Case No: HQ17AO3249

IN THE SENIOR COURT COSTS OFFICE

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

Friday, 15 March 2019

BEFORE:

MASTER BROWN

BETWEEN:

BARRY HEWITT

Claimant

- and -

SA HOPKINS & SON

Defendant

SHAMAN KAPOOR (instructed by Irwin Mitchell) appeared on behalf the Claimant
ROBERT MARVEN QC (instructed by BLM) appeared on behalf of the Defendant

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JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. THE MASTER: I have looked at this closely. It seems to me that the instruction of leading counsel was reasonable in this case, although in the event that was not in issue.

2. This is a gentleman who was 57 at the time of instruction. He had developed mesothelioma, the consequences of which do not need to be set out. It is a tragic case but also a high value case, and unsurprisingly, given the recent developments in medical knowledge, the question arose as to whether immunotherapy may assist him. This would need to be considered. It had consequences for the nature of the way the claim was to be framed, in particular whether a PPO was going to be sought. At the stage of the initial instruction, November 2017, I understand one such order had been recently agreed in October 2017, but in any event the use of PPO order was a recent development in the compensation of mesothelioma claims.

3. I am quite sure there was a significant element of work in relation to these items. Nonetheless, it is somewhat troubling to me that the hourly rate of leading counsel is not specified in the CFA. I am told that it was commonly agreed at £500 per hour. Mr Rawlinson QC was of some seniority at this stage, He had taken silk ten years ago - although I was initially under the impression that it was more recent than that. In any event, this is a case for a QC and it is a case for a QC's rate. £500 was not negotiated, I note that.

4. It does seem to me the time spent for somebody with the expertise and experience appropriate to that rate in a case such as this in relation to the matters arising is, on a standard basis, a matter of some concern and I do think that the times claimed call for some revision. I have to take into account the fact that this work was done over a relatively short period, so that there would have meant work done on one task would also have been of use in relation to another. So that, for instance, preparation carried out for the conference would have also been of use in preparing for the CMC.

5. The CFA does not set out the sort of charges that counsel would be making for these elements of work. I have looked at the skeleton argument in relation to this matter and other documentation. I can infer from this the work done. But it is not sufficiently clear to me why the time taken was so substantial.

6. I think it is appropriate to look at all the items globally. I think the appropriate amount to allow for the consultation is £1,800. I think there is some overlap with the work for the skeleton argument which was produced shortly thereafter and for the fee for the hearing. I think having taken off £700 for the conference, I should also make some adjustment for the time spent in relation to the directions hearing. I shall make a reduction of £500 in all from that.

7. I think the time spent settling the Amended Particulars of Claim does seem to be somewhat on the high side and I am going to allow an hour for that. I take Mr Kapoor's point that this was a matter that needed relatively close consideration, but that had taken place in preparing the skeleton argument to a large extent and the drafting of the amendment at an hour and-a-half claimed at £500 seems to be too high.

8. So those are the adjustments that I make in relation to these matters.

(**After further submissions**)

9. The first point for me to consider is whether there should be implied into this conditional fee agreement, it not being stated expressly, an obligation on solicitors to pay a brief fee for Senior Counsel in respect of the JSM/round table meeting on the basis that it is customary for counsel to be paid on this basis.

10. It may well be the case that it is customary, in the sense of being usual, for solicitors to pay counsel on the basis of a brief fee to deal with the JSM, but in looking at whether I should imply a term, I have to ask whether it is necessary to do so in order to give the written CFA business efficacy. I am not satisfied that this is a conclusion that I can reach. Nor would I accept that any custom and practice, having regard to the terms of the written contract, would necessarily of itself lead to the implication of such a term. But even if I were wrong about that, the difficulty here is that there was no brief fee negotiated in advance. What happened is that counsel sent a fee note, claiming the sum now sought, at some later stage without there having been discussion about the fee payable.

11. That being the case, I note that on Counsel's estimate, there was eight hours' work which, at £500 an hour being the assumed rate, would come out at £4,000. That would suggest to me that the correct figure in this case is £4,000, even if it had been negotiated as a brief fee. Moreover, I think most of the matters that were going to be discussed in the JSM were readily capable of being agreed. The significant issue to be discussed was the question of periodical payments and although it was a potentially complex issue and that it was to some extent a novel issue and therefore required counsel's consideration, it was a relatively narrow issue for further discussion. I think £4,000 is, in these circumstances, the right fee.

(**After further submissions**)

12. This is my decision in relation to the success fee sought in respect of the work done by the Claimant's solicitors. Originally as I understand it, the solicitors were seeking a success fee of 100 per cent on the basis of a staged success fee in the CFA, and this claim having settled shortly before trial. In Mr Kapoor's submissions, as I understand it, he put an alternative position of 70 per cent, in any event an increase on what would be provided under the default regime, if I can refer to it in those terms, provided by CPR 45.24.

13. There is no dispute that there is, in principle, an entitlement under CPR 45.18 and 45.26 to depart from what I might call the default provisions and to seek an assessment of the success fee because of the amount for which the claim settled.

14. The Claimant was aged 57 at the date of the instructing solicitors. He sought damages, having developed mesothelioma as a result of exposure to asbestos, which he alleged to have occurred in the course of his employment with the Defendant for the period set out in his witness statement from 1976 to 1983. By the consent order dated 10 May 2018, the parties agreed damages in the gross sum of £800,000 together with payment for past and future treatment, including in particular immunotherapy. The treatment

costs were agreed pursuant to a Periodical Payments Order. It is said that this was the first such order to be approved by the court and the sums due were something in the order of £60,000 payable quarterly, sums to be paid into a trust. As I say, the threshold provisions under CPR 45.26 for an alternative success fee are satisfied.

(**After further submissions**)

15. The Claimant is seeking in this application a 100 per cent success fee on the basis that the claim had settled within the three months of trial and that it was reasonable for there to be a staged success fee set at 70% up to the date of 3 months before trial and 100% thereafter. That is on the basis of prospects of success of 55-60%. The position of the Defendant is that the success fee should be 27.5 per cent.

16. It is important for me to refer to the relevant rules in CPR 45.24 which provide that in a case to which the section applies, subject to rule 45.26 (the provision for alterative success fees), the percentage increase to be allowed in relation to solicitor fees is (a) 100% if the claim concludes at trial; or (b) where the claim concludes before a trial has commenced or the dispute is settled before the claim is issued, the success fee is to be determined under CPR 45.24 (2) and this being a type A claim, Table 6 applies, so the amount to be allowed would be 27.5%.

17. CPR 45.26 deals with applications for the percentage increase to be assessed. It provides that if the percentage increase is assessed at not greater than 40 per cent or not less than 15 per cent the success fee is 27.5%. A percentage increase cannot be varied where the case concludes at trial.

18. Both sides accept that in assessing the success fee, I have to keep in mind what is said in the decision in *Callery v Gray*, that success fees have been set so as to ensure that solicitors who take on conditional fee agreements are compensated for the cases which they may lose and, therefore, it is an assessment based on risk, the risk that the claimant's solicitors will not be compensated or will not be compensated in full for the work that they do.

19. The Claimant's case is that the case was one of substantial risk for the reasons that are set out in a schedule headed ‘Reasons for Level of Success Fee’ appended to the CFA. His case is that following school, in the period already noted from about 1976 to 1983, he was employed by the Defendant initially as an apprentice heating engineer, and then later as a heating engineer based at their premises in St Albans. As I understand it, the Defendant was in the business of servicing, repair and maintenance of boilers and associated pipework and that, at least, was one of the activities that the Claimant was engaged in. His case is that the work principally focused on commercial and public buildings.

20. I have been referred to the attendance note which was prepared at the time when the CFA was entered into. I have also reminded myself of the contents of the witness statement that was subsequently prepared. I bear in mind that the date of the witness statement, as Mr Bailey has reminded me, is 10 May 2017. The attendance took place on 10 March 2017 and, whilst not in the same terms for understandable reasons, it is

indicative of the nature of the information that was available to the solicitors at the time of the risk assessment. Starting at paragraph 12 the witness statement says as follows:

> "*At the time of my apprenticeship, there were approximately eight to ten heating engineers with a new apprentice starting every year. As the apprenticeships lasted four years, there tended to be about four apprentices at any one time.*
>
> *13. As you would expect from an apprenticeship, I was involved in all aspects of learning the trade of a heating engineer. Certainly to start with, I was tasked with carrying out the dirty jobs, including sweeping up the boiler rooms, fetching and carrying and disposing of the pipework and labouring for the heating engineers.*
>
> *14. I worked on a number of different sites during the course of my employment. I recall working at a large house in Royston. I assisted with an independent boiler house, I assisted the engineers in the boiler house in replacing the whole of the boiler and pipework. This meant working alongside pipes lagged with asbestos material which would be brushed again, causing some disturbance of the asbestos.*
>
> *15 We removed asbestos from the outside of the boilers by hand so the boiler could be dismantled. The only way to remove it was to hit the asbestos from the outside in order to break into it. Whilst this was done, large clouds of dust were in the air.*
>
> *16. Sectional boilers were dismantled one section at a time, mostly using a chisel. They were extremely heavy. Each section then had to be taken out of the boiler house, most of which still had asbestos fibres attached to the cast iron sections.*
>
> *17. Generally boilers were located in basements. Most had no natural light or room ventilation, except for combustion. This was mainly ducted to the boilers. The dust in the basement where there was little air, little light and nowhere to go, was extensive.*
>
> *18. One of the sites we had to regularly maintain was based in Harpenden, Hertfordshire. S A Hopkins & Son had a contract with the Ministry of Agriculture, Fisheries and Food (MAA) at a site now as Plant Pathology. The contract included maintaining the sites heating systems boilers and networks of pipework. I specifically recall that there was an underground system of pipes which led to the greenhouses.*
>
> *19. As part of the maintenance schedule I had to crawl thought he tunnels to inspect the pipework. I specifically recall this was dirty and dusty. Due to the lagging of the pipework, the dust contained asbestos fibres and I was literally covered in it from head to foot. "*

20. Steam was used as a method of decontaminating the soil and there was a large boiler house which contained four large commercial boilers. Each week we had to decommission one of the boilers, which involved stripping it out, cleaning it out and putting it back together again. This meant that every boiler was cleaned once a month.

21. Stripping down the boiler involved removing an asbestos rope gasket from around the boiler door which was opened in order to be able to access the burning chamber and flue tubes for cleaning. There was pipework all around the boiler which contained asbestos lagged material.

22. Work in boiler rooms was extremely dirty and dusty. You could not avoid disturbing a lagging or carrying out this work. As the lagging deteriorated, it tended to fall apart and disturbance resulted in dust, fibres becoming airborne, remaining in the air and within my breathing zone.

23. We were not provided with any sort of mask or other respiratory production. The dust was in our hair, on our hands and clothing. Where the asbestos had been removed, this was swept up and put out in the rubbish.

24. If a pipe needed to be replaced or developed a leak, we simply removed the asbestos insulation from a pipe to start with. There were two types of asbestos pipe insulation as I recall, one which was sectional and held together with tape, bands, clips, the other where a plaster coating was applied over the insulation to keep it in place. When removing the sectional type insulation, once the clips had been removed and the insulation prized off the pipework, this is when a large amount of asbestos dust would be released into the immediate airspace into which we were working. The plaster type insultation was removed by using a hammer and chisel to break into the lagging. The insulation would then break off and fall to the floor, but it resulted where we were working together perhaps on a section, in large clouds of asbestos dust in the area where we worked.

25. The length of time taken to remove the asbestos depended on the section to be replaced.

26. The insulation that had fallen to the floor was swept up at the end of the operation in this area. The sweeping of the asbestos on the floor created clouds of dust in the area where we were working. The residual asbestos on the floor was left to be trampled under foot before later being swept up.

27. Another site I recall working on was at Chapter House, which was attached to the Abbey in St Albans. The old boiler and pipeworks were being replaced to accommodate the additional heating laid, required to provide heating and hot water through New Chapter House.

28. I worked with others on this site. I recall there were 4 of us in total. It was generally the engineers that carried out any pipe replacement that involved welding. Removal of the asbestos lagging that happened was a dirty job that did not require the same level of expertise so apprentices were involved. The asbestos dust was allowed to fall to the floor and we did not give any thought to the fact that the dust to which we were exposing our ourselves might be dangerous.

29. We also gave no thought to the fact that dust which had then fallen to the floor which was trampled underneath and kicked around by us before being dry swept up and bagged up for disposal.

30. I would regularly sweep up by firstly using a long brush and then a dustpan and brush which I would lean over to sweep up the dirt and debris. This contained asbestos dust and fibres which again became airborne as a result of the dry sweeping.

31. I would also take the pipes out to the skips or dispose of the rubbish as and when required. If we were removing pipes, they tended to be welded and again it was the experienced engineers that carried out the work, but I would hold the pipe or the flanges.

32. Another job I recall involved the maintenance of the heating system to Judge's accommodation called Ayres End House. It was approximately seven or eight bedrooms and it had a separate detached boiler house. I had to repair the boiler which involved the disturbance of asbestos lagging.

33. I continued working for the same company once I had qualified as an engineer. I worked on similar maintenance contracts. For example remember working on the MOD site in Carter Hatch Lane in Stanmore. This involved working on relatively old commercial boilers. I had to strip down the boilers to service them and the majority of the boilers had some form of asbestos insulation or gasket which was disturbed when the work was carried out.

34. Given the work that I was doing through my apprenticeship and upon qualification, I have no doubt that I was exposed to asbestos through my employment from 1976 to 1983."

21. The statement then goes on to refer to exposure to asbestos in the course of employment with other employers.

22. At age of 57 when he instructed solicitors, the Claimant was tragically young to develop the condition, and young by the standards of claims that are generally brought for mesothelioma. By then he had he progressed significantly in his career. He worked for various companies and local councils, and the University of East London where he

was in the Estates Department and a line manager responsible for the day to day coordination and control of building maintenance and servicing. He received training, it would appear, in respect of the identification of asbestos, or more particularly as to the steps to be taken in respect of suspected asbestos. Later in his career he worked with strategic planning, coordination of repairs and maintenance on housing association portfolios. He refers in his statement to the practice now that if significant asbestos was identified, specialist contractors would be brought in.

23. That was the factual case against the Defendant, at least as appeared in the Claimant's witness statement. I have also read and considered the Particulars of Claim.

24. In December 2016, the Claimant suffered from sudden, severe breathlessness and a cough. This was investigated in hospital by way of an x-ray. Fluid presenting in the lung was drained. He remained in hospital until Christmas Eve 2016 and was re-admitted on 2 January 2017 as an emergency for further fluid to be drained. He was transferred from Watford to Harefield for surgery. A biopsy was taken during his surgical procedure and he remained in hospital until 12 January 2017. Subsequently he is said to have been diagnosed with mesothelioma with a limited life expectancy, as I understand it, on the basis of a biopsy which was carried was part of the process of providing him with the diagnosis. He was then, on the basis of that diagnosis, to undertake further surgery shortly after the meeting with the solicitors on 10 March.

25. It is common ground that I have to assess the risk to the solicitors at the time the CFA was entered into, that is to say, without the benefit of hindsight. That is clear from the provisions of the pre-LASPO Costs Practice Direction section 11, which remains applicable. This is an important thing to note because it is not legitimate for me to accept (not that it is argued) that simply because liability was accepted, as I understand it, shortly before the Show Cause hearing that therefore there were no or no significant risks involved in relation to the issue of liability. But, if I can put it this way, the quid pro quo was that the events after the risk assessment that the Claimant might rely upon as increasing the risks but were not foreseeable or considered properly to be foreseen at the time of the risk assessment, could also not be taken into account.

26. The risk assessment in this case was undertaken on 10 March 2017 and is set out in schedule 4 to the CFA. It provides, in the first column, the issue in respect of which the risk is being assessed. Then there are three columns where the solicitors indicate whether they consider that particular issue presents a high risk, medium risk or low risk and then there is further column which allows for a comment. I will set out the contents of the schedule:

> Limitation/Date of knowledge, low risk. Very recent diagnosis.
>
> Type of disease, high risk. Law was subject to frequent challenge. Recent cases include *McDonald* and *Williams.*
>
> The Claimant's evidence, medium risk. Recollection of exposure in multiple employments.
>
> Independent witness, high risk. No known witnesses at this stage.

Liability, high risk. Need to prove exposure of significance.

Number of defendants/periods of exposure, high risk. Post 1965 regulation.

Defendant's means to pay, medium risk. Main employer likely to have dissolved. Claim may be possible against local authority.

Identity of insurers for period of exposure, medium risk. ELTO search required.

Diagnosis confirmation, low risk. Confirmed.

Other risk factors, medium risk.

Causation, low risk. Unlikely to be main issue of contention.

Quantum, low risk. Part 36 risk

Expert evidence, high risk. None at the time of his assessment.

Documents available, medium risk. No helpful documents at this stage.

Likely defence, high risk. Will require proof of exposure more than *de minimis*.

27. It seems to me that there is a clear overlap in these heads. There were issues on the claim in respect of limitation, breach, causation, quantum and Part 36 risk.

28. It is important for me to note the nature of the risks taken on by the solicitors as specified in the conditional fee agreement. The agreement states in terms that it covers pursuing "your", the Claimant's, claim for compensation arising from his asbestos disease. That covers, potentially, not just the claim against this defendant but other defendants. It also includes, significantly, a claim under, the Diffuse Mesothelioma Payment Scheme. This scheme, under the Mesothelioma Act 2014, is intended to compensate persons who have developed mesothelioma and who find themselves in a position where they would otherwise have pursued a defendant employer but who do not so because the potential defendant is uninsured. In short, the scheme provides compensation for a claimant in circumstances where there is a lack of insurance. But I bear in mind, in relation to this matter, that the fees which are payable are limited to £7,000 in the event that a claimant makes a successful claim under the scheme.

29. The definition of win is, "*If your claim for damages against your opponent, or against two or more opponents is finally decided in your favour, whether by a court decision or by agreement to pay you damages*."

30. The agreement is a 'CFA Lite'. It provides as follows:

"*We will waive or write off any part of our full legal charges which are not recoverable from your opponent. We will not make any further charge to you in that respect*."

Thus, in respect of any successful claim under Diffuse Mesothelioma Payment Scheme, £7,000 would be payable to the solicitors.

31. As I have noted, this CFA provides for a staged success fee, 70 per cent stepping up to 100 per cent three months before trial.

32. In considering this issue, I have had regard to the matters set out in the two witness statements that have been provided to me by the parties in these costs proceedings. I have also had regard to a Note that has been provided to me by Senior Counsel in relation to the immunotherapy risks.

33. It seems to me whilst the risk in relation to limitation cannot be completely discounted, it was extremely modest. The solicitors can, of course, be taken to be familiar with the relevant provisions of the Limitation Act 1980, in particular the provisions in respect of the date of knowledge. There was a recent diagnosis which indicates the date of knowledge was recent for the purposes of the assessment of risk.

34. One of the main points of dispute between the parties is in respect of the risk in relation to liability. It is said that this was a risky case, reliance being placed on *Williams v University of Birmingham* [2011] EWCA Civ 124. I take into account what is said in that case at the Court of Appeal about TDN13, a technical data note published in 1970, in particular at Para. 61, that this was the best guide to what was acceptable risk exposure to asbestos in 1974. TDN13 was a note prepared setting out the circumstances in which the Factory Inspectorate would consider taking proceedings against defendants. Its contents were said to be an indication of, or more particularly, to indicate the standards applicable in determining foreseeability in relation to breach to an employer against whom a claim is brought.

35. The later case of *Bussey* v 00654701 LTD [2018] EWCA Civ 243 clarifies what Court of Appeal had earlier said in *Williams* about the relevance of TDN13 in determining foreseeability but I disregard that for the moment because that decision was not available at the time.

36. I remind myself of the circumstances in which the dispute arose in Mr Williams' case. Mr. Williams was, at the material time, in the final year at university. He was undertaking experiments in a tunnel which was not ventilated and kept locked. It was said that there was dust within the tunnel and in the course of carrying out experiments within the tunnel for a period found to have been between 52 and 78 hours, there was, so the judge had found, a materially increased risk of him contracting mesothelioma. In my judgment the decision by the Court of Appeal in *Williams*- in allowing the appeal on breach, was based on a wholly different factual scenario from the one that applies here. It does seem to me, supported by some experience dealing with mesothelioma and asbestos related claims both for claimants and for defendants, that the position in *Williams* is indeed far removed from the position in this case, in particular as to the

nature and extent of the exposure which continued, on the Claimant's account, until 1983. Moreover, the Defendants were heating engineers undertaking work in respect of lagging. On the face of the account that was before the solicitors, this seems to me to be a material factor in deciding whether or not employers were in a position to foresee or could be expected to foresee, the consequences of exposure to asbestos. Applying the principles in *Baker v Quantum Clothing Group* [2011]UK SC 10 this would point strongly, in my view, to the Claimant establishing foreseeability and a breach.

37. Moreover, the extent and nature of the exposure described by the Claimant, in my judgment and as I would expect most practitioners in this field to accept, appears to go significantly beyond, *de minimis* exposure for these purposes and, thus, for establishing causation as well.

38. So, I do not accept that the *Williams* case provides a firm and proper foundation for saying that in this case there was substantial risk of the sort contended for.

39. I bear in mind that at this stage it was not identified that there were other independent witnesses who might support the Claimant's account and it is therefore contended that his account might be incorrect, or his account might not be accepted because of a lack of independent witnesses. But it does not seem to me that that matter was addressed, at least on the basis of what appears in attendance note, in any detail. If it was, it was not recorded. It is suggested that it might have been raised by the solicitors and the claimant was asked to ascertain whether there was further support that could be obtained from other witnesses. I had not been specifically taken to any such record. I am quite sure if there was a real doubt about the Claimant's account being reliable, which materially made this a substantially more risky case than might otherwise be the case, that would have been a matter that would have been covered in some detail in the attendance note. I accept, of course, that the solicitors are not expected to take, for the purposes of assessing the risk, the Claimant's account at face value. I would not say that there was no risk that the account would not be accepted. There was a risk, but the question arising, it seems to me, is as to the level of risk.

40. The other matter that is relied upon is said to be the lack of documentation. It is generally the case in mesothelioma claims that there is a substantial lapse of time between the exposure and the development of the condition, not unusually 40 years, so it is a feature of these claims that they lack documentation. I do not accept that that of itself makes this any more risky than other cases of this sort.

41. It is stated that there are a number of defendants and different periods of exposure, which was said to make this a high risk case, but it is not clear to me, given the relevant provisions of Compensation Act 2006, why this would add to the risk. The Act provides, in effect, that if there are a number of potential defendants, a claimant can decide against which defendant he is most likely to succeed and pursue this defendant for the whole of the injury suffered In this case the Claimant chose to go against this Defendant only, presumably because he was confident that he would recover against this Defendant.

42. It is also said that it was post-1965 regulation, but I am not satisfied that this increases the risk. Essentially, as I understood it, in relation to liability the solicitors indicated in the risk assessment, that they had to establish more than minimal exposure, and it seemed to me that the account with which they were provided plainly pointed towards that.

43. So far as the question of causation is concerned, there had, as has already been noted, been a diagnosis of a mesothelioma.

44. The statement from Mr Pargeter, the solicitor on the part of the Defendant, addresses this issue. He qualified as a solicitor in 1989 and has specialised in asbestos related claims. He states that he been handling claims for a very substantial period. He was on the Ministry of Justice Committee for drafting the Disease and Illness pre-action protocol. He deals with the contention that there was a significant risk in relation to the diagnosis, in other words what he says were multiple biopsies taken on 12 January might not in fact prove to be accurate. He says on the basis of his experience that the risk that the Claimant's injury not being shown to be due to life-time occupational exposure to asbestos would have been virtually nil.

45. Mr Bailey, who is the solicitor for the Claimant and has attended this hearing, says that he is aware of two cases in which biopsies were taken which were subsequently challenged and that they may not have been accurate. I do not have any of the papers in relation to these cases. Quite in what circumstances the biopsies were taken and whether it was in advance of post-mortem or otherwise I do not know. I accept that the information provided by the solicitor indicates that the biopsies would not have confirmed beyond any doubt that mesothelioma was established. There was risk associated with this, I accept that, but it seems to me the extent of the risk in relation to diagnosis, once you have a biopsy, is, in my judgment - and would appear to most solicitors doing this work, to be modest indeed.

46. The diagnosis of mesothelioma is dealt with in the report of Dr Rudd:

> "*Mesothelioma is a rare tumour in person who have not been exposed to asbestos, occurring with an annual incidence of around one per million population, and most cases occur in persons who have been so exposed. Occasionally spontaneous cases unrelated to asbestos exposure do occur, however, when there is a history of past asbestos exposure the balance of probabilities strongly favours that exposure having been responsible for a mesothelioma which occurs subsequently*".

47. This, of course, indicates that in the light of a substantial exposure to asbestos, and a diagnosis of mesothelioma, that the asbestos exposure is likely to be indicated as the cause of it and the development of mesothelioma in the absence of asbestos exposure is a rare one. This passage, or similar, I have seen many times and would expect practitioners to be familiar with the essentially uncontroversial views expressed in it. So, on the assumption that a mesothelioma diagnosis was confirmed, it seems to me in the context of this case and looking at the facts of this case, whilst nothing could be

said with certainty, it would be anticipated that causation would be established with a considerable and real degree of confidence.

48. There were further issues in relation to immunotherapy treatment, this being another main ground of controversy between the parties. It is stated in the risk assessment, that the risks in relation to quantum were low, but it does appear from the attendance notes and other material with which I have been provided, that the solicitors were aware that the Claimant may be offered such treatment. Such treatment would offer him an opportunity to significantly extend his life and, quite understandably, he would want to take such medication and would want to make a claim for it. The matter is further complicated, at least potentially, because such medication has not been available on the NHS. So, I understand such a claim would have to be made in these proceedings in all probability.

49. It is important, however, to remind myself that, if the Claimant recovers damages then he has succeeded for the purposes of the CFA. In this case the risk assessment records that causation was unlikely to be the main issue in contention, confirming my views about the effect of what the solicitors were told of as to the diagnosis. Part 36 risk, that was said to be a low risk in this case. That was the nature of the assessment, even though it was anticipated that there might be a claim for the cost of immunotherapy.

50. I accept, however, the point that is made by Mr Kapoor that an introduction of a claim of this nature may increase the risk. The recent medical developments meant that the claim being brought was different from the way such claims had previously been brought, as were the nature of the damages that were sought. This increased the risk that a Part 36 offer might be made and, that if one were made, the solicitors would advise against accepting it and the Claimant would not do better than the offer, the risk that they would not recover their profit costs or the success fee for work done after the period for acceptance. I accept that this feeds significantly into the assessment of risk.

51. In *C v W* [2008] EWCA Civ 1459 the Court of Appeal decided that a success fee of 20 per cent (a success fee which applied throughout even if the matter went to trial) was sufficient to compensate solicitors who had agreed to undertake a case on a CFA. In that case primary liability had been admitted, but there was an issue in relation to contributory negligence, and there were issues potentially in relation to the causation of the brain injury, or at least as to the causation of part of disability alleged- as appears from paragraph 3 of the judgement. It was suggested in that case that some of the damage to Mrs C's brain might have been caused by excessive consumption of alcohol and in addition there was issues arising from the development of breast cancer. The Court had these matters in mind and nonetheless, taking all these factors into account, Lord Justice Moor-Blick said (at paragraph 24) that "*he should be prepared to accept that a reasonable assessment of the risk in overall terms would be 17%"* and that this *"would lead to a success fee of 20% which* [he thought was] *fair in the circumstances of this case.*"

52. Looking at this case, it does seem to me that is a relatively clear band in which General Damages would be awarded. I accept Mr Kapoor's point that the Claimant being young and having a significant income may give rise to some significant risk in relation

to a Part 36 offer. But the scheme for assessing damages under a claim for 'lost years' is relatively clear. There was not, on the face of the information, any substantial doubt that the Claimant was, on the face of it, a significantly high earner at the age of 57, albeit there might have been an issue as to how long he would have carried on in work. In any event, applying the approach of the Court of Appeal, these risks do not necessarily feed into a high success fee. Indeed, it does seem to me that there would have been reasonable confidence, as the risk assessment reflects, or a real prospect that issues of quantum would in due course be resolved by agreement. But that could not be said with any degree of certainty.

53. There was a further significant point of disagreement in the application as to the risk that the Defendant would be uninsured and not able to meet to claim. As was pointed out in the course of argument, from 1 January 1972, Employers Liability (Compulsory Insurance) Act, made it a criminal offence for an employer not to be insured in relation to these matters. It appears that the Defendant was not, at the stage the risk was assessed, understood to be a limited company but owned and run by a father and son, in any event a relatively small company. Nevertheless, it does seem to me that this being a post-1972 case and the fact there was criminal liability for failing to take out the necessary insurance increases the chances that there would be such insurance and that this feeds into the risk assessment.

54. An ELTO (Employers' Liability Tracing Office) search took place subsequent to the risk assessment which revealed that the Defendant was insured. But I must look at the matter at the time the risk assessment was carried out. It does seem to me however that I should also bear in mind that if it were established that the Defendant were uninsured, then as Mr Marven is right to say, at that point after the risk assessment, if there was no defendant who could meet the claim for damages, then the claim would not be pursued. In any event in this case there were other defendants, public institutions, who could potentially meet the claim. Further, there was the scheme which would meet, in the circumstances which I have already set out, a claim for damages. So, I have to bear all these matters in mind in determining what is a reasonable success fee.

55. The key point for me to address is whether a success fee above 40 per cent is reasonable. That is because, if I do not think that a success fee above 40 per cent is reasonable and were I to take, for instance, the view that 35 per cent is the appropriate success fee, then the fee would default back to 27.5 per cent.

56. Using the Ready Reckoner Table a 40 per cent success fee corresponds to chances of winning of between 70 and 72 per cent. 71 per cent prospects corresponds to a 41 per cent success fee. A 70 per cent chance of winning corresponds to 43 per cent, and a 72 per cent chance to 39 per cent.

57. As I say, I accept that there were Part 36 risks, particularly in respect of the claim for immunotherapy costs. It seems to me that the risks in relation to liability in relation to this Defendant, if found to be insured, were very modest indeed. Bearing in mind all the relevant factors and based on the information provided to me, I think that a success fee of above 40 per cent is not reasonable.

58. I bear in mind also, independently of these findings, that if this matter were to have gone to trial, the Claimant's solicitors would have recovered a success fee of 100 per cent if successful. This was the case, as I understand it, if the trial was concerned with issues in relation to the liability but also if the trial was concerned with issues in relation to quantum only. So, if it did turn out that there was a substantial issue as to the nature and extent of the exposure of the Claimant, the solicitors would be compensated by that risk by a success fee of 100 per cent in the event of success. Also, if an issue as to the costs of immunotherapy went to trial, there would be a success fee payable on the profit costs that were recoverable at 100 per cent. Clearly, the solicitors would be at risk in relation to a Part 36 offer, they might well not recover their costs after the time for accepting the Part 36 offer has passed, but their costs up to that point would be subject to a 100 per cent success fee. These matters do, it seems to me, reinforce my view that the success fee claimed is unreasonable and should not be increased above the default provision. Having looked through the attendance notes and at what counsel had advised, there was nothing to change my view that this was a case which, once insurance was established, would succeed against this Defendant. There was a risk, at least conceptually, that there might come a point at which the claim had to be abandoned, which cannot be completely discounted, but I consider that it was a modest one.

59. On the basis of factual scenario and the information that was available to the solicitors I would anticipate for the reasons stated above, that a very substantial number of solicitors, would have been perfectly content to take the case on on the basis that the default success fee provision would adequately compensated them for the risks. There may be no true market, as there is not in relation to hourly rates, in relation to success fees because a claimant has no interest in seeking to negotiate the success fee if his funding agreement is a CFA lite. Indeed, a claimant may not have the ability to question the level of success fee and may not know what the real risks are in respect of his claim. But as I think the Supreme Court made clear in *Coventry v Lawrence* [2015] UKSC 50 (paragraph 55) this places a burden on the Costs Judge to subject claims for success fees to a close scrutiny on an informed basis. This I have sought to do, supported as it is by some experience dealing with these claims.

60. The decision in *Edwards v Rolls Royce* concerned whether a case should be transferred from the Asbestos list in London. Master Whitaker determined that it should not be transferred out, but he made reference to the nature of the claims that were brought generally in the list. As far as I recall, he said in respect of what were considered to be- tragically- fairly standard claims brought by or for laggers and other such tradesman who have had close exposure to asbestos on pipework or the like and that in some 99% of cases- or at least a substantial number, there was no proper defence. There is now a tighter procedural regime in place. There are higher expectations under the pre-action protocol, and there are tighter rules of what may be pleaded in the defence. So that some care therefore has to be taken with the comments in this case. However, it remains the position, as I understand it, that defendants put claimants to proof or make denials that cannot in the event be supported.

61. In any event in this case a Defence was submitted by the Defendants in which liability was denied. The defence was not pursued at the Show Cause stage. For the purposes of assessing the success fee I have to consider the position, as at the date of entry into

the CFA, on the basis of the information available to the solicitors at the time they entered into the CFA, not what was later put into the Defence. I am bound to say what from what I have seen in the papers, including the written submissions of senior counsel, there might have been legitimate criticism to be made of the contents of the Defence. That is not really a matter that is necessary for me to address. As at the time the risk was assessed in this case, the risk that the Claimant was substantially inaccurate in his account, as anticipated by a suitably skilled practitioner, would be modest indeed.

62. Further, I am bound to say - although it is not a part of my reasoning- that it is my experience and understanding that it remains the position that there are relatively few cases which proceed to a trial on liability in mesothelioma claims. There clearly are some and they are often reported. There are significant numbers in which a Defence is permitted to proceed at the Show Cause stage, but they still remain a relatively small percentage of the overall claims. Indeed, it is my understanding also in relation to quantum, that there are still relatively few claims which proceed to a quantum hearing.

63. Looking at this case in the round, it is clear to me that it would not be appropriate to award more than 40 per cent. I think a 27.5 per cent success fee remains a reasonable reflection of the risk. There are riskier cases, as regards liability, with low exposure or incidental exposure or non- employment exposure which are litigated to trial. I can quite see that in those sorts of circumstances it may be appropriate for a substantial uplift in the success fee. But it seems to me, looking at the cases as a whole, in respect of liability this case falls within those cases which I would consider to be less risky than most.

64. It follows that I think that the 70 per cent success fee claimed, on the basis clarified by Mr Kapoor, based as it is, on an assessment of prospects of success of 55-60% for the first stage of the success fee is too high. This is particularly so bearing in mind the staging itself assumes a 100% success fee if the matter gets to trial. I also think in the context of the way that live mesothelioma claims are run, and having regard to the anticipation as to when the defendants might be in a position to make an offer, the stepping up of the uplift to 100 per cent at three months pre-trial is unreasonable. My understanding is that a fully pleaded schedule may not be available until later on in the case, as is perhaps understandable in some cases, and the mesothelioma directions may allow for that. Moreover, it seems to me, that it reinforces my decision, that I am required to proceed on the basis that if this case did go to trial, 100 per cent would have been awarded, and that I have to take that matter into account in deciding the appropriate success fee.

65. So, for these reasons, this application is dismissed, and the success fee is set at 27.5 per cent.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge