importance of the matter to the client) of £229, £165 and £121 Grade A C and D respectively

The Claimant (Group Seven) included in the Budget £793,100.00 for Leading Counsel of which the brief fee was £567,000.00 with Junior Counsel's total £468,650.00 including a brief fee stated to be £335,400.00

The claimant ETS sought £345,000 QC only of which £250,000 was declared as the brief fee

Swiss Bank sought £487,000 QC and £319,000 Junior

The Judge allowed

Group Seven and ETS (together) Leading Counsel -Brief £200,000 (reflecting 30 days preparation) plus refresher fees £5,500.00 per day (36 days)

Group Seven and ETS (together) Junior Counsel -Brief £100,000 plus refresher fees £2,750.00 per day (36 days)

Swiss Bank – Leading Counsel - Brief £125,000 (reflecting 20 days preparation) plus refresher fees £5,000.00 per day (36 days)

Swiss Bank – Junior Counsel - Brief £65,000 plus refresher fees £2,500.00 per day (36 days)

TUI UK LTD V Tickell & Ors

Mrs Justice Elisabeth Laing (sitting with Master Leonard as an assessor) heard an appeal from a decision of Master Howarth on the costs of a claim by 205 claimants.

Many claimants were ill and all had holidays which were not of the quality they had paid for. The claims, which started in 2011, were settled shortly before trial in February 2014, with 116 claimants settling for 60% of the value of their holidays (on average, £500), 57 claimants who suffered relatively minor illness for less than £1,500 (on average £700) and the 32 claimants who had been more seriously ill for more than £1,500. The defendant denied liability throughout.

The total costs claimed were £1,768,011.25. Master Haworth, who decided that the costs were disproportionate applying the *Lownds* Test, allowed £999,121.36.

He assessed the generic bill at £365,580. There was no appeal against that however the defendant contended that following assessment of the individual bills, the overall base costs which the master allowed – £630,456 – were too high. TUI submitted that this represented some 80% of the total base costs claimed and that 60-70% rather than about 80% would be the norm.

The agreed method for assessing the individual bills was that the parties each chose a representative 'sample' claimant from three groups for the master to assess. The parties then added together the amount allowed for the two bills, divided it by two and multiplied the result by the number of claimants in each group. The result was the amount he assessed for each group of claimants. Laing J said: "*This was a rough and ready approach, but the parties agreed that it was a sensible and proportionate alternative to an assessment, by reference to the points of dispute, of each of the 205 individual bills of costs*."

TUI argued that in assessing the individual bills of costs, the master did not give effect to his decision that the costs were disproportionate and in particular that he did not apply the necessity test with sufficient rigour.

However, citing what Lord Woolf MR said about necessity in *Lownds*, along with Lord Neuberger MR views in *Motto* –that whilst necessity was a higher hurdle than reasonableness, "*it does not carry with it the strictest sense of necessity*" – Laing J said: "*These authorities do not support the defendant's proposition that one can identify a 'benchmark' of appropriate overall reduction, on the basis of necessity, by a given percentage of the costs claimed. The extent to which claimed base costs will be reduced will depend upon the facts of the particular case*."

The main point of dispute raised by TUI was that Master Haworth was wrong on several grounds to allow 144 hours of inter-fee earner discussions on the individual bills at the claimants' solicitors.

There was a general point of dispute about this head of work namely that no such discussions had been necessary, and that they all, therefore, should be disallowed. Because of the general nature of this objection, the claimants' solicitors did not include in the bundle of attendance notes which they prepared for the master the attendance notes recording inter-fee earner discussions. The bills, in any event, had relatively full descriptions of the items of work claimed – 135 hours were claimed on the general bills and 205 on the individual bills.

"*The defendant eventually made, during the hearing, an offer of 104 hours. The master allowed 95 hours of generic time and 144 hours on the individual bills; that is, slightly rounded up, 70% of the claim. By the time the master made his ruling on this head of claim, the parties had agreed that the master should deal with this head 'on a broad brush basis', applying the test of necessity. As the master recorded, the alternative would have been to spend a day on this aspect of the bills…"*

"*The master found against the defendant on the question whether or not this was a case in which inter-fee earner discussions were in principle justified. There was no way, in his view, if a case was mainly being conducted by a paralegal, that the case could be conducted without the involvement of some of the fee earners*."

Laing J rejected TUI's submission that the master was wrong to say that the vast majority of the inter-fee earner discussions billed involved paralegals. "*It is… quite clear that he was right to say that that work had been done by the lowest level of fee earner possible*" adding "*I agree with the master that, in principle, if, as here, much of the work on files was being done by paralegals under the supervision of legal executives, it was necessary, from time to time, to have discussions between fee earners, specifically supervising solicitors, including partners."*

She similarly dismissed the submission that Master Haworth was wrong not to look at the attendance notes. "*It is clear… that the parties had sensibly agreed that the claimants did not need to go the expense of producing the attendance notes and taking the master through them. The parties also agreed that the master should deal with this topic with a broad brush*."

The Defendant had also in the points of dispute relied on the fact that it was an ABTA bonded company and thus contended that no costs or disbursements should be allowed on '*the claims which settled for damages for personal injuries below £1000 and for breach of contract claims that settled below £5000.00*' as those Claimants could have used the ABTA mediation process.

The Claimants' response was that the Defendant had never invited the Claimants to do this. The fact that the Defendant denied liability throughout showed that mediation would have failed, and more costs would have been incurred. Moreover, the Defendant did not provide a decision on liability in the pre-action protocol period; the Claimants had offered to mediate in a letter dated 22 February 2011; and the Defendant had not responded to that suggestion.

The Judge had some difficulty on this issue as the transcript of the hearing before the costs judge was not available and stated:

"It seems to me that it could, on appropriate facts, be a distinct argument from the general argument that a failure to use ADR makes the costs as a whole disproportionate. It may be important, where there is more than one reason for a holding that the costs as a whole are disproportionate, for such an argument to be distinctly ruled on in a detailed assessment. I have been referred by Mr Munro to the decision of Master James in Briggs v First Choice Holidays and Flights Limited (case no: HQ11X02646). She held that 152 of the claimants in that case who had not used the ABTA scheme should be restricted to the costs of using the ABTA scheme and should not recover their base costs (some £456,000). I have not seen the skeleton arguments in that case, and know nothing about the underlying facts, other than that the ABTA scheme was referred to in those claimants' contracts. However, on the facts of this case, I consider that it would not have been open to the Master to hold (had he entertained the argument) that the quality only Claimants should, either, recover no costs at all, or be restricted to the costs of using the ABTA scheme. I consider that if a Defendant wishes to rely, at the stage of a detailed assessment, on the availability of an industry-specific ADR scheme, which is referred to in the relevant contract, but it is not binding, and is not expressed to oust the jurisdiction of the courts, the Defendant must make that clear in its pre-action protocol response. The Defendant did not do so here. The Defendant did not admit liability. The claims were robustly contested. Moreover, the Defendant did not respond to the Claimants' offer of ADR. Had the Master concluded in this case that the Claimants should get no costs, or only recover the costs of using the ABTA scheme, such a conclusion, on these facts, would have been plainly wrong"

And finally

Costs Judge Leonard recently considered when ATE insurance was reasonable

In the matter of *Allan Coleman v Medtonic Ltd* (as yet unreported) the Paying Party disputed the reasonableness of the Claimant obtaining ATE.

A number of claims were brought against the Defendant, a UK distributor of medical devices and in the instant case had supplied cardiac leads used in cardiovascular defibrillators. On a number of occasions the leads had fractured causing electrical shocks.

The issue was the recoverability of the pre April 2013 ATE premium.

At an early stage the Claimant had advised the Defendant of an intention to take out ATE in order to be protected against any adverse costs. In order to reduce costs a costs amnesty was agreed between the parties with the Defendant waiving its right to recover individual costs and disbursements.

A number of stays in the proceedings were agreed which extended the costs amnesty. A stay until 20 February 2012 was agreed to explore settlement options and on 31 January 2012 the Defendant made an offer of settlement in the sum of £5,703.00. The offer was inadequate therefore the Claimant advised the Defendant that a quote for ATE had been obtained though this could be avoided if the Defendant agreed to one-way costs shifting. The Defendant advised, 20 February 2012, that it thought obtaining ATE would be unreasonable and disproportionate.

The Defendant was notified that the Defendant considered the amnesty agreement was not in the Claimant's interest as the same did not protect the Claimant from disbursements incurred and that it was not an irrecoverable one-way costs shift.

A further stay was agreed to 25 April 2012. At the end of the stay the Claimant refused the Defendant a further extension to provide its Defence which had been sought to allow the Defendant to obtain its own expert reports. The Defendant provided its Defence 27 April which denied liability.

The effect of the Defence was to bring the costs amnesty period to an end and on 11 May 2012 the Claimant obtained an ATE policy, served Notice of Funding and went on to recover damages of £60,000.00.

In response to the Defendant's challenge to the premium Costs Judge Leonard found that there was no obligation on the Claimant to have refereed back to the Defendant before taking out insurance to give the Defendant the chance to extend the costs amnesty. The question then became was it reasonable for the Claimant to reject the Defendant's suggestion of a further stay?

The Costs Judge found that no particular stay had been mooted by the Defendant, rather it sought an extension of time to obtain expert evidence (an exercise likely to involve many months). The Defendant had made an offer that was a tiny fraction of the of the pleaded value therefore the parties were far from settling and the Claimant had no good reason to expect that settlement, without recourse to litigation, was likely as to justify further delay in proceeding.

The Costs Judge also took the view that the amnesty offered by the Defendant included individual costs and did not include any common costs. Whilst the amnesty extended to the Defendant's disbursements the Claimant had been incurring his own disbursements which while outside the scope of the amnesty, were covered by the ATE policy.

The Costs Judge considered the overriding objective of the Civil Procedure Rules but did not find it to be incumbent upon the Claimant to put on hold the claim for as long as the Defendant was willing to extend a costs amnesty and the Costs Judge found that it was reasonable for the Claimant to have taken out the ATE insurance.