Case No: 90L03967

IN THE LEEDS COUNTY COURT

The Combined Court Centre , Oxford Row , Leeds

Date: 06/11/2013

Before:

HIS HONOUR JUDGE GOSNELL

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Between:

ANDREW PROCTER **Claimant**

- and -

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RALEYS SOLICITORS **Defendants**

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Mr Watt-Pringle QC and Mr Greenbourne **(**instructed by Mellor Hargreaves) for the Claimant
Ms Foster (instructed by Berrymans Lace Mawer) for the Defendants

Hearing dates: 16th and 17th October 2013

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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.

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HIS HONOUR JUDGE GOSNELL

His Honour Judge Gosnell:

1. This claim is made by the Claimant against the Defendant firm of Solicitors for professional negligence. The Claimant was employed as a miner at various collieries in Yorkshire. He was employed by the National Coal Board which became British Coal from 29th August 1986 to 31st December 1994 and RJB Mining Ltd ("RJB") which became UK Coal Mining Ltd ("UK Coal") from 1st January 1995 until January 2004. During these employments he was exposed to vibratory tools as a consequence of which he alleges he developed Vibration White Finger ("VWF") a form of Hand Arm Vibration Syndrome ("HAVS"). He instructed the Defendant firm in January 2000 to pursue a claim on his behalf for damages as a result of developing this condition.

2. With the Defendants' assistance he made a claim for compensation against both prior employers under a compensation scheme set up by the Department for Trade and Industry which provided tariff based compensation for people who had developed VWF as a result of exposure whilst employed at British Coal and subsequent employers. On 17th November 2003 he agreed to settle his claim against both previous employers for the sum of £11,141 including interest. This sum was paid in settlement of his claims for general damages and handicap on the labour market. No payment was made in compensation for services required as a consequence of his disability as no such claim had been registered under the scheme. It is the Claimant's case that if the Defendants had properly advised him about the nature of the scheme and the claims which were open to him he would have made a claim for services and could have received £11,079 under this head. The Defendants' case is that he was properly advised and that the Claimant failed to tell them that he had any need for services following his contraction of VWF and that if he had done so, they would have advised him to consider making a claim. The Defendants say that the Claimant failed to tell them that he needed assistance with certain tasks because he did not in fact need such assistance.

3. **The Scheme**

In July 1998 the Court of Appeal upheld a decision of the High Court finding British Coal negligent in exposing miners to excessive vibration resulting in them contracting VWF. By this time the Department for Trade and Industry ("DTI") had taken over responsibility for British Coal and set up a compensation scheme ("the Scheme") to provide tariff based compensation to miners who had been exposed to vibration and suffered from VWF. The Claimant had used vibratory tools in both his employments and was entitled to claim under the Scheme.

4. The Scheme was administered for the DTI by IRISC Claims Management ("IRISC") in accordance with the terms of a Claims Handling Arrangement ("CHA") dated 22nd January 1999 as amended from time to time. The CHA was an agreement between IRISC and firms of Solicitors who belonged to the VWF Litigation Solicitors Group ("VWFLSG"). After the agreement was executed there were continuing negotiations between VWFLSG and the DTI and other mining contractors like UK Coal in relation to the claims as a whole and services claims in particular. Where disputes arose they were either resolved by agreement or determined by the Court. The Defendants and other members of the VWFLSG were kept informed of developments by bulletins from the VWFLSG steering committee.

In addition to the CHA there was a Services Agreement of 9th May 2000 which governed the management of services claims.

5. Claims were initially categorised according to whether or not proceedings had been issued and whether or not a medical report had been served. The Claimant's case was a category C claim as neither of the above milestones had been reached. A claimant would first have to submit a questionnaire to IRISC about his occupation and he would be assessed into an occupational group depending on his likely exposure. If he was accepted into a relevant occupational group by IRISC arrangements would then be made for a medical examination in accordance with the Medical Assessment Process in the CHA. The medical report produced by this process became known as MAP1. The report was intended to ascertain whether the Claimant was suffering from VWF and if so his staging on the Stockholm Workshop scale. IRISC was then obliged to make an offer of compensation or to reject the claim with reasons. A claimant could challenge the findings of the MAP1 report but there was no provision in the CHA for IRISC to do so. The CHA agreement provided for compensation for general damages, handicap on the labour market and special damages.

6. The CHA made provision for interim payments where payments were for some reason delayed and initially amounted to 50% of IRISC's valuation of British Coal's liability to the Claimant. By February 2001 this had increased to 92.5% and by 20th November 2002 100% although this latter increase was not put into effect until 2003. The CHA also provided for apportionment of claims between British Coal and other employers with IRISC agreeing to attempt get other employers to agree to the Scheme and if not making payments reflecting their own apportioned responsibility.

7. A further agreement was entered into on 9th May 2000 ("the Services Agreement") which set out the agreed approach where services were claimed. The onus was initially on a claimant to establish as a matter of fact that prior to his injury he actually undertook the tasks for which services were claimed and that he no longer undertook those tasks due to his condition. He did this by completing a standard form questionnaire supported by those helpers who provided the services who themselves completed a different standard form questionnaire. It was agreed that once a claim reached a certain level it should be presumed that a claimant could no longer carry out certain tasks but the tasks to which this presumption applied varied according to his staging as determined in the MAP1 report. IRISC were not bound to accept the claim and did conduct telephone interviews with helpers to ensure that services were actually required and being provided. Dubious claims could be referred to the Securities Investigation Department. A further medical examination known as MAP2 would then be arranged which was purely to consider whether the claimant had any co-morbid conditions which would have affected his ability to do the required tasks in any event, and if so, what effect those conditions would have had. A tariff based approach would then be used to calculate the value of the claimant's services claim, depending on the claimant's staging and any deduction to reflect co-morbid conditions after the MAP2 examination. Services claims were initially subject to a pilot scheme but offers of settlement began to be made after the pilot scheme ended from mid 2003 onwards. Many of the claims were not however resolved until 2005 or 2006.

8. The Services Agreement was only entered into with British Coal and was not supported by the other employers such as UK Coal. They were only prepared to make

payments for services claims on traditional common law grounds. As a consequence of that the Claimant in this case only claims what he could have achieved under the tariff based system from British Coal and makes no claim for any common law claim he could have made against UK Coal.

9. **Mr Proctor's Claim**

The Claimant instructed the Defendants and filled in one of their standard questionnaires on 12th January 2000. He related his employment history and recorded that he first noticed his symptoms in 1990 although he did not know the cause. The form stated that he ceased using vibratory tools on 23rd September 1999 and he described various symptoms arising from his condition. It is fair to say that a schedule of employers attached to the form suggested that his exposure was continuing. A claim was submitted to IRISC and accepted by them on 27th November 2000 as a Group 1 claim which was for workers who used vibratory tools regularly in their work. On 30th March 2001 Dr Bernard Ryan produced the MAP1 report which confirmed the Claimant's staging at 2V 2Sn (late) bilaterally. The only entry relevant to services is that the Claimant reported that he found gardening to be a problem as he could not grip a spade properly.

10. The lawyer dealing with the Claimant's case Mr Kuleszka reviewed the report and recorded in a file note that "there is a potential services claim". He then wrote to the Claimant on 10th September 2001 enclosing the report and giving certain information and advice to the Claimant about services claims and other claims which could be made which will be considered further in due course. On 27th January 2003 a further letter was sent to the Claimant enclosing an interim payment. This letter also gave the Claimant some information about potential services claims. Finally on 23rd October 2003 the Claimant was notified of the offer of £11,141 in a further letter which contained more information about services claims. On 17th November 2003 he provided a form of authority to the Defendants authorising them to accept the offer which had been made. These three letters are crucial to this claim as they appear to contain the sum total of advice that the Claimant received. The Claimant claims that he never had any face to face meeting with any lawyer employed by the Defendants and the Defendants have not called any witnesses to give evidence that they actually gave any particular advice. The Defendants have relied on Mr Barber who was a partner at the relevant time who can give evidence that the file shows that the letters were sent and that, in his view, the contents of the letters represent sufficient advice.

11. **The Law**

It is not controversial that the Defendants owed a duty of care to the Claimant both in contract and tort. The standard of care required is that of the reasonably competent Solicitor. In *Midland Bank v Hett, Stubbs Kemp* [1979]Ch 384 Mr Justice Oliver emphasised that a solicitor should not be judged by the standard of a " particularly meticulous and conscientious practitioner ….The test is what the reasonably competent practitioner would do having regards to the standards normally adopted by his profession". However a solicitor should be judged by the standard of the reasonably competent practitioner specialising in whatever areas of law the Defendant holds himself out to be a specialist as was applied by Douglas Brown J in *Green v*

Collyer Bristow [1999] Lloyds Reports P.N. 798. In this case the Defendants hold themselves out to be specialists in Industrial Disease claims and were experienced in both claims for miners and this particular scheme.

12. In considering the correct approach in dealing with a case such as this I derive the following assistance from the authorities. In *Dixon v Clement Jones Solicitors [2004]* EWCA Civ 1005 Lord Justice Rix said:

> *"There is no requirement in such a loss of a chance case to fight out a trial within a trial, indeed the authorities show as a whole that that is what should be avoided. It is the prospects and not the hypothetical decision in the lost trial that have to be investigated. …. The test is not to find what the original decision of the underlying litigation would have been as if that litigation had been fought out, but to assess what the prospects were*."

Agreeing, Carnwath LJ observed at [54]:

> *"The judge was not trying the action against the accountants. The opportunity for a trial of that had been lost. His view as to what the outcome would have been was strictly irrelevant, except as one stage in the process of deciding the value of the loss opportunity.*

Lord Justice Simon Brown has given Judgement in two relevant cases on this issue. The first in time was *Mount v Barker Austin* [1998] PNLR 493 at 510D:

> *"(1) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim … he has lost something of value i.e. that his claim … had a real and substantial rather than merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' -- the word used in a somewhat different context in* Allied Maples Group Ltd v Simmons & Simmons *[1995] 1 WLR 1602 -- lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)*
>
> *"(2) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position ….*
>
> *"(3) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim … than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty ….*
>
> *"(4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in* Armory v Delamirie *(1722) 1 Stra 505 comes into play."*

He developed this further in *Sharif v Garrett and Co [2001]* EWCA Civ 1269, [2002] 1 WLR 3118:

> *"38 In stating the principles generally applicable to this class of case, I indicated in Mount v Barker Austin [1998] PNLR 493, 510 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial hurdle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.*
>
> *"39 With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the Armory v Delamirie (1722) 1Str 505 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure."*

The correct approach would therefore appear to be to firstly determine whether there has in fact been a breach of duty. Secondly, if there has, the court must then ask whether the breached caused or materially contributed to the Claimant's alleged loss. In deciding whether the Claimant would have acted differently if he had received competent advice the court must decide the issue on the balance of probability. Thirdly, the court must decide if the Claimant has lost something of value in the sense that his prospects of success are more than negligible. Fourthly, if the court decides that the Claimant has lost a claim with more than negligible prospects of success it must make a realistic assessment of what those prospects of success were. Finally, the court will need to make an assessment of what the likely value of the claim was having taken account of the prospects of success.

13. **The Evidence**

The Claimant gave evidence about his employment history as a miner from 1976 to 2004 and his instruction of the Defendants in January 2000 to pursue his VWF claim. His evidence was that he had never had any face to face meetings with any of the various lawyers who dealt with his file and the claim had been conducted by correspondence, questionnaires and telephone calls. He completed a questionnaire to confirm his symptoms, stating that he had attacks in summer and winter and suffered from poor grip, an inability to pick up small objects from a flat surface and a tendency to drop things. He also reported pins and needles when the circulation returned. He confirmed he had been examined by Dr Ryan who assessed him at 2V 2SN (late) in terms of staging. He told Dr Ryan that he suffered from tingling in the cold and whilst gripping a pen and that he had a problem gardening as he couldn't grip a spade properly.

14. He accepted he had received letters from the Defendants asking him if he wished to make a services claim but contended that as the letters had mentioned recovering expenses and other losses he thought he could only make a services claim if he had actually suffered financial loss and made a payment to a third party. As the majority of the tasks he would have claimed for were being done by his wife and son free of charge he claimed he was not aware that he could make a claim. He accepts that he never told the Defendants that he wished to make a claim for services but says that if

they had made it clear that he could claim for tasks which he could no longer do but for which he was receiving gratuitous assistance he would have made such a claim as, from what he has been told by his current solicitors, he had everything to gain from making a claim and virtually nothing to lose by doing so. He said he had received no advice whatever about the potential strength or weakness of his claim. He claimed that prior to becoming symptomatic with VWF he had done gardening, DIY, decorating, car maintenance and car washing and once he became symptomatic he needed assistance which was provided by his wife and son. His witness statement recorded that up to 2004 he had a garden but in that year it was flagged over although they did have a lot of potted plants which he had difficulty dealing with.

15. The Claimant was robustly but fairly cross-examined for most of the first day of the trial. He gave his evidence in a straightforward way and certainly appeared to be attempting to answer the questions truthfully. There were a number of contemporaneous documents which appeared inconsistent with parts of his evidence which were put to him and he gave an explanation in relation to each, some of which were more convincing than others. For example, he gave evidence that although he worked as a miner until January 2004 he had effectively stopped working with tools producing vibration when he stopped being a development worker in 1999. There were a number of documents which appeared to give the impression that he was still using vibratory tools in 2000, 2001 and 2002. His reply was that he was describing the tools which were used in his working environment although he did not necessarily use all the tools which he had listed. I formed the view that this was inherently unlikely and I find as a fact that he used vibratory tools after 1999 although perhaps intermittently until May 2002 when he was first graded as being unfit to use vibratory tools and banned by his employers from using them.

16. He was cross examined in detail about each of the five tasks which he said he used to do and now required assistance with. It was clear that he was never a keen gardener and his knowledge of gardening generally was poor. He maintained that he had mown the lawn near his caravan and had put bedding plants in pots prior to becoming symptomatic and now these tasks were carried out by his wife. My impression was that he had probably done very little gardening previously and that this was a part of his claim which, on a common law assessment in a civil trial, would have produced a very limited claim in monetary terms. There were other parts of his evidence however which were much more convincing in terms of detail and had the ring of truth about them. He gave evidence that he had always been mechanically minded and had always maintained and serviced his own cars. His description of the tasks he used to perform showed a familiarity with the process and his irritation that he had to pay high fees to garages for servicing now seemed genuine. Also his description of how he had difficulty changing a plug seemed to stem from honest recollection and his immediate response that he could not put up a shelf because he could not use a hand held drill made sense.

17. There were a number of other documents which were put to him as they appeared to be inconsistent with his assertion that he had actually been suffering symptoms which were causing disability. For example in September 2001 he instructed the Defendants to deal with a Mineworkers Respiratory Disease Claim and he filled in a questionnaire for that purpose. One of the questions was " Have your health problems caused you to seek help (from family friends and others) with household DIY jobs that you would

normally have done yourself , for example cleaning windows , gardening , decorating , car maintenance ?" to which he answered "No" . His explanation for this apparent inconsistency was that he thought the questionnaire was directed to problems which had arisen as a consequence as a result of his chest complaint only rather than any other conditions (like VWF) that he had. Similarly when he underwent a Health Surveillance Assessment with UK Coal in October 2003 he was asked about any musculo-skeletal problems and he declared back pain /sciatica without mentioning the problems with his hands caused by VWF. His explanation for this was that the nurse who completed the form knew he had VWF as she had certified him unfit for work with vibrating tools as part of the same health assessment and so he did not feel the need to mention it specifically. I felt these two explanations were both sensible and credible. There was also a Department of Social Security questionnaire he had completed in 2009 when he made a claim about his knee and failed to mention his hand symptoms. He was unable to explain this omission but I did not consider it to be particularly significant as he was not claiming for anything to do with his hands.

18. My overall impression of his evidence was that he was attempting to recall the history of his condition truthfully. He was not consistent about some matters in particular in relation to the dates when certain events occurred and as a result his evidence should be treated with caution in that respect. I did however reach the conclusion that he was suffering from symptoms caused by VWF and that those symptoms had meant that he required assistance with certain tasks that he had previously carried out without assistance. In my view, I need make no more detailed findings of fact than that for reasons I will explain later in this Judgment.

19. The Defendants relied on the evidence of Mr David Barber who at the relevant time was the partner in charge of the department at the Defendants who dealt with the Claimant's claim. He had no personal involvement in the Claimant's file and gave his evidence following a review of the relevant file of papers. He prepared a witness statement containing his evidence in relation to this claim and a generic statement relating to VWF claims generally as operated by the Defendants. He was somewhat hampered by the fact that no witnesses of fact were called by the Defendants who actually dealt with the Claimant's claim and effectively relied on the three letters which were sent to the Claimant on 10th September 2001, 27th January 2003 and 23rd October 2003 which he says gave the Claimant clear and unambiguous advice about the various claims he could make. Mr Barber said that if the Claimant had indicated that he wished to make a services claim he would have been sent a questionnaire seeking further information about which particular tasks he needed assistance with and he would also have been given further advice and information about his services claim generally. It was suggested to him that the Claimant should have been advised about the medical presumption which his staging would justify (i.e. that there were certain tasks which he would be presumed to be unable to do) but Mr Barber explained that whilst this might be explained to a client who was actively making a services claim it would not be discussed with a client who had indicated no intention to make a claim. He emphasised that it was important not to encourage fraudulent or unjustified claims and it was for the solicitor to ask an open question and if the client answered it by asserting that he had a potential services claim it could then be investigated further. Similarly he would not normally explain the MAP 2 procedure or workings of the employment protocol to a client unless they had replied to the first letter indicating a wish to make a services claim.

20. Mr Barber also sought to give evidence as to the various obstacles which might have prevented the Claimant succeeding with his claim such as his previous inconsistent statements, his co-morbid conditions and contra-indicative employment. In relation to these contentions I have to exercise some caution. Although Mr Barber was a helpful and courteous witness he was clearly partial. He was again reluctant to accept that the typical clients in relation to these claims were not sophisticated and could be poor historians. Having denied this in cross-examination his own words were put to him as they had been in the previous trial of Mr Barnaby where he had said that "many clients, as you know were not good historians". He also had put to him a training exercise which he agreed he had delivered which was said to involve a fictitious client "Mr Thikas Toosh Ortplanks". Whilst he denied he had made this poor joke it clearly showed that at least one of his colleagues agreed that the Defendants' clients were not sophisticated to say the least. Mr. Barber also appeared to indicate that he did not agree with my findings in Mr Barnaby's case concerning the lack of a robust investigation of these claims by IRISC and the relative ease of overcoming an allegation of contra-indicative employment. Whilst he is of course entitled to his opinion on these matters it did not help to persuade me that he had any sort of balanced view of the issues in this case. In relation to the letters which had been written to the Claimant he was not prepared to accept that they were anything other than clear and I felt he was attempting to defend his own work as it was he who had drafted the letters. That in itself was not too surprising but the fact that he appeared to suggest that the letters contained all the information which the Claimant needed and did not seem troubled that there were no file notes to show that any relevant advice had been given to the Claimant other than in those letters was not what I would have expected of a solicitor who was managing those fee earners at the relevant time. The answer I would have expected was that the client should have been advised in addition to the letters, the advice should have been recorded in a file note and the advice then confirmed in writing to the client. Where Mr Barber gave his opinion about various issues in the case I have therefore borne in mind that his opinion is coloured by his partiality. He was cautioned at one point by Leading Counsel for the Claimant for seeking to advocate the case rather than acting as a witness and at that point I felt the criticism was justified.

21. **Breach of Duty**

The Particulars of Negligence and Breach of Contract are set out in some detail in paragraph 30 of the Amended Particulars of Claim. In essence however the allegation is that the Defendants were negligent in allowing the Claimant to settle his claim without advising him to register and pursue a claim for services in addition to the claims he was already making for general damages and handicap in the labour market. This is particularly so, says the Claimant, when as a result of his staging at MAP 1 there was a medical presumption that he needed assistance with certain tasks and that the process for making such a claim was simple and which might produce a further figure in damages about equal to the sum of the two claims he had already made. The Defendants' case is that the Claimant was advised that he could make such a claim but he failed to evince an intention to do so. As the Defendants have called no witnesses who can give evidence as to what advice was given apart from in correspondence it is necessary to pay some attention to the three crucial letters they rely on as giving appropriate advice about this issue.

22. The first document in the Solicitors' file is the questionnaire which the Claimant completed on 12th January 2000. Interestingly, it had to be returned to him on 23rd February 2000 because it had not been fully completed and it would appear from the copy in the trial bundle that three separate questions had not been answered. The Claimant underwent his MAP 1 examination and, apart from his staging at 2V 2Sn (late) there was also an indication in the report that the Claimant had difficulty gardening as he could not grip a spade correctly. When the report was reviewed by Mr Kuleszka the lawyer dealing with the claim on 3rd September 2001 he recorded (inter alia) "there is a potential services claim". It is not clear however that any changes were made to the standard letter which followed this assessment to reflect that judgment. On 10th September 2001 a letter was sent to the Claimant enclosing Dr Ryan's report and giving certain advice and requesting further information. Relevant extracts are as follows:

> " *Additional Investigations -Other Financial Losses*
>
> *On reviewing your case further there may be further investigations that may need to be undertaken in order to assess the amount of damages you may be entitled to. I may need your further instructions. See attached form of authority.*
>
> *Please read the following carefully*
>
> *The basic legal principle is that you are entitled to recover any expenses or other losses arising from having vibration white finger or carpal tunnel syndrome. I set out below some of the main losses we can consider but this is not an exhaustive list:*
>
> *1.Claim for loss of earnings ….*
>
> *2. Handicap on the labour market…*
>
> *3. Service Claim*
>
> *The DTI have recently agreed to pay additional compensation for services. What this means is that if you are prevented from doing certain tasks such as decorating, DIY, gardening, car washing, window cleaning, car maintenance as a result of having VWF/Carpal Tunnel Syndrome and as a result you now require assistance then you will be entitled to receive additional compensation. ….*
>
> *On the basis of the medical evidence I advise that you may qualify for such a claim.*
>
> *Regrettably I have to advise that there are further forms that will need to be completed. In addition those carrying out assistance on your behalf are required to complete "witness questionnaires" verifying the truth of the assistance that is provided.*
>
> *4 Care ….*
>
> *5 Other financial losses …*
>
> *If you think that you may have a further claim or your have sustained other financial losses as a result of having vibration white finger / carpal tunnel syndrome it is important you let us know at this stage."*

The letter enclosed two authorities to sign, one confirming receipt and agreement with the medical report, the other suggesting a tick in a box to notify additional claims. The

Claimant returned his form and dated it 12th September 2001 ticking only the box for general damages. Significantly , he not only left the box for services unticked but also the box for handicap on the labour market , even though he qualified for such a claim according to the clear terms of the letter he had received.

23. The next significant letter received is dated 27th January 2003 which enclosed the first interim payment for £2902.43. This was similar in terms to the earlier letter with a summary of the five additional claims which could be made. Under the title "Services" the following was stated:

> *"In the event that your vibration white finger prevents you from undertaking certain tasks e.g. gardening, decorating, DIY, car washing etc with the result that you now require assistance to undertake these tasks the DTI has recently agreed in principle to award further compensation for such loss."*

A further copy of the tick box form was enclosed to notify the Defendants of any additional claims to be made. On this occasion the Claimant ticked the box for handicap on the labour market as it would appear that at some point he had decided to pursue this claim even though on the receipt of the first letter he had indicated he did not wish to do so.

24. The final letter was sent on 23rd October 2003 which notified the Claimant of the offer which had been made for general damages and handicap on the labour market. It contained the following further advice:

> "*The basic legal principle is that you are entitled to recover any expenses or other losses arising from having vibration white finger or carpal tunnel syndrome. We have attached to this letter the main losses that can be considered. However, it is not an exhaustive list. There may be other losses which can be taken into account. For example:-*
>
> *1 Loss of Earnings ….*
>
> *2 Services*
>
> *It is a well established principle of law that anyone unable to carry out everyday tasks due to an injury should be able to recover the cost of any assistance to carry out those tasks. It may be possible to claim damages for past and future assistance in carrying out gardening, decorating and other tasks if your VWF results in a reduction in your ability to carry out these every day tasks.*
>
> *We note that you have previously indicated that you do not wish to pursue this additional claim.*
>
> *…..If you think that you may have a further claim or you have sustained other financial losses as a result of having vibration white finger /carpal tunnel syndrome it is important that you let us know at this stage.*

25. The first question I need to consider is whether the letters contained negligent advice or were misleading. I have to say the final letter does add some support to the Claimant's contention that he thought he could only make a claim if he had actually incurred some financial cost. The final letter speaks of "expenses or other losses" and the ability to recover the "cost of any assistance". I have to bear in mind however that

he had already had two opportunities to make a services claim and it is likely that his decision that he was not entitled to make such a claim was made after having received the first letter and certainly by no later than the second letter. The first two letters merely speak of "compensation" where assistance is required due to the inability to undertake certain tasks. I have to say on an objective reading it does not suggest that claims can only be made where there has been actual financial outlay.

26. The next issue is whether the sending of the three letters is sufficient to comply with the Defendants obligation to properly advise their client about his claim. What would a reasonably competent practitioner specialising in this type of work have done? Would he or she send out a series of long standardised letters to their client and expect him to tick the correct boxes on the tick box form to reflect his instructions or should they have a discussion with the client to try to ensure that he has not only read but understood the correspondence. On the facts of this case I have reached the conclusion that the Defendants should have done more to ensure that the Claimant actually understood the advice he was receiving. When a solicitor takes instructions from his client this is a three stage process. Firstly the solicitor must obtain information from the client about the nature of his claim and the facts which surround it. Once the solicitor has all the relevant information he can then give the client advice which is the second stage. The third stage is when the client tells the solicitor what action he would like him to take on the basis of the advice he has received. In this case the information was contained in the questionnaire, the advice was in the initial letters and the instructions were by tick box form. In my view it was reasonably foreseeable that a client such as this Claimant might not fully understand how the system operated and what claims he was actually entitled to make. Whether the particular mistake he claims to have made was foreseeable is not relevant if that mistake could have been avoided by the obtaining of full instructions which would include a meaningful discussion about what the Claimant could and could not do once he became symptomatic.

27. The Claimant had stated in evidence that his education was limited. Even if the Defendants were not aware of this they could have assumed that most miners were not highly educated. Despite what Mr Barber said in evidence it was clear from the documents which were put to him that the Defendants knew there were risks in accepting information from the clients at face value. The Claimant relies on the words of Donaldson L.J. in *Carradine Properties v CJ Freeman Co [1999]* Lloyds Rep PN 48 when he said " an inexperienced client will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client". There is some indication from the Defendants records that they were regularly experiencing clients who had not notified them of a potential service initially, but changing their minds at a later stage on receipt of further information. At a staff meeting on 3rd December 2003 at which Mr Barber was present the following was recorded:

> *"DB expressed concern at the rate we are converting offers into services. The procedure that seems to have developed is that where a Claimant changes his instructions at the offer stage we write to him to clarify those instructions. It was agreed that AWE would amend the existing standard letter to make it more robust.*
>
> *It was agreed that we need to revise the offer procedure. AWE explained that he has a greater conversion rate having spoken to the client. The new procedure which we will*

> *introduce will ensure that when we get to the offer stage we will specifically request the client to make contact with the fee earner so proper advice can be given over the phone or in the office. We need to ensure that services are fully explained to the client."*

The implication of this record is that firstly some clients were not initially notifying claims for services when they were entitled to make such claims and that secondly more clients made claims for services if they actually spoke to the lawyer directly about the issue either in person or on the telephone. The phrase "so proper advice can be given over the phone or in the office" is, in my view, telling.

28. There were also some aspects to the Claimant's case in particular which should have rung alarm bells. Firstly, when he completed the initial questionnaire he left three questions blank. Secondly, in his reply to the first letter he did not make a claim for handicap in the labour market even though he was factually entitled to do so. Thirdly, his staging at 2V 2Sn (late) was one which justified a medical presumption that there were certain tasks he would need assistance with. Fourthly, the Claimant mentioned difficulties with gardening in the MAP1 assessment. Fifthly this was noted and recognised by the lawyer concerned on receipt of the report. Sixthly, a file note on 6th October 2003 appears to recognise a possible DIY/gardening claim. There is no evidence that these matters were taken into account either by amendment to the standard letters or by any attempt being made to specifically discuss the issue with the client. Faced with a client with that staging in my view it was incumbent on the solicitor to at least check whether the factual matrix applied, namely that the Claimant was carrying out certain tasks prior becoming symptomatic which he now needed assistance with. If that factual matrix did apply the solicitor could then give advice to the client that he may have a potential claim, he could outline was the process was, what the prospects of success were and a broad indication of the likely quantum of the claim.

29. I fully accept that it was not the Defendants' duty to attempt to create a claim where none existed, or to encourage a fraudulent claim. If the client replied to the enquiry by saying that he had never done the tasks concerned or was still doing them without need for assistance then I accept there would be no need to go any further. In my view however it was not too much to ask the solicitor to directly consult with the client to advise him in layman's terms what a services claim was and whether on the facts that applied to him he potentially qualified to claim. The system set up by the Defendants involving as it did, the extensive use of questionnaires and standardised letters with very little personal contact with the client enabled them to deal with a very high number of claims at limited cost. The disadvantage however of such a system is that it is heavily reliant on the client carefully reading all the correspondence and filling the questionnaires in accurately. It was foreseeable in my view that some clients (particularly these clients) would not fully understand the long and detailed letters and might misunderstand whether they had a right to claim or not with the consequence that potentially valuable claims might never be made when they could have been. The evidence suggests that a number of the Defendants' clients did not fully understand the right to make a services claim until they actually had a meeting or telephone discussion with a lawyer who would fully explain the subject. It follows from these conclusions that I find that the Defendants were in breach of duty.

30. **Causation**

The next issue is whether the breach of duty I have identified caused or materially contributed to the Claimant's loss. The Claimant's case is that if he had been told he could have made a services claim for assistance gratuitously provided he would have done so. The Defendants' case is that Claimant would not have made such a claim as firstly he was not in fact under such a misapprehension and secondly he had no claim in any event. The first question is whether in fact the Claimant did believe that he was unable to make a claim because he did not appreciate that he would be able to claim for assistance gratuitously provided. This is a question of fact. Some doubt was cast on the Claimant's contention when he conceded in evidence that he had to pay a garage to service his car and took his car to a car wash. These were two examples of situations where he had carried out the tasks before the symptoms prevented him doing so but now he had to pay someone to do them. The Defendants' counsel in cross -examination asked, not unreasonably, why he didn't make a claim for these services as they were not gratuitously provided. His answer was that "everyone pays for their car wash and car servicing". Whilst this is not a complete answer to the Defendants' argument I could see that the fact that he was paying for car servicing and when he went to the car wash just made him like the average member of the public. The fact that he could not mow a lawn, change a plug or put a shelf up was something unusual which most members of the public can and do achieve without difficulty. Overall and very much on balance I find that he did think that he could not claim for services because he had not paid the members of his family who had helped him.

31. This leads me to the Defendants' second point which is that he had no claim in any event, either because he was not carrying out the tasks prior to the diagnosis or because he had no need of assistance afterwards due to his symptoms being insufficiently severe. The Defendants rely on the findings of the single joint expert Mr Tennant who found that the Claimant's staging was 3V 1Sn. He also recorded certain comments of the Claimant which suggested a lower level of disability than his current claim suggests. For example Mr Tennant recorded that the Claimant could change a wheel and check and fill reservoirs with oil and water. The Claimant suggested he might have said he might be able to do it if he had to. It is fair to say that in his report Mr Tennant appeared to conclude there was no disability in car maintenance and either mild or moderate disability in relation to other tasks. The Defendants also rely on the various documents which were put to the Claimant which appeared to be inconsistent with his pleaded case and the fact that his helpers did not give evidence to support him during the trial. I have dealt with the various documents which were put to the Claimant in my review of his evidence and I stand by the findings of fact that I made in paragraph 18 of this Judgment namely that that he was suffering from symptoms caused by VWF and that those symptoms had meant that he required assistance with certain tasks that he had previously carried out without assistance. Counsel for the Defendants submitted that I was entitled to take into account Mr Tennant's findings in particular as to the Claimant's staging to find that his level of disability was in fact less than he was in fact claiming . She also submitted that I was obliged to make findings of fact in relation to each task as to whether the Claimant was prevented from doing any of them by VWF and whether in fact he required assistance as a result.

32. In my view I am not required to make such findings because if I did I would be essentially retrying the original litigation. My task is to assess the loss of a chance. I

rely on the various authorities set out in paragraph 12 of this Judgment which set out the principles clearly to be applied in cases such as this. By way of a concrete example however I further rely on the case of *Hanif v Middleweeks (a firm) [2000] Lloyds Rep PN 920* where the Claimant and his partner operated a night club. It was destroyed by fire and the insurers sued for a declaration that the Claimant was not entitled to indemnity due to breach of condition precedent , material non-disclosure and fraud in that it was alleged the fire had been started by the Claimant's partner. The Claimant's counterclaim was struck out for want of prosecution so he sued his solicitors. His Honour Judge Tetlow who dealt with the claim found the Claimant had an 80% chance of succeeding on the first issue, a 60% chance of success on the second issue and a 25% of success on the third issue (whether the fire was started by the Claimant's partner). The main ground of appeal was that the Judge had not only assessed the prospects, but also found positively, that there was arson by the Claimant's partner and so the appellant argued that the claim should be dismissed. Lord Justice Mance giving the leading Judgment carefully analysed the jurisprudence and what the Judge had actually said in his Judgment and concluded as follows:

> *"29. In reality, however , I consider that what he was doing was consistent with the task which he had set himself: working through the material before him with the single aim of coming to an ultimate conclusion as to the prospects of success on a trial in 1995. I think it is wrong to treat him as having assumed the role of deciding on the material before him what was the actual position regarding arson. Furthermore, if he had assumed that role, then I consider that he would, in the light of accepted principle and authority, have been wrong in this case to do so"*

33. In my view the issue of what the level of the Claimant's disability was when he made his claim, and which tasks he required assistance with are factual issues which are similar to the issue of whether there was arson in the above authority. My task is to decide on the Claimant's prospects of success in his overall claim which depended on proving those facts. It is only if I formed the view that he had no claim at all that I could dismiss the claim without assessing his prospects. The justification for this process in the jurisprudence is that the second Judge is unlikely to have exactly the same material before him as the first Judge would have done and so a retrial of the issues is not possible. This is all the more important in a case such as this where the original claim was being made under a complex scheme which would actually not involve a trial or Judge at all but the submission of questionnaires followed by a telephone interview of the helpers. Before me the Claimant was cross-examined for over three hours, under his original claim he would not have been cross-examined at all. This is why it is important I assess his prospects of success, not decide for myself what his level of disability was in 2006 when his claim would have been concluded. I can of course take into account evidence which impugns his claim which might have affected his award under the scheme when I make my assessment.

34. Finally, I consider whether if the Claimant had been properly advised by the Defendants he would have instructed them to make a services claim. I find that he would on balance of probabilities. If he had been asked whether he was getting any assistance with tasks he did not need prior to becoming symptomatic he would have told the solicitors about the various tasks for which he now claims. He would then have been told of the medical presumption applying given his staging that he would need such assistance. It would have been explained that he would need to attend the MAP 2 medical examination and fill in some questionnaires and his helpers may have

to be interviewed by telephone. He would have been told that he could not accept the final offers which had been made for general damages and handicap in the labour market but he would be entitled to an interim payment representing 100% of the value of the offer until his overall claim was determined. If he asked what his prospects of success were I find that he would have been told they were good even in 2003. Against this background it is highly likely that the Claimant would have pursued his claim for services and I find as a fact that he would.

35. **The loss of a chance**

The legal burden lies on the Claimant to prove that in losing the opportunity to pursue his services claim he has lost something of value, namely that his claim had a real and substantial rather than merely a negligible prospect of success. However an evidential burden lies on the Defendants in this case to show that, despite their acting for the Claimant in the litigation and advising him that they would recommend he proceeded with the claim where there was a reasonable prospect of succeeding, there was in fact no real prospect of success.

36. The Defendants' case on this issue was put by Mr Barber. He identified three problems which may have resulted in IRISC denying the Claimant's claim. Firstly, the Claimant may not satisfy the evidential requirements of the agreement to show that he used to do the tasks concerned and now needed help to do them, secondly that his employment as a miner and then a fork lift driver was one of a number which the DTI had indicated were inconsistent with the pursuit of a services claim and finally that the MAP 2 assessment might establish a co-morbid condition which could reduce or extinguish the claim.

37. Given the inconsistencies between the Claimant's evidence and some of the relevant documents and his uncertainty in particularly about gardening and car washing I can understand concerns about whether he could convince IRISC that he satisfied the evidential requirements of the CHA. Looking at the way these claims were investigated however it is unlikely that he would ever have to speak directly to IRISC let alone be interviewed or give evidence in front of them. Under the Services Agreement there was an assumption that someone graded at 2V 2SN like the Claimant would be unable to do the five tasks we are concerned with. He would submit a simple questionnaire from himself and two from his wife and son confirming they provided the assistance. Mr Barber did not suggest that the claimants were telephoned but suggested that the helpers habitually were. At page 917 behind tab 10 of Bundle three there is a Services Claim telephone discussion note showing the script of the telephone interview of the helper of a claimant. It appears that the helper was asked whether they in fact helped with the task claimed and if so when they started to do so. This was then compared with the date they had entered in the questionnaire. There appeared to be no other questions asked and the call recorded in the bundle lasted for fifteen minutes. There is obviously a risk Mrs Procter and her son would say something inconsistent with their questionnaire and provoke further investigation but it was not a particularly taxing interview process. In VWFLSG bulletin 59 the steering group confirmed that where the helper was out by a few years on dates IRISC would still accept the questionnaire so the risk does not appear to be high.

38. One issue which is relevant to this claim however which was not relevant to the previous trial is that Mrs. Procter and their son Darren did not give evidence at this trial. If this was because they would not support the Claimant's claim then it would be a fair assumption that they would not have supported the Claimant's claim in 2003 by filling in a questionnaire. Without this the claim would be doomed to failure. The Claimant was asked about this in cross-examination. His immediate response was that his wife and son had given statements to his solicitors but they had not been asked to attend the trial. Whilst this is forensically difficult to understand his response was so immediate (and his solicitors were sat in court) that I felt it was probably true. He gave evidence that they were prepared to support his claim but I have no way of knowing how convincing they would be or how strongly they are prepared to support it. This must attract a substantial discount from this Claimant's claim compared with someone who can bring their family to court to persuade the Judge that they would have completed a questionnaire and answered any questions in a telephone interview convincingly.

39. The issue of contra-indicative employment is also relied on by the Defendants. Bulletin 62 from the steering group confirmed that IRISC had sought to argue that certain occupations were not consistent with a services claim. Initially IRISC were refusing all claims from miners but at a later stage evidently agreed to look at each one on its merits. By 2002 the Claimant had stopped using vibratory tools and by January 2004 had left the mining industry. He then got a job driving a telehandler which is a type of outdoor fork lift truck. He was sat inside a heated cab and it does not seem to me that operating the controls of such a vehicle would be categorised as requiring fine manipulative handling. The Services Employment Protocol was not agreed until 2006 and so it seems to me this latter employment would be much more relevant than the previous employment as a miner. The Protocol agreed that where Capita (the successors of IRISC) contend that the Claimant's employment contra-indicates the claim for assistance they may deny the claim (wholly or in part) only if they can rebut the presumption that once the man's condition has reached the relevant stage he will be expected to have difficulty with relevant tasks and reasonably requires assistance. It was also agreed that to rebut the presumption created by the Services Agreement Capita must establish that the actual duties carried out by the Claimant in the relevant employment are such as to demonstrate he could reasonably be expected to carry out <u>all</u> aspects of the services task in issue without assistance. In case of dispute there was a dispute procedure to resolve these issues. It is fair to say that throughout this litigation the VWFLSG drove a hard bargain and obtained very favourable terms in the various agreements which were presumably conceded by the DTI to enable them to process a large number of claims quickly and more cheaply. The burden on the DTI to prove contra-indicative employment was a heavy one under the terms of this agreement but I accept there was a risk to the Claimant on this basis. It has to be borne in mind however that the vast number of services claims were successful. Mr Barber gave evidence in the beginning of his cross-examination that of all the claims for services made by the Defendants only 2.8% were wholly unsuccessful compared with 6% nationally.

40. In this case the issue of co-morbidity is relevant. The medical report of Mr Tennant on this issue is particularly relevant as no MAP2 assessment was carried out at the time and this is very good evidence of what the MAP2 assessment was likely to have produced. Mr Tennant found that there was a condition which the Claimant was

suffering from at the time which may also have had an effect on his symptoms namely sciatica. In relation to each task he found the effect of the co-morbid condition to have been "mild". According to Handling Agreement version 0.8 at paragraph 9.1 where the impact of any condition is "minor" which is the equivalent of "mild" the annual figure for the task should be reduced by 10% from the time the condition reached that stage. As the diagnosis first appeared in 2001 the discount would apply through virtually the whole of the claim. It is therefore almost inevitable that the Claimant would have suffered a 10% reduction in his claim due to co-morbidity.

41. I have reached the conclusion that the Claimant's original claim had a real and substantial prospect of success that was more than negligible. In terms of an assessment of those prospects there are a number of factors that I should take into account. Firstly, this was not a particularly robust process of assessment unlike normal civil litigation. If a claimant passes the MAP1 examination and his staging is at a certain level there is a presumption that he will require services to assist him in performing certain tasks. The normal verification process required a telephone interview lasting about 15 minutes with his helpers but would not normally require direct questioning of the claimant unless it was specifically referred for further investigation. The statistics reveal that 97.2% of services claims brought by these Defendants were successful at least in part. Balanced against these factors, the Claimant is a poor historian and the details of some of the tasks he carried out are not clear (although the prospects of him actually being interviewed were not high) and he was working in a job which the DTI may have considered was not consistent with a services claim. The terms of the employment protocol were however slewed in favour of claimants making it difficult for the DTI to discharge the presumption that a claimant with a certain staging medically would require such services. The Claimant would have in all likelihood suffered a reduction of 10% to reflect his co-morbid condition. A further substantial discount should be made to reflect the risk that the Claimant's wife and son may not have agreed to fill in the questionnaire or may not have given corroborating evidence on interview. This risk was made harder to assess by their absence from the trial process. The Claimant's prospects of succeeding with a services claim were overall therefore good and my best assessment of his statistical chances, taking into account all the above factors would be 50%.

42. The logical conclusion from my findings is that the Claimant succeeds in his claim for £ 5539.50 which is 50% of £11,079. 42. The Claimant put his case on the same basis as my finding in Mr Barnaby's case that the claim would have been resolved on 30th November 2006 which was not subject to adverse comment by the Defendant.

43. This Judgement will be handed down on a date to be fixed by the court in public. The time for appealing the Judgment shall not start to run until it is handed down. CPR Practice Direction 40E shall apply. If the parties can agree the form of an order and any consequential directions arising from this Judgment then the attendance of Leading and Junior counsel and solicitors will be excused.