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Costs in mesothelioma cases

The costs claimed in mesothelioma cases are often contested. Conditional Fee Agreements (CFAs), high hourly rates, success fees and all the associated costs of bringing claims against multiple Defendants can easily lead to costs spiralling. A recent case in the Supreme Court Costs Office, *Woolley v Haden Building Services Ltd. (2008)* considered a number of these issues.

Background

The case concerned a claim for fatal mesothelioma arising from exposure to asbestos. The Claimant had worked for 30 years for the Defendant as a heating engineer. As a result of his employment, he was exposed to asbestos and developed mesothelioma. Symptoms were first apparent in 1998 and he was diagnosed in December 2001. The Claimant instructed solicitors to bring a claim on his behalf and a letter of claim was sent in November 2001. The Claimant's condition then deteriorated rapidly and he tragically died in March 2002. Thereafter, the case was transferred to Irwin Mitchell on the advice of a worker at the hospice where the Claimant received care. A CFA was entered into in December 2002. The case continued and proceedings issued in March 2005. In March 2006 the Particulars of Claim were amended to include dependency claims for the deceased's foster children and the matter was set down for a 3 day trial in November 2006. Shortly before trial, the matter settled for £250,000 in October 2006.

Costs Proceedings

Costs were claimed in the sum of £244,220.52. This included a 100% success fee under the terms of the CFA. Points of Dispute were served and 8 preliminary issues were identified and dealt with by the Court at a 2-day hearing in July 2008 before Master Rogers. Two judgements were given, the first in relation to issues dealing with the validity of the CFA and the second dealing with various other matters.

Validity of the CFA

The Defendant challenged the validity of the CFA on the grounds that the Claimant Solicitor had failed to consider and advise the Claimant in relation to alternative methods of funding before entering into the CFA, as required by s4(2)(c) of the Conditional Fee Agreement Regulations 2000. A Part 18 request was made and answered by the Claimant dealing with how these enquiries were undertaken. The Claimant also filed witness statements from the 2 conducting solicitors, one of whom was cross examined at the hearing.

The Defendant's case was that the Claimant Solicitor had failed to comply with the regulation because they had merely asked the Claimant whether there was any appropriate legal expense insurance and relied upon her answers. Rather, said the Defendant, they should have considered any insurance documents themselves and formed their own view, following the Court of Appeal's guidance in *Sarwar v Alam (2001)*. In fact, the Claimant did have legal expense insurance under her home insurance and it was argued that this demonstrated that the solicitor's enquiries were insufficient.

The Court disagreed. The guidance in only applied to low value RTA claims. In other cases, the test was whether the enquiries were reasonable in all the circumstances, *Myatt v National Coal Board (2006)*. In this case, the enquiries were reasonable and the CFA was therefore valid and enforceable.

<u>Estimates</u>
The Claimant's allocation questionnaire contained an estimate of base costs to trial of £38,000. The actual base costs claimed in the Bill were £106,453.88. The Defendant argued that they had relied on this estimate when setting the reserve for the case and therefore, in accordance with Costs Practice Direction section 6, the costs should be limited by reference to the estimate to reflect the difference between the estimate and the final costs.

Evidence was put forward by the Defendant to show that the estimate had been relied upon and, by reference to the Court of Appeal's decision in Leigh v Michelin Tyres (2004), it was argued that where there had been reliance, the costs should be limited. The Claimant's case was that the case had materially changed after allocation and this had lead to costs increasing dramatically.

Master Rogers agreed that the estimate given was far too low and whilst accepting that the changing direction of the case had lead to increased costs, this did not fully explain the discrepancy between the estimate and the final costs. However, the Defendant's case that they had relied on the estimate was not strong enough to justify a reduction in costs to reflect the low estimate. The Defendant had the option to make an application for an updated estimate at any time and they chose not to do so. In the absence of clear reliance on the estimate, the Defendant's submissions that the costs should be limited by reference to the estimate were rejected.

<u>Proportionality</u>
The Court applied the test set out by the Court of Appeal in *Lownds v The Home Office (2002)* in determining the proportionality of the Claimant's costs. Global base costs were around £120,000 and the damages recovered were £250,000. This was an important case to the Claimant and there were complex issues surrounding the dependency claims. In all the circumstances, the global costs were considered to be proportionate to the matters in issue and no reduction would be made on this basis.

<u>Hourly Rates</u>
The Claimant Solicitors were based in London. The following hourly rates were claimed:

	<30/4/04	**1/5/04-30/4/05**	**>1/5/05**
Partner	£320	£350	£365
Litigation Assistant	£120	£125	£130
Trainee/Paralegal	£175	£180	£185
Associate		£350	£365
Associate (Public Law)			£365
Senior Paralegal			£275

Costs Draftsman			£115

The Defendant argued that it was unreasonable to recover London hourly rates when the Claimant, who lived in Kent, could reasonably have instructed solicitors in Kent or outer London, following *Wraith v Sheffield Forgemasters (1998)*. The Court agreed. It would have been reasonable to instruct solicitors in outer London to deal with this case and therefore the hourly rates allowed would be by reference to the SCCO guideline rates for Outer London, enhanced to reflect the issues in the case and the expertise of the Claimant Solicitors. The following rates were allowed:

	<30/4/04	**1/5/04-30/4/05**	**>1/5/05**
Partner	£210	£215	£250
Litigation Assistant	£105	£110	£125
Trainee/Paralegal	£150	£160	£175
Associate		£215	£250
Associate (Public Law)			£250
Senior Paralegal			£225
Costs Draftsman			£115

Success Fee

A 100% success fee was claimed and it was submitted by the Defendant that no more than 40% should be allowed. The Claimant's risk assessment referred to a number of factors and categorised each as high, medium or low risk:

- High Risk: Claimant's evidence, independent witness evidence, causation of loss, identity of Defendant's insurers.
- Medium Risk: Limitation, type of occupational disease, weakness of liability, identity number of Defendants, quantum of damages, costs recovery, medical condition, expert witness evidence, Claimant's documentation, Defendant's financial position, Defendant's Part 36 Offer
- Low Risk: Contributory negligence.

It was the Claimant's case that this was a case with real issues and, at the time the CFA was entered into, the evidence was sparse. The Claimant had died and the statement he prepared prior to his death was brief and did not deal with liability in any real depth. There were also issues regarding insurance and identifying the correct Defendant, all of which, said the Claimant, justified the 100% success fee.

Considering the various factors, Master Rogers concluded that the prospects of success were 65% and this equated to a reasonable success fee of 54%.

Counsel had also been instructed under a CFA and sought a success fee of 67%. By this stage of the case, the risks were lower but there remained some live issues. A reasonable success fee would be 33.3%, equating to a 75% prospects of success.

Costs of Funding

The final issue was whether the Claimant was entitled to recover from the Defendant the costs associated with setting up the CFA and other elements of funding the case. In the absence of any higher court authority on the issue, Master Rogers held that these costs were a solicitor/client cost and could not therefore be recovered from the Defendant on the standard basis:

> *'In my judgment, the costs of funding have never been recoverable and nothing has changed as a result of the introduction of CPR or, indeed, as a result of the introduction of the CFA Regulations, and therefore that element of this bill in which the Claimant seeks to recover its funding costs, fails.' (at paragraph 134)*

<u>Summary</u>

Whilst very much a decision on its facts, it is rare to see a reported case where so many important issues are considered by the Court. The issues considered are commonly argued at Detailed Assessment and it is illustrative to see the manner in which a Master in the SCCO deals with such issues.

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<u>Cases Cited:</u>

Woolley v Haden Building Services Ltd. [2008] EWHC 90097 (Costs)
Woolley v Haden Building Services Ltd. (No. 2) [2008] EWHC 90111 (Costs)
Sarwar v Alam [2001] EWCA Civ 1401
Myatt v National Coal Board [2006] EWCA Civ 1017
Leigh v Michelin Tyres [2004] EWCA Civ 1766
Lownds v The Home Office [2002] EWCA Civ 365
Wraith v Sheffield Forgemasters [1998] 1 WLR 132

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