Neutral Citation Number: [2022] EWHC B9 (Costs)
Case No: H118C02949, SCCO reference: SC-2021-BTP-000498

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 8/04/2022

Before:

COSTS JUDGE LEONARD

- -

Between:

Scott Dance	**Claimant**
- and -	
(1) East Kent University Hospitals NHS Foundation Trust	
(2) Dr. W. J. Moffatt	
(3) Dr. Robert Malcolm	
(4) Dr. Aravinth Balachandran	**Defendants**

- -
- -

Kevin Latham (instructed by **Shoosmiths LLP**) for the **Claimant**
Mark Friston (instructed by **Clyde & Co. LLP**) for the first Defendant

Hearing dates: 25, 26 and 27 January 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. I am assessing the Claimant's costs of a clinical negligence claim in the Queen's Bench division of the High Court, payable by the first Defendant following the Claimant's acceptance of a Part 36 offer on 23 July 2019. The issue addressed by this judgment is whether the Claimant can recover from the first Defendant part of the cost of an "After the Event" ("ATE") insurance policy premium, included in the Claimant's bill of costs at £5,266.01.

2. ATE policies, as the name suggests, are taken out after the event upon which a legal claim is founded. They are designed to cover litigation risk, in particular the insured litigant's potential liability to pay the costs of an opponent and (insofar as not recovered from an opponent) the cost of disbursements incurred by the insured for the purposes of the litigation.

3. Where an ATE policy was taken out between 1 April 2000 and 31 March 2013, the cost (the "ATE premium") could, subject to the normal principles applicable to the recovery of costs, be recovered from an opponent who had been ordered to pay the insured's costs of the litigation covered by the policy. The relevant statutory provision was section 29 of the Access to Justice Act 1999:

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

4. Since 1 April 2013, the general rule has been that an ATE premium will not be recoverable from an opponent under an order for the opponent to pay the insured's costs. Exceptions were made, at least for a time, for certain categories of litigation and a very specific, limited and permanent exception was made for clinical negligence claims.

5. The new general rule, and the exception for clinical negligence cases, are to be found at section 58C of the Courts and Legal Services Act 1990 ("the CLSA"). Section 58C was added to the CLSA by section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") with effect from 1 April 2013:

> "(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).
>
> (2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—
>
> (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,
>
> (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect

> of clinical negligence in connection with the proceedings (or against that risk and other risks),
>
> (c) the policy is of a prescribed description,
>
> (d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence ("the relevant part of the premium"), and
>
> (e) the amount is to be paid in respect of the relevant part of the premium.
>
> (3) Regulations under subsection (2) may include provision about the amount that may be required to be paid by the costs order, including provision that the amount must not exceed a prescribed maximum amount.
>
> (4) The regulations may prescribe a maximum amount, in particular, by specifying—
>
> (a) a percentage of the relevant part of the premium;
>
> (b) an amount calculated in a prescribed manner."

6. Regulations were made under section 58C(2) of the CLSA, coming into effect from 1 April 2013. Lord Justice Lewison set out in his judgment in *McMenemy v Peterborough and Stamford Hospitals NHS Trust* [2017] EWCA Civ 1941 a comprehensive account of the way in which the law as to the recoverability of ATE premiums has developed.

7. At paragraphs 38 to 44 of his judgment Lewison LJ explained the history of, and the policy behind, the regulations made under section 58C(2). There had in fact been two sets of regulations, the first of which was repealed before it came into effect:

> "38. Regulations were first made under this section on 21 January 2013. They were The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 due to come into force on 1 April 2013 at the same time as section 58C. Regulation 2 provided:
>
> '(1) Subject to paragraph (2), a costs order made in favour of a party to clinical negligence proceedings may include provision requiring the payment of an amount in respect of the relevant part of the premium of a costs insurance policy taken out by that party which insures against the risk of incurring liability to pay for one or more expert reports in connection with the proceedings (or against that risk and other risks).
>
> (2) A costs order may not require the payment of an amount in respect of the relevant part of the premium which relates to the liability to pay for any expert report if—
>
> (a) the report was not in the event obtained;
>
> (b) the report did not relate to liability or causation; or
>
> (c) the cost of the report is not allowed under the costs order.'

> 39. However, these regulations never came into force. The 20th report of the Parliamentary Joint Committee on Statutory Instruments suggested that they were ultra vires, because they would apply to all clinical negligence claims rather than to clinical negligence proceedings of a "prescribed description" as required by section 58C(2)(a). On 26 March 2013 they were revoked by The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 ("the No 2 Regulations"), which did come into force on 1 April 2013. Regulation 3 of the No 2 Regulations provides:
>
> > '(1) A costs order made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy may include provision requiring the payment of an amount in respect of all or part of the premium of that policy if—
> >
> > (a) the financial value of the claim for damages in respect of clinical negligence is more than £1,000; and
> >
> > (b) the costs insurance policy insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence (or against that risk and other risks).
> >
> > (2) The amount of the premium that may be required to be paid under the costs order shall not exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence in connection with the proceedings.'
>
> 40. The three significant changes were: i) The removal of the absolute bar against recovery of ATE insurance premiums in the event that the expert's report was not in fact obtained; ii) The introduction of a minimum financial value of the claim before an ATE insurance premium was capable of being recovered; and iii) The removal of the contemplation that the cost of the report might not be allowed under the costs order.
>
> 41. The draft regulations were accompanied by an Explanatory Memorandum prepared by the Ministry of Justice, and laid before Parliament. That memorandum also conveys a good understanding of the policy underlying the No 2 Regulations…"

8. Lewison LJ want on, at paragraphs 41-44, to refer to specific provisions of the memorandum with particular emphasis on the matters in issue before him, which included challenges to the timing and reasonableness of ATE premiums. For present purposes it may be helpful to set out the following passages from the memorandum:

> "4.3 Section 29 of the Access to Justice Act 1999 (c.22) provides for the recovery, by way of costs, of costs insurance premiums from a losing party in civil proceedings. This provision enables the costs of an insurance policy, taken out by a party to insure against the risk of having to pay their

> opponent's costs and their own disbursements if they lose their case, to be recovered from the losing party should
> they win their case.
>
> 4.5 The effect of new section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings and only allows recovery of any premium to the extent that it relates to the risk of incurring liability to pay for the cost of an expert report or reports in clinical negligence. The new section also enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium will be recoverable, including limiting recoverability to specified proceedings and to certain descriptions of policy. Regulations may also make provision about the amount of the premium that may be required to be paid under a costs order…
>
> 7.2 …The effect of Section 46 of the LASPO Act is that the ATE insurance premiums are no longer recoverable from the losing defendant. As a result of this change, the ATE insurance premium will be payable by the successful claimant out of damages awarded…
>
> 7.3 However, the Government has allowed for a permanent limited exception for clinical negligence cases, where ATE insurance premiums covering the cost of expert reports will still be recoverable. This is because expert reports are often necessary to establish whether there is a case for bringing proceedings, but can be expensive. Currently ATE insurance can insure against the risk of incurring liability to pay the costs of such reports, but with the substantial withdrawal of legal aid in personal injury (including clinical negligence) cases, a funding mechanism available to claimants to purchase those reports is required. As a result, the practical effect of this exception is that it will allow claimants to purchase expert reports for clinical negligence claims and the premium in respect of incurring the costs of those reports will remain recoverable from defendants.
>
> 7.4 In order to control the cost of the ATE insurance premiums, these Regulations restrict the recoverability of the insurance premium to the risk of incurring liability to pay for an expert report or reports determining liability and causation only. The responses to the Government consultation and the department's discussions with
> stakeholders… suggest that in order to pursue the claim, an expert report or reports establishing liability and causation only is required. By restricting the recoverability of the insurance premium to the cost of these reports (and not, for example, reports concerning quantum), claimants will still be able to progress their claim, whilst ensuring that the costs paid by defendants to cover claimants' ATE insurance premiums are reasonable and proportionate…"

9. I shall refer to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 and the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013, respectively, as "the First Regulations" and "the No 2 Regulations", and to the recoverable element of a clinical

negligence ATE premium (whether all or part of it, and whether under the First Regulations or the No 2 Regulations) as "a recoverable ATE premium".

The Points of Dispute

10. It is not disputed that the £5,266.01 sought by the Claimant is, in principle, recoverable under regulation 3 of the No 2 Regulations. The first Defendant's Points of Dispute contend that it is, nonetheless, irrecoverable.

11. That contention is based on two grounds. The first, as the Points of Dispute put it, is that in *Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654 "the Court of Appeal confirmed that a Part 36 offer or a Tomlin Order did not amount to an 'order for costs'".

12. The second is that even where there is an order for costs, the ATE premium will only be recoverable if the costs order makes specific provision to that effect. The first Defendant relies in that respect upon an editorial note at paragraph 48.0.4 of Sweet & Maxwell's "Civil Procedure" ("the White Book"):

> "Regulation 3 of the 2013 Regulations provides that 'a costs order made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy may include provision requiring the payment of an amount in respect of all or part of the premium of that policy'. It is therefore incumbent upon the party seeking costs to request the judge to include the necessary provision when making the order. If no such provision is included in the order, the cost of the premium will not be recoverable. The Civil Procedure Rule Committee decided that there was no need for any further rules in respect of ATE premiums in clinical negligence cases."

13. I can address the first of those grounds now. Self-evidently a Part 36 offer is not an order, but the Claimant's right to recover costs in this case arises from his acceptance of the first Defendant's Part 36 offer. It would seem that the first Defendant's contention is that the Court of Appeal found that such acceptance leaves the Claimant without the benefit of an order for costs for the purposes of recovering the cost of an ATE premium.

14. That, as Mr Latham for the Claimant points out, is incorrect. It is not in issue that the Claimant accepted the first Defendant's Part 36 offer within the period set by the first Defendant for acceptance. His right to recover costs arises, accordingly, under 36.13(1) of the Civil Procedure Rules ("CPR"). CPR 44.9(1)(b) provides that in those circumstances, a costs order in the Claimant's favour will be deemed to have been made on the standard basis.

15. Given the provisions of CPR r.44.9(1)(b) it would not have been open to the Court of Appeal in *Cartwright v Venduct Engineering Limited* to find that acceptance of a Part 36 offer cannot give rise to an order for costs, nor did the court purport to do so. The point of *Cartwright v Venduct Engineering Limited* is that a Tomlin Order is a record of a settlement reached between the parties designed to have binding effect, not an order for damages and interest made in favour of the claimant for the purposes of CPR 44.14(1), with the result that the making of a Tomlin order (and, of necessity, the acceptance of a Part 36 offer) would not result in damages being available for set-off under the regime that governs qualified one-way costs shifting.

16. There was no finding of the kind contended for by the first Defendant. On the contrary, it is an established principle that a Tomlin order may incorporate effective provision for the payment of costs, as long as it is be incorporated in the body of the order rather than the attached schedule.

17. Mr Friston for the first Defendant, unsurprisingly, did not press this particular point. His submissions focused upon the second ground, to which I now turn.

The First Defendant's Submissions

18. Mr Friston submits that regulation 3(1) of the No 2 Regulations is permissive rather than restrictive. Rather than assuming a default position of an entitlement to recoverable ATE premiums, subject to prescribed fetters, it affords the court a restricted power to make an order that includes provision for the payment of recoverable ATE premiums.

19. This is made clear not only by the language that is used but also by fact that the No 2 Regulations were made under section 58C(2) of the CLSA. The default position (of non-recovery) is established by the primary legislation, subject to secondary legislation. That secondary legislation affords the court the power to make an order in respect of recoverable ATE premiums.

20. It would be wrong to read regulation 3(1) of the No 2 Regulations as saying that a costs order will, by default, include an entitlement to recoverable ATE premiums. Both the wording of the No 2 Regulations and the legislative context in which they were made make it clear that any such entitlement will arise only if an order is made to that effect.

21. Hence the note at paragraph 48.0.4 of the White Book, which correctly describes the law. The burden is on the receiving party (in this case, the Claimant) to seek what the editors describe as "the necessary provision". The burden is not on the paying party to seek an order disallowing the recoverable ATE premium.

22. This is supported by an examination of the legislative history. The First Regulations unequivocally required the trial judge to turn his or her mind to the recoverability or otherwise of recoverable ATE premiums. They also provided a "steer" as to the exercise of the court's discretion.

23. Lewison LJ in M*cMenemy* identified the three significant changes made when the No 2 Regulations replaced the First Regulations. They did not include a provision to the effect that an order for costs will necessarily incorporate an entitlement to a recoverable ATE premium. They merely created a facility by which the court could make provision, in an order for costs, for the payment of a recoverable ATE premium.

24. As the editors of the White Book correctly say, an order making provision for payment of a recoverable ATE premium has to be made. It does not exist merely because an order for costs has been made. If that had been the intention of Parliament, the Regulations would have been worded entirely differently.

25. The fact that an entitlement to recoverable ATE premiums has to be affirmatively made is entirely logical. There are few other constraints on a defendant's potential liability for an ATE premium, because such premiums are subject to assessment on 'macroeconomic' grounds rather on the grounds of individual reasonableness. They are

also almost entirely exempt from the test of proportionality. As such, it is entirely understandable that the legislature intended to create a mechanism for judicial oversight that was additional to assessment. Those protections may not be as strong as those that existed in the First Regulations, but they continue to exist nonetheless.

26. For all these reasons, a receiving party will be able to recover a recoverable ATE premium only to the extent that they have an order to that effect in their favour. In the absence of such an order, there is no entitlement.

27. It is not for this court to improve upon the deemed order made, in this case, upon the Claimant's acceptance of the first Defendant's Part 36 offer. A Costs Judge has no power to re-write the very order that governs the assessment. Any such power would be expressly conferred by the CPR, and it is not.

28. The next question is whether the deemed costs order in this case this should be interpreted as including a recoverable ATE premium. That is a question of law, in particular of the interpretation of the combined effect of CPR 44.9(1)(b) and CPR 36 (CPR 36 being a self-contained code).

29. The Claimant's right to recover costs arises under CPR 44.9(1)(b), which says nothing about the scope of the deemed order, and in particular nothing about recoverable ATE premiums.

30. To determine the scope of any such order, then one must look at CPR 36.13, which (in so far as it is relevant) reads:

> "(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror…
>
> (7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.'

31. Thus, a deemed order arising out of acceptance of a Part 36 offer will, expressly, be for "the costs of the proceedings". It says nothing specific about recoverable ATE premiums. The Rules make it clear that this will include the pre-action costs and the costs of a counterclaim, but there is nothing to say that this would include recoverable ATE premiums. The Civil Procedure Rule Committee ("CPRC") could easily have included a paragraph that provided for the recovery of such costs (as they have done with counterclaims) but has not done so.

32. This invites the question of what is meant by "costs of the proceedings", and in particular, what is meant by "costs". Again, this is a question of legislative interpretation.

33. CPR 44.1(1) defines costs in this way:

> "In Parts 44 to 47, unless the context otherwise requires… 'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement

> allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track…"

34. There is a noticeable omission from this list, namely any form of "additional liability" (as referred to in the pre-1 April 2013 CPR) such as a success fee under a Conditional Fee Agreement or an ATE premium. This is not an inadvertent omission. Prior to 1 April 2013, costs were defined in the following way (in CPR 43.2(1)(a)):

> "… 'Costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 48.6, any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track…"

35. From 1 April 2013, reference to additional liabilities was removed. The fact that this was intentional (in the context of whether the post-2013 test of proportionality applies) was made clear by Sir Terence Etherton MR in *BNM v MGN Ltd* [2017] EWCA Civ 1767, at paragraph 81:

> "Standing back from the minutiae, it seems perfectly clear that the reference to 'any additional liability incurred under a funding arrangement' was deliberately omitted from the definition of "costs" in the new CPR 44.1(1) …If it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions or the new costs rules or both and it was not."

36. It follows first that the post-31 March 2013 definition of the word "costs" does not include recoverable ATE premiums, and second that if the intention were otherwise, this would be something that would have been made clear, either by the CPR or other legislation.

37. The revisions to the definition of "costs" in CPR 44 were made at about the same time as the First Regulations were due to come into force. It was, therefore, an entirely logical and coherent revision. Recoverable ATE premiums were not "costs" by default but were something ancillary to costs which were in the discretion of the court. They only became embraced by the CPR once a specific order to this effect was made. The definition incorporates the word "includes" because recoverable ATE premiums are not "costs" by default. They become "costs" if the court makes an order that they be recoverable.

38. If the definition had remained as it was, then any order for costs would, by default, have included a provision for recoverable ATE premiums. This would have run counter to the changes made by both the No 2 Regulations and the First Regulations, which clearly envisaged that recoverable ATE premiums would be payable only if and to the extent that the court made an order to that effect.

39. This view is further supported by reason of the fact that CPR 36.13 refers to other species of costs which are included by default (such as pre-action costs and the costs of a counterclaim) but is entirely silent as to recoverable ATE premiums.

40. When read as a whole, the entire scheme is coherent and well-integrated. Importantly, the definition of "costs" affords no basis for saying that an order for costs made by way of acceptance of a Part 36 offer will, by default, include the provision for the payment of a recoverable ATE premium. Quite the opposite is so.

41. Given that the Claimant urges upon the court a purposive interpretation, it is not clear what legislative purpose would be served by such an approach. One intended purpose of the Regulations is to enhance access to justice in clinical negligence claims by affording claimants the opportunity to recover premiums for the purposes of funding certain expert reports. It is quite clear, however, that Parliament did not intend that this would always be so. One could go so far as to say that the purpose of those Regulations was to strike a balance between the needs of claimants (namely, access to justice) and the needs of defendants (namely, protection from excessive liability), and that an interpretation that focused on the former without regard to the latter would be impermissible. It would be wrong to read the word 'may' in regulation 3(1) as if it read 'will'.

42. In any event, given that the No 2 Regulations represented Parliament's second attempt to get the regulations right, the court should have a very high threshold for applying a purposive interpretation.

43. In fact the Claimant does not find himself in difficulty by reason of the No 2 Regulations. The real reason he finds himself in difficulty is by reason of the operation of the CPR. The Claimant finds himself having to rely on a purposive interpretation not because the Regulations say what they say, but because CPR 36.13 makes no provision requiring the payment of a recoverable ATE premium. As such, if a purposive interpretation were to be appropriate, it would have to apply to the CPR rather than the Regulations.

44. The intended purpose of CPR Part 36 is to encourage settlement and to promote certainty. It has nothing to do with promoting access to justice (indeed, in many respects, its purpose is to do precisely the opposite by imposing substantial costs penalties on parties who fail to accept offers). It would be an impermissible exercise of interpretation to interpret Part 36 as if access to justice were its intended purpose.

45. In any event, it is far from clear that an acceptance of a Part 36 offer would preclude a claimant from recovering a recoverable ATE premium. It may well be possible to make an application, either under CPR Part 8 procedure or CPR Part 23, for the necessary order. That was not done in this case.

46. Even if it is not possible for a claimant to make such an application, the most that can be said is that the outcome is anomalous and counterintuitive. This would not be the first time that CPR 36 has given rise to counterintuitive results.

47. By way of example, in *Cartwright* the Court of Appeal made a highly counterinitiative finding. Coulson LJ declined to avoid this by adopting a purposive approach, and instead said, at paragraph 46 of his judgment:

> "In order to allow for…" (the intuitive outcome) "… Mr Williams QC had to rewrite the rule … That is not what the rule says. Indeed, no matter how he

> put his case, Mr Williams QC needed to add further words... In my view, the absence of the necessary words is fatal to his case on interpretation."

48. Exactly the same applies here. In order to allow recovery of the Claimant's ATE premium, the court would have to read CPR 36.13 as if it contained something along the lines of "… and an order for costs will, without further order of the court, include provision requiring the payment of an amount in respect of all the premium where such a premium is recoverable pursuant to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013". Reading such words into Part 36 would not only be an impermissible exercise of judicial legislation. It would also cut across the well- established principle that Part 36 is a self-contained code and it would overlook the fact that CPR 44.1 was specifically revised so as to remove any reference to additional liabilities.

49. Even if a purposive interpretation of CPR 36 were permissible, the court would be faced with the insurmountable difficulty of not being able to see into the mind of the CPRC. The CPRC could have included a provision which dealt with recoverable ATE premiums in the event of a Part 36 offer being accepted by introducing provisions to the effect that recoverable ATE premiums under the No 2 Regulations would (subject to assessment) always be recoverable; or that recoverable ATE premiums would be recoverable only upon application; or that such premiums would be recoverable by default but may be disallowed upon application by a defendant as matter of general discretion; or that recoverable ATE premiums would be recoverable by default but could be disallowed if it would be unjust to allow such a premium.

50. This court has no way of knowing which of these is the 'right' approach. Each has its own merits and difficulties (and each may require its own consequential amendments to other parts of the CPR). In particular, whilst the first of these options would deny defendants the protections afforded by the No 2 Regulations, the second to the fourth preserve those protections to varying degrees. It is not for this court to decide which is the 'right' one. This court is simply not in a position to determine what CPR 36.13 "ought" to have said, which would be a matter for the CPRC itself.

51. For all these reasons, a purposive approach is not permissible.

52. It is possible that CPR 36.13 contains an error. The court has the power to correct drafting mistakes, but the threshold for doing so is very high. In *Inco Europe Ltd and Others v. First Choice Distribution (A Firm) and Others* [2000] UKHL 15, [2000] 1 WLR 586 at 592D-H, Lord Nicholls had this to say:

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had

> the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in Jones v. Wrotham Park Settled Estates [1980] A.C. 74, 105. In the present case these three conditions are fulfilled."

53. Not one of these conditions is satisfied. There is no material before this court which would justify a finding that the intended purpose of either CPR 44.9(1)(b) or CPR 36.13 was to allow for recoverable ATE premiums on the making of a deemed costs order, much less material that would allow this court to be "abundantly sure" that this was so. There is nothing to suggest that there has been an error.

54. In this regard, Mr Friston refers to the observations of Briggs LJ at paragraph 53 of his judgment in *Qader & Ors v Esure Services Ltd & Ors* [2016] EWCA Civ 1109:

> "It may be said that the interpretative jurisdiction to put right obvious drafting errors in a statute is fortified by the difficulties which typically face Parliament in doing so, in relation to primary legislation, in the light of its heavy workload. The same difficulties do not affect the Rule Committee to any similar effect. It can, and regularly does, re-consider rules when invited to do so by the court, either to correct drafting errors or other infelicities which have been proved to cause procedural difficulty."

55. In view of the fact that the White Book has highlighted for many years the need to make specific provision in an order for costs for the payment of a recoverable ATE premium, it must follow that the CPRC has had the opportunity to look into the matter. As such, this court cannot be 'abundantly sure' that there has been error. In fact, as already highlighted in the context of purposive interpretation, the court does not know what the CPRC would have done if it had made rules dealing specifically with recoverable ATE premiums.

56. In any case, as previously observed, it may well be that it is open to a claimant to make an application for an order for recovery of recoverable ATE premiums upon acceptance of a Part 36 offer. If so, there can be no error to correct.

The Claimant's Submissions

57. Mr Latham refers to the fact that in *McMenemy* the Court of Appeal was concerned with two clinical negligence claims, in both of which Part 36 offers were accepted by the claimants, and in both of which the claimants, entitled as they were to their costs under CPR 36.13(1) and CPR 44.9(1)(b), received, within the costs paid by the defendants, their recoverable ATE premiums.

58. The note to the White Book at 48.0.4 was in *McMenemy* expressly drawn to the attention of, and considered by, the court. It was not, as in this case, cited in support of the proposition that a recoverable premium could not be recovered under the deemed order for costs provided for CPR 44.9(1)(b). It was rather cited in support of the proposition that recoverable ATE premiums are recoverable as of right under the No 2 Regulations, and not governed by the CPR at all.

59. At paragraphs 43-55 of his judgment Lewison LJ summarised the way in which the point was put, and the court's conclusions on it:

> "46. One preliminary point needs to be dealt with at the outset. Mr Bacon submitted that the recovery of ATE insurance premiums under the No 2 Regulations was not subject to the CPR at all. First, the previous legislation about the recovery of ATE premiums, contained in section 29 of the Access to Justice Act 1999 permitted the recovery of ATE insurance premiums "subject to rules of court". That phrase is absent both from section 58C and also the No 2 Regulations. The enabling legislation permitted regulations to prescribe the amount recoverable, and that is done by regulation 3(2). The regulations could have delegated the function to a costs judge, but they did not. Second, the references to "liability incurred under a funding arrangement" formerly contained in CPR Part 43.2, which included ATE insurance premiums, have now been removed from the CPR. The definition of "costs" in CPR Part 44.1 does not extend to methods of funding. Third, whereas the previous regime included a practice direction dealing expressly with the factors to be taken into account when deciding whether the cost of insurance cover was reasonable, there is no such practice direction under the CPR as they currently stand. Thus the CPR contain no express provisions to deal with the recovery of ATE premiums in clinical negligence cases. Fourth, the notes to CPR Part 48 in Civil Procedure state at 48.0.4…" (*Lewison LJ referred here to the note reproduced at paragraph 11 above*.)
>
> "… 47. Mr Bacon submitted that the fact that the Rules Committee saw no need for any further rules supported his submission that, as he put it, once a claimant has gone through the gateway described in regulation 3(1)(a) and (b) the amount of the premium prescribed by regulation 3(2) is automatically recoverable without any further control by the court. That, he said, was also supported by paragraph 7.4 of the Explanatory Memorandum which was expressed to be the mechanism by which the Government ensured "that the costs paid by defendants to cover claimants' ATE insurance premiums are reasonable and proportionate."
>
> 48. What we were invited to conclude was that Parliament made a policy choice to the effect that the level of ATE premiums would be regulated, in the first instance, by the market which he said was competitive; and if the market failed to produce acceptable results further regulations could be made under section 58C.
>
> 49. I am sceptical about the submission that ATE premiums can be controlled solely by market forces…
>
> 51… it seems to me to be unlikely that Parliament chose to allow the level of recoverable ATE premiums to be determined solely by such an imperfect market, with further regulation as a back-up in case of market failure.
>
> 52. If Mr Bacon's submission is right, it would mean that ATE insurance premiums are not subject to scrutiny by the court at all… However, in my judgment it is not right. First, neither section 58C nor the No 2 Regulations expressly empower the court to make a costs order at all. They presuppose that the court has such a power, and merely state what such an order may include. The court's power to make an order for costs is contained in section 51 of the Senior Courts Act 1981 which says that "subject to rules of court" costs are in the discretion of the court. Second, regulation 3 does not say that ATE insurance premiums are recoverable. It merely says that a costs order may include them. Clearly, then, the court has a discretion. How is that discretion to be exercised if not in accordance with the CPR? Third, most cases settle: often by the claimant's acceptance of a Part 36 offer. Where a claimant accepts a Part 36 offer in due time he is entitled to his costs up to the time

> of acceptance. CPR Part 36.13(3) provides that those costs are to be assessed on the standard basis if not agreed. That assessment must take place within the confines of the CPR**.** Fourth, I am not impressed by the submission based on the detailed definition of "costs" in CPR Part 44.1. In the first place, as Mr Bacon fairly acknowledged, the definition says that costs "includes" certain categories of expense. Second, as Mr Mallalieu pointed out in reply, the definitions apply "unless the context otherwise requires". In a context in which the No 2 Regulations state expressly that ATE premiums may be included in a "costs order" it is an inevitable consequence that either the definition of costs in the CPR must be expanded to include ATE premiums where authorised by the No 2 Regulations, or alternatively, that the context does require an expanded definition. Fifth, Parliament must be taken to know that a "costs order" is an order made under the CPR.
>
> 53. At the hearing of the appeals Mr Bacon sought to rely on the "costs only" procedure in CPR Part 46.14 as providing the mechanism by which an ATE premium might be recovered outside the CPR. That procedure applies where, before proceedings have been started, parties have reached agreement on "which party is to pay the costs" but have not agreed the amount. In such a case a Part 8 Claim may be issued, and the court may "make an order for the payment of costs". The flaw in this argument is that the definition of "costs" in Part 44.1 is said to apply, not only for the purposes of Part 44, but to Parts 45 to 47 as well. So if an ATE premium is outside the scope of the definition in Part 44.1 it cannot be recovered by proceedings under Part 46.16. Nor can it be included in a detailed assessment conducted under Part 47. So in my opinion this argument runs into the sand.
>
> 54. In written submissions filed after the hearing (and after the decision of this court in *BNM v MGN Ltd* [2017] EWCA Civ 1767) Mr Bacon argued that the ATE premium was recoverable, not by virtue of anything in the CPR, but simply because the No 2 Regulations said they were. This argument has some superficial attraction in the light of *BNM v MGN* Ltd in which Etherton MR said at [74]:
>
> > 'A costs order may make provision for the recovery of such premiums, not because they fall within the ordinary meaning of the word "expenses" in the definition of "costs" in the new CPR 44.1(1) but because they are expressly made recoverable in an order for costs by the Clinical Negligence Regs."
>
> 55. However, it was also common ground in that case (and not doubted by the court) that the new proportionality test in CPR Part 44.3 would apply to ATE premiums in post-April 2013 clinical negligence proceedings (see para [62] below). That measure of common ground in that case necessarily presupposes that the CPR will apply to such premiums. Accordingly, once a costs order is made, its assessment must be governed by the CPR, as the court implicitly acknowledged in that case. Nor does it seem to have been argued in BNM v MGN Ltd that in the particular context of costs orders permitted to be made by the No 2 Regulations the "context" might "otherwise require" an expanded definition of "costs."

60. This decision post-dates and expressly acknowledges Etherton MR's observations in *M v MGN Ltd*, which concerned the recoverability of ATE premiums in one of the time-limited exemptions (a privacy claim) that turned on an entirely different statutory framework. In any event, at paragraph 55 of his judgment in *McMenemy*, Lewison LJ recognised the limited scope of the decision in *M v MGN Ltd.*

61. The Court of Appeal's binding judgment in *McMenemy* could not be clearer. In the context of a claim to which the No 2 Regulations apply, "costs" includes an ATE premium. Thus, an order for costs is an order for payment of an ATE premium. In *McMenemy*, both claimants were permitted to recover ATE premiums pursuant to the deemed orders for costs secured by operation of Part 36.13 and CPR r.44.9(1)(b).

62. As Lewison LJ stated at paragraph 53 of his judgment, such an approach is demanded in the context of the No 2 Regulations. To conclude otherwise would give rise to the following consequences.

63. First, any order for costs given in a clinical negligence claim in the 'usual' form since 2013 (that is to say an order which provides for a defendant to pay the claimant's costs of the claim on the standard basis subject to detailed assessment if not agreed) would not permit the claimant to recover an ATE premium despite the clear intention that such premiums should remain recoverable.

64. Second, any claim which concluded by way of Part 36 offer and acceptance would not permit the claimant to recover an ATE premium despite the clear intention that such premiums would remain recoverable.

65. Third, any claim which settled prior to the issue of proceedings would not permit the claimant to recover an ATE premium, as pursuant to CPR r.46.14 (the 'Costs Only' Procedure) the Court is only granted jurisdiction to "make an order for the payment of costs". If the definition of "costs" does not include an ATE premium, the Court would be unable to order more.

66. Fourth, if an ATE premium is not encompassed by the definition of "costs", it cannot be included in a detailed assessment of costs under Part 47. Clearly that is incorrect.

67. This court is bound to follow the Court of Appeal's decision in *McMenemy* and, in consequence, to permit recovery of the Claimant's ATE premium. As no challenge is raised to the quantum of the premium (and none can be, following *West v Stockport NHS Foundation Trust [2019] 1 W.L.R. 6157*) the premium should be allowed as drawn.

68. For the above reasons, it is not necessary for the court to concern itself with the questions of purposive interpretation, nor whether there has been a drafting error in Part 36. If however the court takes the view that a purposive construction is required, pursuant to the principles set out clearly by the Supreme Court in *Plevin v Paragon Personal Finance Ltd [2017] UKSC 23*, in order to give effect to the obvious intention of parliament that ATE premiums ought to remain recoverable and subject to assessment in the usual way, the proper interpretation of the statute and the No 2 Regulations is that an order for "costs" is an order for recovery of an ATE premium where the threshold test is otherwise met.

Conclusions

69. Whilst I admire the ingenuity of Mr Friston's submissions, I do not find them persuasive. My reasons are, in summary, first that I do not accept that the No 2 Regulations create an exception to the normal rule that "costs" as defined at CPR 44.1(1) are (subject to assessment) recoverable under any order for costs without

specific provision for any particular element of those costs: and second, that recoverable ATE premiums do fall within the definition of "costs" at CPR 44.1(1). I will explain those conclusions.

70. I must start with section 58C(1) of the CLSA, which is not, in my view, to be given an entirely literal interpretation. That is because read literally, the words "A costs order… may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy" would mean only that a costs order may not incorporate an express provision to the effect that such an amount must be paid.

71. The fundamental obstacle to any such interpretation is that it would not achieve the undisputed purpose of section 58C, which is to establish a general rule to the effect that ATE premiums are not recoverable under any order for costs except in limited, specified circumstances.

72. The words "A costs order… may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy" in section 58C(1) of the CLSA must, accordingly, be understood not to refer to any express provision in the order, but to mean only that a costs order (however worded) will not enable the recovery of an ATE premium except to the extent permitted by regulations made under section 58C(2).

73. It would follow that the words "A costs order… may include provision requiring the payment of an amount in respect of all or part of the premium of the policy" in section 52C(2) are not to be taken to refer to an express provision in a costs order either.

74. The question then is whether those words, when repeated in both the First Regulations and the No 2 Regulations, are to be read differently, so that they do refer to an express provision. There is no obvious reason why they should be, and my reading of the First Regulations (which Mr Friston accepts can serve as an aid to interpretation of the No 2 Regulations) offers a clear indication that they should not.

75. I say that because the First Regulations, having said at regulation 2(1) that "a costs order… may include provision requiring the payment of an amount in respect of all or part of the premium of the policy", go on to provide at regulation 2(2)(c) that the order "may not" do so if the cost of the report "is not allowed" under the costs order.

76. If it were necessary, for an ATE premium to be recoverable under regulation 2(1) of the First Regulations, for a costs order to make express provision to that effect, regulation 2(2)(c) would be otiose. The necessary inference is regulation 2(1) of the First Regulations is not to be read in that way.

77. On the contrary, regulation 2 of the First Regulations, read as a whole, is in my view consistent only with the conclusion that, provided that the statutory criteria are met, a costs order in a qualifying case will permit a claimant to recover a recoverable ATE premium against an opponent unless that order makes express provision to the contrary. That is consistent with normal practice and procedure under the CPR.

78. I can see no good reason to read the words "A costs order… may include provision requiring the payment of an amount in respect of all or part of the premium of the

policy" in regulation 3(1) of the No 2 Regulations any differently from the same words in section 58C(2) of the CLSA and regulation 2(1) of the First Regulations.

79. Mr Friston describes that wording as "permissive", but I can attach no significance to that. It must of necessity be permissive. Statutory provisions made to preserve the right to recover ATE premiums under orders for costs in certain cases will provide either that such costs orders may allow the recovery of an ATE premium, or that they shall allow the recovery of an ATE premium. The first option is the obvious one, because the second would purport to prevent the court from exercising its discretion on assessment, for example by disallowing in its entirety a recoverable ATE premium that has been unreasonably incurred.

80. For that reason and for the other reasons I have given, the wording of the No 2 Regulations does not support the conclusion that they add to the CPR by introducing an additional requirement to the effect that a recoverable ATE premium must be expressly provided for in a costs order.

81. Even if I had not drawn those conclusions as to the way in which the No 2 Regulations should be read, I would not accept the suggestion that they were intended to create a new mechanism for judicial oversight, additional to assessment and exclusively for recoverable ATE premiums.

82. That is first because I can see no real basis for the conclusion that the No 2 Regulations are intended to do more than to establish the criteria which an ATE premium has to meet if it is to be recoverable. That is their purpose under section 58C(2) of the CLSA. There is nothing to support the conclusion that they are intended to improve upon the established procedures and criteria for the assessment of costs.

83. Second, it is already well within the discretion conferred upon the court by CPR 44, when making an order for costs, to disallow all or part of a recoverable ATE premium if there is a case for doing so. It would neither be necessary nor appropriate for the No 2 Regulations to purport to impose some sort of additional jurisdiction.

84. Third, although as I have said the discretion must exist, in the great majority of cases there would be no exercise of any sort of judicial oversight as to the recovery of an ATE premium at the point when a costs order is made. Even where a costs order is made at the end of the trial of a clinical negligence claim, it is unlikely that any trial judge would, on making the order, address the component elements of the costs awarded. That would be a matter for assessment.

85. There would be no opportunity for judicial oversight at all in the majority of clinical negligence cases that (as Lewison LJ observed) settle without a trial. That will include cases, as in *McMenemy* and this case, where a Part 36 offer is accepted and an order for costs is deemed to be made under CPR 44.9(1)(b). It will also include cases where a clinical negligence claim has been settled without the issue of proceedings and the costs cannot be agreed, so that a costs-only order under CPR 46.14 is required. The CPR 46.14 procedure makes no provision for the judge making the order to have any idea whether any ATE premium has been paid, much less about the merits of recovering it.

86. I have myself, in making costs-only orders in clinical negligence cases since April 2013, routinely been including express provision for recoverable ATE premiums. I have done

so not in the exercise of any sort of judicial oversight (because, as I have said, the procedure does not allow for the exercise of such oversight). I have done so only to forestall the dispute that is addressed by this judgment. I have of course made provision for such recovery subject to the court's discretion on assessment, which is the appropriate forum for determining whether an ATE premium should, on the merits, be recovered.

87. I would add that no paying party has ever taken issue with the form of order I have used (no doubt because any principled objection to the ATE premium can be addressed on assessment) and that to the best of my knowledge, most judges consider this precautionary wording unnecessary. In the course of preparing this judgment I have concluded that they must be right.

88. That is first because of the conclusions I have reached upon the construction of the No 2 Regulations and second because, as Mr Latham says, Lewison LJ in *McMenemy* has already determined that the definition of "costs" under the CPR must in clinical negligence cases extend to recoverable ATE premiums.

89. It follows that a recoverable ATE premium will, subject to the normal principles on the assessment of costs, be recoverable under any order for costs (whether deemed or actual) without any need for the order, CPR Part 36, or any other part of the CPR to make further provision.

90. Mr Friston argues that Lewison LJ in *McMenemy* (consistently with the findings of Etherton MR in *BNM v MGN Ltd*) envisaged that recoverable ATE premiums would fall within the definition of costs under CPR 44.1(1) only where an order for costs makes express provision for their recovery. In other words, an order providing in express terms for the recovery of a recoverable ATE premium will bring it within the CPR 44.1(1) definition of "costs", but without such express provision it will fall outside it.

91. I can find nothing in the judgment of Lewison LJ to support such a convoluted interpretation. His finding to the effect that the definition of costs in the CPR must include a recoverable ATE premium was not qualified in any way, much less by reference to the precise wording of a costs order. On the contrary, he expressly stated that following acceptance of a Part 36 offer (in which case there would be no express provision in an order for its recovery) a recoverable ATE premium would fall to be assessed under the CPR.

92. There is nothing in the No 2 Regulations or the CPR that could support the novel proposition that the CPR's definition of "costs" will change depending upon the terms of an order for costs. An order for costs may award part of a party's costs, or disallow some specific part, but it does not, and could not, define what "costs" are. They are defined by CPR 44.1(1).

93. It also seems to me that the proposition that, absent specific provision in a costs order, a recoverable ATE premium will fall outside the CPR's definition of "costs" is inconsistent with Mr Friston's submission to the effect that a clinical negligence claimant, having accepted a Defendant's Part 36 offer, could make a separate application for the recovery of a recoverable ATE premium either under CPR Part 8 or CPR Part 23. As Lewison LJ pointed out in *McMenemy*, if the recoverable ATE

premium does not fall within the definition of "costs" then a CPR Part 8 application will inevitably fail. It seems to me that a CPR Part 23 application would also fail, because acceptance of a Part 36 offer creates only an entitlement to recover "costs" as defined under the CPR.

94. Mr Friston argues that Lewison LJ did not find, expressly, that the note at 48.0.4 to the White Book was incorrect. That of course is right, presumably because the paying parties in *McMenemy* were not advancing the case put to me by the first Defendant. For that reason, Lewison LJ's judgment may not, as Mr Latham submits, represent a full and binding determination of the issue. The point is however that Lewison LJ's findings cannot be reconciled with the first Defendant's case, and they are at least determinative of whether a recoverable ATE premium falls within the definition of "costs" at CPR 44.1(1).

95. It follows that I must respectfully disagree with the conclusion reached by the author of the note at 48.0.4 to the White Book.

96. As for the proposition that the CPRC has, in making no specific provision in the CPR for recoverable ATE premiums, implicitly approved that note, I would refer to the words of Lewison LJ at paragraph 79 of his judgment in *McMenemy*:

> "I think that it is unfortunate that the Rules Committee took the view that there was no need for rules or practice directions dealing with the recovery of ATE insurance premiums in clinical negligence cases; and would invite them to reconsider the question. At the moment, however the pieces of the jigsaw puzzle are manoeuvred they do not all fit properly."

97. Part of the puzzle has, thankfully, been solved by Lewison LJ. For that reason, and for the other reasons I have given, I have concluded that the £5,266.01 sought for the Claimant's ATE premium should be allowed.