Case No: 1LS03193

IN THE LEEDS COUNTY COURT

The Combined Court Centre, Oxford Row , Leeds

Date: 25/07/2013

Before :

HIS HONOUR JUDGE GOSNELL

- -

Between :

RONALD ALAN BARNABY **Claimant**

- and -

-

RALEYS SOLICITORS **Defendants**

- -

- -

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

Hearing dates: 24th, 25th and 26th June 2013

- -

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.

.....

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 the British Coal Corporation ("British Coal") from 6th October 1976 to 7th November 1992 and by Specialist Mining Services Limited ("SMS") from 8th January 1993 to 28th March 1994. 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 Defendants in February 2009 to pursue a claim on his behalf for damages arising as a result of developing this condition.

2. With the Defendants' advice and 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. On 6th December 2002 he agreed to settle his claim against both employers for the total sum of £10,822.01 plus interest. This was paid in settlement of his claims for general damages and handicap on the labour market. He had previously indicated an intention to make a claim for services which were required as a consequence of his disability. He abandoned his services claim as a consequence, he claims, of negligent advice by the Defendants which potentially could have produced a further award of £14,582.02 had he been competently advised and had he successfully pursued this additional claim. The Defendants' case is that the Claimant was in fact competently advised and decided not to pursue his services claim for his own reasons , one of which may have been that he was not in fact suffering from VWF at the relevant time and therefore had no need for services.

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 SMS 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 stagings 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. **Mr Barnaby's Claim**

The Claimant instructed the Defendants and filled in one of their standard questionnaires on 1st March 1999. It is fair to say that the form is only partially completed in some areas (in particular about his symptoms) but it did say his

symptoms had commenced on 1st June 1991. A claim was submitted to IRISC and accepted by them on 27th October 1999 as a group 1 claim which was for workers who used vibratory tools regularly in their work. On 4th May 2000 a MAP1 report was produced by Dr Ryan. He assessed the Claimant as suffering from VWF and his staging was 2V 2SN (early). The Claimant was advised by the Defendants that he may be able to make a services claim and he was sent a Claimant Services Questionnaire to complete and a Claimant's Witness Questionnaire to be completed by anyone who provided services.

9. The Services Questionnaire contained a spreadsheet entitled "Give details of what tasks, if any, you require assistance with because of your VWF". There were six tasks listed on the left of the form with seven cells for providing information about those tasks. The six tasks were: gardening; window cleaning; DIY; decorating; car washing; and car maintenance. To the question "did you do this task prior to developing VWF Yes/No" the Claimant entered "yes" to gardening, decorating and car maintenance. He entered details in the other cells in respect of each of these three tasks but made no entries at all in relation to the remaining three tasks. He indicated in each respect that he had needed assistance for the last five years. Mrs Barnaby completed her questionnaire referring only to gardening, decorating and car washing giving similar details to her husband. She was also provided with the same six tasks on the first page of the questionnaire and ticked only three tasks corresponding with those she gave details about. It would appear from a file note that these questionnaires were handed to a lawyer employed by the Defendants on 8th August 2000. A services claim based on the information in these questionnaires was subsequently submitted to IRISC on 22nd February 2002 but the Claimant was advised that his staging did not justify a presumption that he required assistance with decorating and so this aspect of the claim could not be successfully pursued.

10. On 16th March 2001 IRISC sent a cheque for £6418.68 to the Defendants which at the time represented approximately 97% of the value of British Coal's total liability towards general damages. On 10th July 2001 Norwich Union confirmed that they would contribute to the Claimant's claim on behalf of SMS under the terms of the CHA. On 19th June 2002 IRISC accepted the Claimant's claim for handicap on the labour market which was presumed to be valid if evidence of current employment could be produced. On 20th August 2002 Norwich Union sent the Defendants a cheque for £983.83 representing SMS's proportion of the Claimant's claims for general damages and handicap on the labour market. On 30th October 2002 IRISC wrote to the Defendants offering the sum of £9838.18 plus interest in full and final settlement of the Claimants claims arising from his employment. The offer included £3,692 for handicap on the labour market. When the cheque from Norwich Union was included it represented a total offer of £10,822.01 for the two heads of claim but in full and final settlement of all claims.

11. The Defendants wrote to the Claimant informing him of the offer and on 6th December 2002 a telephone conversation took place between the Claimant and Mr Swift of the Defendants. Shortly after this conversation the Claimant agreed to accept the offer and filled in a form to confirm this. He was aware that he could not pursue a services claim in the future if he accepted this offer but his claim is based on the fact that he did not receive competent and adequate advice before making the decision.

12. **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. The parties in this case disagree whether the Defendants did in fact act in accordance with that standard and whether in fact there was a breach of the duty of care. There was however some debate as to the correct approach in dealing with a case such as this and 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:

> *"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. 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 in support of his claim and had previously served three witness statements setting out his evidence. He confirmed on oath that these statements were true. During the course of cross-examination however it became clear that he was not familiar with the contents of the statements and that they had been drafted on his behalf by his Solicitors and he had signed them without fully understanding what they said. The Claimant however did give evidence that he had suffered from VWF since about 1989, that shortly after that date he had required help with various services, including car washing, car maintenance, cleaning windows and gardening. He confirmed that he was in fact receiving such assistance from his wife and had done so for many years. He said that he had wished to make a services claim but when he was told about the offer in December 2002 he decided to accept it as he needed the money. He had planned a surprise holiday for himself and his wife in June 2003 to celebrate their 25th Wedding Anniversary and he needed to pay for the holiday soon. He was not able to elucidate his thought process at the time in any more detail other than that he needed the money and that he thought if he did not accept the offer he would not get the money (at least for some time).

14 He was robustly but fairly cross-examined and my assessment is that he was not a convincing witness. Counsel for the Defendant took him to a number of documents where he had given inconsistent details of both his symptoms and the date of commencement of those symptoms. He was not able to in any way explain or justify these inconsistencies. His description of his current symptoms was not convincing either in that he was reporting attacks occurring twenty times per day without any particular trigger mechanism such as cold or wet weather. He was specifically asked why he only included claims for gardening, decorating and car washing in his Services Questionnaire when it was obvious he could have included the other two claims he now wishes to make at the same time. He was unable to explain why he had not done so at the time. He claimed a lack of recollection to many questions where I might have expected him to have a more convincing answer. He did not actually give the appearance of someone who had or was making a fraudulent claim. I would have expected him to have provided answers in the witness box which obviously suited his claim if that were the case. He in fact gave vague and unconvincing evidence generally, even to questions where there was an obvious answer that would have supported his claim.

15 The Claimant's wife Ann Barnaby gave evidence to support the Claimant's claim. She gave evidence that she had in fact provided assistance to him in the tasks set out in his services claim and the other two tasks he would have added to his claim if asked. She also was totally unfamiliar with the relevant documents in the claim and again could not explain why she had only confirmed three out of the possible six tasks in the Witness Questionnaire. She gave evidence that she and her husband had not conferred before completing their respective questionnaires which I felt was unlikely.

16 The Defendants relied on Mr David Barber to give factual evidence on their behalf. This was not ideal as Mr Barber, although a partner with the Defendant firm at the relevant time had no personal involvement in the Claimant's case at all. He clearly had a very detailed knowledge, based on experience of the workings of the British Coal VWF claims and the operation of the CHA. He reviewed all the relevant documents on the Claimant's file and used those documents to back up his contentions that the Defendants were not negligent and that even if they were found to be, the Claimant's claim for services would probably not have succeeded. He was a much more convincing witness than the Claimant but not an impartial one. He was very reluctant to make any concessions which he thought might be damaging to the Defendants' case (and as an experienced lawyer he was quick to spot these pitfalls). It took him quite some time to eventually concede that he would normally only advise a client to pursue a claim if it had reasonable prospects of success on the evidence. This did not seem to me to be a controversial proposition. He contended that it was not unreasonable for Mr Swift to fail to advise the Claimant of the potential value of his services claim as he felt it was meaningless when it could have been reduced due co-morbidity issues or evidential problems perhaps caused by contra-indicated employment. Whilst he was obviously correct that the claim would not inevitably succeed he had the material at his disposal to say what the claim was worth if it succeeded. I could not see that this information was "meaningless" provided it was couched with appropriate caveats. Finally, when asked whether certain advice given by Mr Swift to the Claimant by telephone was correct (when the Defendants have had to concede that it was not) he could only bring himself to say it was "likely to be incorrect" and he repeated this on a number of occasions. I therefore had to consider

with caution any opinions he expressed as to the prospects of success of the Claimant's claim given his approach to what should have been uncontroversial matters. It was helpful however that he gave some useful statistics of the Defendants own experience of these claims. He thought the Defendants had handled 12,297 VWF claims of which 2,555 included services claims. Of those services claims the failure rate was 2.8% which compared favourably with the national average failure rate of 6%. The failure rate did not include claims which had been reduced but succeeded in part.

17 **Breach of Duty**

This case is mainly about the advice which the Defendants gave to the Claimant shortly before he accepted his offer but there is a subsidiary point which developed at trial to enable the Claimant to deal with the fact that he had only claimed services for three tasks (one of which he was not entitled to claim on his staging) whereas in fact he requires services for two additional tasks (window cleaning and car maintenance). The Claimant (through leading counsel) alleges that the Questionnaires appear to have been partly completed and contain some information which is not consistent with what the solicitor was told on 8th August 2000 namely that his symptoms started in 1989 and he had been to see his doctor in 1991. The Questionnaires both give the impression that the need for services arose in 1995. If the Defendants as competent solicitors had discussed these entries with the Claimant directly and fully, they would have discovered firstly perhaps that the dates in the Questionnaires were wrong and secondly that there were two other tasks which he was no longer performing and for which he was obtaining assistance. If they had done that they would have submitted a claim to IRISC claiming for all four tasks.

18 The Defendants' case on this issue is that an inference can be drawn that the services claim was discussed from the file note on 8th August 2000 which reads " services chores :- YES completed questionnaire" . I indicated during the trial that I felt this was no more than an acknowledgement that the questionnaires had been completed and handed over. Once the Claimant makes an allegation that he was not properly advised in relation to his services claim an evidential burden passes to the Defendants to show he was so advised. They can rely on the questionnaire to show his instructions were sought and information obtained but there is no actual evidence of advice given, either from contemporaneous file notes or evidence from lawyers who gave the advice. It does seem to me that a competent solicitor would go through the questionnaire with the client to make sure that it accurately recorded his instructions. There is no evidence that this was done. If this had been done what is likely to have happened? In my view the Claimant would have confirmed the instructions he had given on the questionnaire. This was a very simple form which, according to the Claimant and his wife, they completed independently of each other. Both of them made the same claims for the same tasks with the same starting date. In Mrs Barnaby's case she has actually ticked the three tasks against the list of six when there was no requirement to do so. I find that the reason they did this was because these were the only tasks with which he needed help that he did before and he could no longer do. This is an obvious conclusion to draw from the way they both completed this very simple form (which had the other tasks listed as options). Whilst I accept that the Claimant gave evidence that he did actually need help with window cleaning and car maintenance, the quality of his evidence was so poor that I cannot accept it is

capable of overturning very compelling contemporaneous evidence of his instructions to his solicitors at the time. I therefore find as a fact that if he had pursued his services claim he would have done so solely in relation to gardening and car washing.

19 The next issue is whether the Defendants gave negligent advice about the offer made by IRISC on 30th October 2002. When the Defendants wrote to the Claimant about the offer on 3rd December 2002 they sent a four page letter which was clearly in standardised form but did contain the figures which were relevant to his claim. He was told that the offer did not include any award for services and that if he wished to pursue a claim for services he must reject the offer. He was told that if he rejected the offer the Defendants would request a further interim payment of 92.5% of the general damages whilst pursuing the remaining elements of the claim. The letter contained some general information about services claims including that it would not settle in the near future and that medical assessments would not take place until spring 2003 at the earliest. It concluded that they would encourage and strongly recommend the Claimant to proceed with any further claim provided there is a reasonable prospect of succeeding and there is strong supporting evidence. I would describe it as a letter giving information without any real advice.

20 On 6th December 2002 the Claimant telephoned the Defendants to discuss the offer and a telephone attendance note records:

> "*I explained the issue to Mr Barnaby regarding services and explained the delays regarding this. Mr Barnaby told me that his claim had been ongoing for five years but he told me he will think about this over the weekend, and send the form back accepting or rejecting.*
>
> *I did however explain to Mr Barnaby that he will not be entitled to a second interim payment as he received a high amount the first time round. Mr Barnaby understood this."*

The Defendants at trial conceded for the first time that the second paragraph of this note contains incorrect advice. The Claimant's case is that he should have been told that rejection of the offer would not result in the offer of £10,822.01 being reduced and that he would be entitled to a further interim payment of up to 92.5% of this sum pending determination of his services claim. He should have been told how much his services claim was potentially worth which would be a relatively easy calculation on the basis of his staging and the tariff figures (on my factual findings £7900). He should have been told that on the basis of his MAP1 report he was presumed to need assistance with the activities he was claiming for (apart from decorating) and that the MAP2 examination was solely to determine whether he had some other medical condition which could affect his ability to do these tasks. The Claimants case is that he should have been given proper advice about the quantum and strengths and weaknesses of his case so that he could make a properly informed decision whether to abandon the services claim and accept the offer.

21 The Defendants concede that the Claimant was wrongly advised when he was told that he would not be entitled to a further interim payment. Their case is that he would have been entitled to 92.5% of British Coal's liability for both general damages and handicap in the labour market. There was some uncertainly whether SMS would have to contribute 92.5% of their share also but assuming they did not the Claimant would

still have been entitled to a further interim payment of over £3000 if he rejected the offer and he was not told this. Counsel for the Defendants described it as "blip" in otherwise competent conduct of the claim. The Defendants rely on the fact that they had a policy not to tell claimants the potential value of their services claim as the services claims at this stage were in their early stages. They needed to manage client expectation as the claims could be reduced or extinguished if IRISC were not satisfied on the evidence, if they were in contra-indicated employment or if there were co-morbid conditions discovered at MAP2.

22 Whilst I accept that there were potential problems which could possibly reduce or extinguish claims it was known by this point that there was a presumption that claims would be met where there was evidence to support the need for services and the appropriate staging at MAP1. It was possible to calculate what the maximum amount the claim might be from the CHA agreement and Services Agreement. It was also possible to warn clients of problems which might affect those claims. On 20th November 2002 the VWFLSG Bulletin had been published which advised that during the services claims pilot, the average compensation that had been paid in respect of services was over £8000 per claim. This might have been a useful piece of information to impart to the Claimant by way of rough example.

23 The Claimant was making three claims against the employers: general damages; handicap in the labour market and a services claim. He had been told that the offer represented fair compensation for the first two claims and that the third claim may well take some time to settle. He was also told that if he rejected the offer he was not entitled to a further interim payment. In order to assess this offer and decide what course to take he was entitled to seek advice from his solicitor which he did in the telephone call of 6th December 2002. I cannot see how he could reasonably make the decision without knowing what he was giving up by abandoning the services claim. He needed to know roughly what it was worth and what his prospects of success were in very general terms. In my view it was negligent of the solicitor to fail to provide this information when he was capable of doing so with a little thought. If he had done so the client could then make a value judgement about whether it was worth abandoning the services claim to obtain immediate full payment of the other two claims. It was also a clear breach of duty to advise the Claimant that he was not entitled to a further interim payment when in fact he was entitled to an interim payment of at least £3000 on any view.

24 **Causation**

This leads neatly on to the next issue which is whether the breaches of duty I have identified caused or materially contributed to the Claimant's loss. The Defendants put their case very strongly on this issue. The Defendant says that the Claimant is not suffering from VWF and has never done so. If the court makes a factual finding to that effect then the court will find it easier to make a factual finding that the Claimant abandoned his claim for services because he knew he had no real need for services not because he was negligently advised. The Defendants rely on the fact that the original MAP1 medical assessment is not as robust as a normal medico-legal assessment and cannot be relied on. The Defendants also rely on the fact that the Claimant at various times to various bodies (his own solicitors, the Benefits Agency, doctors assessing his condition) has given conflicting information as to the commencement of his symptoms and the nature of his symptoms such that his claim is not believable. They

also rely on the Claimant's performance in the witness box to add weight to this contention.

25 Leading counsel on behalf of the Claimant conceded that the Claimant was a poor historian and an unimpressive witness. I have to say that is probably an understatement. He contends however that the Claimant is not fundamentally dishonest and does have and always has had (since 1989) VWF. He also relies on the fact that Dr Ryan assessed the Claimant at 2V 2SN and Mr Tennant assessed him as 2V 1SN. Mr Tennant was the single joint expert appointed by both parties to assess the Claimant in this litigation and supports the diagnosis unless the court finds that the Claimant has never had the symptoms which were reported by him. My overall conclusion of the Claimant was that he did not appear to me to be putting forward a fraudulent claim but he was a very poor historian whose evidence had to be treated with caution. He was clearly exposed to vibration during the course of his work and I think it likely he has some form of VWF. I would hesitate to rule on what the appropriate staging should be in the light of his conflicting history but I am not convinced that is a finding I need to make. This claim is not a re-run of the original claim although it appears the Defendants would like it to be.

26 One piece of evidence which did emerge clearly was the Claimant's need for cash. He explained how his 25th wedding anniversary was due to take place in June 2003 and he had planned a surprise holiday for him and his wife. This was not in his witness statement and ordinarily I would have regarded its emergence at trial with considerable suspicion. It was however recorded by one of the Defendant's lawyers in a file note on 15th August 2002. When asked why he decided to accept the offer in his evidence the Claimant replied because he needed the cash to pay for this holiday. He was unable to provide any other reason. The question is whether he would have accepted the offer if he was told that he could reject it, obtain an interim payment of £3000 and then continue to pursue a claim which might be worth up to £7900 although there were some potential problems which might reduce or extinguish this claim. Faced with an unsophisticated client who had already disclosed a need for ready cash the solicitors advice should have been that he had very little to lose by rejecting the offer and pursuing the services claim bearing in mind he would still receive £3000 or so shortly. Faced with these figures no sensible person would have accepted the offer. It is not easy from the Claimant's evidence to reconstruct what he might have done but on balance, if properly advised, I find as a fact that he would probably have rejected the offer and pursued the services claim. As I have not found that at this time the Claimant was not suffering from VWF and knew it I do not need to consider this alternative.

27. **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. This burden is higher in the present case where they never told him his case was hopeless or even alluded to the difficulties in his case at the time.

28. 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 postman 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. I have fairly good evidence that the last issue was unlikely to reduce or extinguish his claim because this issue was considered by Mr Tennant in the single joint expert's report and he confirmed there were no co-morbid conditions. It seems unlikely that the MAP2 assessment would produce a different result.

29 Given the Claimant's performance in the witness box 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 two tasks we are concerned with. He would submit a simple questionnaire from himself and one from his wife confirming she provided the assistance. Mr Barber did not suggest that the claimants were telephoned but suggested that the helpers habitually were. At page 917 of Bundle 6 of the trial bundle 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 Barnaby would say something inconsistent with her 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.

30 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. It is true that postman was included in the list, but so was office cleaner and car park attendant. Claimants' solicitors were exhorted in the bulletin to look at rejections carefully and seek full reasons where it occurred. These refusals continued to cause concern until a services employment protocol was agreed in May 2006. It was 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 that of all the claims for services made by the Defendant only 2.8% were wholly unsuccessful compared with 6% nationally. His evidence was that the Claimant's claim would either have been refused or "parked" until the employment protocol was agreed in May 2006 but this does seem to me to be a very pessimistic assessment.

31. 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 helper but would not normally require direct questioning of the claimant unless it was specifically referred for further investigation. His assessment by Mr Tennant in this litigation did not suggest he had any relevant co-morbid conditions. 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 very poor historian (although the prospects of him actually being interviewed were not high) and he was working in a job which the DTI 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. Mr Barber had no personal knowledge of a postman whose claim had been refused although in theory he thought it was possible. 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 75%.

32. The logical conclusion from my findings is that the Claimant succeeds in his claim for £5925 which is 75% of £7900. There is an issue about when the Claimant would have been paid his services claim. The Claimant contends that it would have been December 2005. The Defendants I suspect contend that he never would have received a services claim but I have found that he lost the chance to claim and, doing the best I can, I find that he would have received payment about 6 months after the employment protocol was agreed in May 2006 and so perhaps 30th November 2006 would be a fair assessment.

33. 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.