

ENGLAND AND WALES / JUDGMENT

Woolley v Haden Building Services Ltd

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Neutral Citation Number: [2008] EWHC 90097 (Costs) IN THE HIGH COURT OF JUSTICE
SUPREME COURT COSTS OFFICE Case No: HQ05X00623 SCCO Ref: 0705738 Clifford's Inn, Fetter
Lane London, EC4A 1DQ Date: 15 February 2008 Before : MASTER ROGERS, COSTS JUDGE

- ----- Between : BARBARA JUNE WOOLLEY (WIDOW AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF DAVID JOHN WOOLLEY, DECEASED)
- and - HADEN BUILDING SERVICES LIMITED Claimant Defendant
- -----
- ----- Mr John Foy QC (instructed by Messrs Irwin Mitchell) for the
Claimant Mr Simon J Brown (instructed by Berrymans Lace Mawer) for the Defendant
Hearing date: 22 January 2008
- -----

Judgment

Approved Judgment Master Rogers: THE ISSUE Woolley v Haden 1. The issue in this matter, the first of a number sought to be heard as preliminary issues, is the now familiar one of whether Regulation 4(2)(c) of the 2000 Regulations has been complied with. If not, the Claimant's Solicitors' will recover no costs at all in respect of the work they did in connection with this claim, but, if the provisions have been complied with, the matter will proceed to a full detailed assessment at a later date. Since the Claimants Solicitors bill is for £244,220.52, it can readily be seen that much turns on this issue. THE BACKGROUND 2. 3. 4. 5. 6. 7. 8. 9. Apart from a period of two years, between 1955 and 1957, when he was doing his National Service in the RAF, the deceased worked either for this Defendant company, or one within the Haden Group, continuously from August 1950 to 1983. He started employment with them as an apprentice, in due course becoming a general heating and ventilation engineer and welder. During his period as an apprentice, part of his work had included the cutting of galvanised cylinders which involved asbestos. The deceased worked on pipes, valves, flanges and boilers in numerous locations, and the work required the removal of the asbestos lagging with hand tools, so as to enable the repairs to be carried out. Between 1950 and 1973, the deceased was able to recall working at Woolwich/ Deptford power station, Romford swimming pool, Ferrodo in Blackfriars, Guildford Cathedral, Kings College Hospital, The Royal Albert Hall, HMS President and Queens Gate Terrace. The deceased first experienced symptoms of mesothelioma in 1998/99, and was informed of the

diagnosis of mesothelioma on 28 December 2001. Thereafter, his condition deteriorated rapidly, and he required constant medication to ease the pain. He died aged 67, on 16 March 2002. The deceased left a widow, the Claimant Barbara June Woolley, and two dependent disabled adults (Kim Webber and Kwankou Esemé). Kim Webber was fostered by the deceased and the Claimant in 1967 when she was a baby, and had lived with the deceased and the Claimant ever since, and was considered to be a child of the family. Kim suffers from Downs Syndrome, and accordingly is incapable of living independently, or of managing her own affairs. Kwankou Esemé was also fostered by the deceased and the Claimant in 1975 when he was a baby. Since that time he had lived with the deceased and the Claimant, and had been treated as a child of the family, although his legal guardian remains the London Borough of Tower Hamlets. Kwankou suffers from cerebral palsy and other conditions, and is therefore equally incapable of living independently, or managing his own affairs. Approved Judgment Woolley v Haden 10. These two factors, coupled with the cause of death in the death certificate being stated as peritonitis, clearly complicated this claim. 11. The deceased and the Claimant had lived in Cliftonville, near Margate since 1991. THE COURSE OF THE PROCEEDINGS 12. 13. 14. 15. 16. 17. 18. During his lifetime the deceased instructed a local firm of Solicitors, Messrs Boys & Maughan, who had notified the Defendant of a potential claim against them on 28 November 2001, under the pre action protocol. By May 2002 Messrs Boys & Maughan had decided that, following the deceased's unfortunate and untimely death, the case was not one to which they could devote the necessary time and attention, and therefore they would have to cease to act for the Claimant. That decision was conveyed to her by letter dated 24 May 2002, part of which I will need to examine in more detail at a later stage in this judgment. Although Messrs Boys & Maughan acted for the deceased and the Claimant under a CFA, and although their claim for costs is included in the bill which is before me for detailed assessment, they have waived all claims for costs, and I am therefore not concerned, as I might otherwise have been, with the validity and enforceability of the CFA entered into between the deceased and Messrs Boys & Maughan. The Claimant was directed to Messrs Irwin Mitchell, apparently by someone working at the hospice where the deceased died, and the matter was handled by that firm's London office. Since the Claimant continued to reside in Margate, an issue has arisen as to whether it was appropriate for her to transfer instructions from a local firm to a Central London firm, but that is not something which forms any part of the debate in relation to this preliminary issue. The case was initially handled on behalf of the Claimant by Mr Colin Ettinger, a very experienced and senior partner, who, apart from his extensive day to day experience of this sort of work, has played a prominent role in APIL, the Association of Personal Injury Lawyers, and has for a period been its President. In due course, however, conduct of the Claimant's case was handed over to Caroline Elisabeth Pinfold, a senior solicitor experienced in this field. Proceedings were issued in the Queen Bench Division, on 4 March 2005, and after a supplementary report from Dr Moore-Gillon, confirming that the true cause of the deceased's death was indeed mesothelioma, and clarification of the position of the two adult dependents, judgment was entered in favour of the Claimant, for damages to be assessed on 13 October 2005. At that same hearing, before Master Whitaker, the Master considered the position of Kim Webber and Kwankou Esemé, and asked for additional information to be provided, and, upon further consideration the Claimants Solicitors decided to seek leave to amend the Particulars of Claim, in

include claims for Kim and Kwankou, and to appoint the Claimant as their litigation friend. 19. That application was listed at the same time as the assessment of damages hearing, but was adjourned to 23 February 2006, to allow formal evidence as to the Claimant's Approved Judgment Woolley v Haden 20. 21. 22. suitability as a litigation friend, and the mental capacity of Kim and Kwankou to be ascertained. On 16 March the Claimant was given leave to amend the Particulars of Claim, and the Claimant was appointed Litigation Friend on behalf of Kim Webber and Kwankou Esemé. At the same time a new revised directions timetable was laid down, and the matter was given a trial window between 2 October and 20 December 2006, and was ultimately listed to commence on 27 November 2006, with a time estimate of two days. Negotiations for a settlement of the Claimant's claim took place in early October 2006, culminating in the Claimant accepting the Defendant's offer of £250,000 plus costs, on 26 October 2006. THE CLAIMANT'S SOLICITOR'S BILL 23. 24. As indicated the gross sum claimed is £244,220.52, though this includes the costs of Messrs Boys & Maughan, totalling £3,144.98, which, as indicated, have been waived. The base profit costs claimed total £92,326, and the base disbursements £14,127.88. Obviously, in those circumstances, proportionality is put forward by the Defendant as a major issue, but again that is not something with which this preliminary issue is concerned. 25. Full Points of Dispute have been served and amended, as have the Claimants Replies, and the issues have been very clearly set out in those documents. THE CLAIMANT'S CFA WITH HER SOLICITORS 26. This document is dated 30 December 2002, and has, in accordance with modern practice, been disclosed to the Defendants. It was preceded by two conversations between Mr Ettinger and the Claimant, on 23 and 24 December 2002, and provided for 100% success fees. 27. Following Notice of Commencement, and disclosure of the CFA, the Defendant's Solicitors served a Part 18 request for further information, on 1 August 2007. 28. The request and the answers given, on 20 August 2007, are as follows: "REQUEST

1. Did Barbara June Woolley have any insurance policies and/or trade union membership? ANSWER Yes – Reasonable and proportionate investigations revealed that Barbara June Woolley did not have any travel insurance or car insurance (she did not have a car), but did have household contents insurance. Approved Judgment Woolley v Haden No - Barbara June Woolley was not a member of a Trade Union. REQUEST
2. If so, with whom? ANSWER Details of the contents insurer have not been retained on the file. REQUEST
3. Did Barbara June Woolley have any legal expenses insurance and/or trade union cover for legal costs? ANSWER No. policy did not have legal expenses insurance attached. Barbara June Woolley's household contents insurance No. legal costs." Barbara June Woolley had no trade union cover for THE WITNESS STATEMENTS 29. 30. 31. 32. Once it became clear that the Defendant's Solicitors were going to pursue this point strongly, witness statements were filed. On behalf of the Claimant Mr Colin Ettinger made two witness statements, one on the 3 October 2007, and a supplementary one on 2 January of this year, and certain documents were exhibited to those witness statements, to which I will need to refer later in this judgment. In addition, Caroline Pinfold made a witness statement, on 11 January 2008, and

witness statements were filed on behalf of the Defendants, having been made by Christopher Newton and Adam Lidster, both dated 16 January 2008. The Claimant agreed that Mr Ettinger should attend for cross-examination on his witness statements, but no similar request was made in relation to Ms Pinfold, because, of course, she was not involved in the critical stage prior to the signing of the CFA. THE DOCUMENTATION FILED 33. Heeding previous judicial complaints that all relevant material was not properly marshalled and paginated for us by all parties, two substantial lever arch files containing much relevant material were lodged by the Claimants' Solicitors. The first of these contained the relevant documents relating to the CFA and the proceedings, and the second contained the substantial number of authorities upon which the parties were going to rely. Approved Judgment Woolley v Haden 34. 35. Neither bundle was restricted to documents relating to this preliminary issue, because it was hoped that the other "preliminary issues" would be heard immediately after this preliminary issue, and therefore the bundles contained material to which the advocates wished to refer on some of these additional points. Despite the Claimant's Solicitors best efforts, however, it was still necessary for me to be shown additional documents during the course of the hearing. I mention that not so much as a matter of complaint, but simply as a matter of record, and, unlike the earlier case with which the Claimant's Solicitors were concerned (*Barlow v Perks*), this "late" lodgement did not really prolong or complicate the hearing before me. THE HEARING ON 22 JANUARY 36. 37. 38. 39. 40. Both parties instructed Counsel, Mr John Foy QC by the Claimant, and Mr Simon J Brown by the Defendant. Mr Brown filed a helpfully full skeleton in advance, and Mr Foy brought his shorter, but equally effective, skeleton with him. The briefing of these two highly experienced costs Counsel undoubtedly assisted in clarifying the issues, and ensuring that no time was wasted. Nevertheless, the hearing took the best part of a working day, largely because Mr Ettinger was subjected to lengthy, but perfectly fair, cross-examination on his two witness statements. I am satisfied that Mr Ettinger was as helpful to the court as he possibly could be. I put the matter in that way, because it is quite clear that he is not only a highly experienced solicitor, but also a very busy one, and had only an incomplete recollection of the two critical telephone conversations that he had with the Claimant, on 23 and 24 December 2002. This is hardly surprising, bearing in mind the lapse of over five years, the workload and other responsibilities that Mr Ettinger carries, and the fact that he handed over the conduct of the case to Ms Pinfold at a relatively early stage.

41. Mr Ettinger was completely frank with the court, and when he could not expressly remember any particular matter, he said so, and I unreservedly accept his evidence as being frank and truthful.
42. Mr Brown, quite properly, sought to demonstrate that Mr Ettinger had not complied with the duties imposed upon him by Regulation 4(2)(c) in this particular case, and accordingly that the consequential CFA breached the Regulations, and could not be enforced. 43. 44. In the course of his lengthy cross-examination, Mr Brown referred to a limited number of documents, which both advocates accepted are the critical documents to be considered. In paragraphs 5 and 6 of his initial witness statement, of 3 October 2007, Mr Ettinger said this:

“5. According to the file, I spoke to Mrs Woolley on 23 December 2002 and this was the first discussion with Approved Judgment Woolley v Haden 6. her in which I raised the issue of funding. I recorded that I discussed funding with her and gave her “all the necessary information relating to CFA’s”. It is my practice to ensure that all types of funding are investigated. During this conversation I anticipate that I would have explained to Mrs Woolley that Public Funding would not have been available to fund the case, the alternatives would have been trade union, legal expenses insurance funding or the matter being dealt with by way of Conditional Fee Agreement. I would have asked her to have looked at all insurance and any other documents available that may provide her with some form of legal assistance. I would have explained that particularly under insurance policies, sometimes legal assistance is offered. I note from my file that I spoke to Mrs Woolley the following day, the 24 December 2002. I recall that she confirmed that she was not a member of a trade union. To the best of my recollection during the course of my discussions with Mrs Woolley, she confirmed that she had looked into the position regarding other funding. She did not have any travel or car insurance. I recall that she mentioned that she had household contents insurance. However, she told me that having looked at the insurance policies that she had, she did not find any indication at all that there was legal expenses cover to support a claim of this nature. I found Mrs Woolley an intelligent and articulate woman. From my discussions with her she was somebody who in my view would have been capable of reading through the documentation that she had in order to identify whether any legal support was available.” 45. In addition, Mr Ettinger went on to say this in paragraphs 9 – 13: “9. As mentioned, at about the time that I was instructed to act on behalf of Mrs Woolley I had been involved in a number of cases involving asbestos related disease. I do not recall in any of those cases any of my clients having a policy of insurance that would give them legal expenses cover. Motor insurance policies did not cover disease claims. Indeed, my knowledge of them today is that they still do not cover such cases. I have never come across a credit card certainly at that time that would provide legal expenses cover to cover a case of this nature. I have only ever known legal expenses cover to be provided where it’s associated with the use of the credit card. Approved Judgment Woolley v Haden 10. 11. 12. 13. I also recall that about that time, 2002, household insurance policies did not often provide legal expenses cover. In respect of all of the various cases where I have been involved where an individual has suffered from an asbestos related disease, I have never come across one of these policies that has provided cover for this type of claim. In considering whether “before the event” insurance is appropriate in these cases, I am always mindful of the potential costs involved and whether such a policy gives sufficient funding protection. These policies usually give a maximum cover of £50,000. Indeed, it will be noted that the position here is that the amount claimed in respect of costs, VAT and disbursements, even ignoring any additional liabilities, is substantially more than this sum. If legal expenses insurance was available in a case like this, at some stage during the case, consideration would have to be given to entering into a Conditional Fee Agreement in any event as the indemnity would not be sufficient. When this happens, it is sometimes difficult to secure after the event insurance when the case has been proceeding for some time. Indeed, even if such a policy of

insurance can be obtained then the likely cost of the premium would be very substantial indeed. In such circumstances, there will almost certainly be a challenge as to the level of the premium. Accordingly, it may, in any event, be desirable to advise a litigant in an asbestos related disease case to enter into a Conditional Fee Agreement immediately. Should this take place, then after the event insurance would be relatively easy to secure and at a much lower premium than if taken out later in the case. The Claimant would then have adequate protection with regards to funding.”

46. Mr Ettinger returned to this topic in paragraphs 8 to 10 of his second witness statement, made on 2 January 2008: “8. In paragraph 10 of my statement of 3 October I state that it was my recollection at the time that few household insurance policies offered legal expenses cover. To the best of my recollection, the only legal expenses insurance that was available to any significant extent was with car insurance. Normally the policies were restricted to the use of the car. In my experience, it was not common to find legal expenses Approved Judgment Woolley v Haden 9. 10. cover in household insurance until about 2005. I have also never seen legal expenses cover in building insurance unless such a policy was associated with household contents policy. Similarly, I have never come across any legal expense cover for personal injury cases in credit cards. However, I have been informed that some credit card companies offer this which is why I always investigate this aspect as well. Even now, it is extremely rare to find any legal expenses cover on an asbestos related disease case. As already indicated, car insurance policies will be confined to road crashes. Where a home insurance policy does offer legal expenses insurance, it is usually only for sudden and specific accidents that occur during the currency of the policy. Indeed, I am only aware of one case that we currently have in the London office that has had the benefit of legal expenses insurance. Even this was limited to £750 just to cover initial investigation. At paragraphs 11 and 12 of my previous statement I mention that taking out legal expenses cover, even if it was available, may not have been in Mrs Woolley’s best interests. The £50,000 cover would have had to have covered both Claimant’s and Defendants’ costs in the event of the costs being unsuccessful. In a case like this, this would not have been sufficient. As mentioned in that statement, I was particularly concerned that if we entered into a Conditional Fee Agreement after the legal expenses cover had been exhausted, then the cost of the after-the-event insurance, even if a policy had been available, would have been high. To the best of my recollection, at about that time, Accident Line Protect was the main provider of after-the-event insurance. They were the provider in this case. I recall that at about that time it was quite well known that Accident Line Protect had some adverse claims experiences. I believe that by this time they were insisting that policies were taken out before letters before action were sent. From what I recall I was aware by this time that if an application was made for after-the-event insurance when the case was a year or two old, then the cost of the premium would be substantially higher. The position has not changed. Even on a liability admitted case where no Part 36 offer had been made, the cost of after-the-event insurance applied for close to a hearing will result in a premium of several thousand pounds.” Approved Judgment Woolley v Haden 47. 48. 49. I turn now to consider the

documents which were exhibited to these two witness statements of Mr Ettinger, and which were the subject matter of close cross-examination by Mr Brown. The first of these documents is the letter from Messrs Boys & Maughan to the Claimant, dated 24 May 2002, in which they state that they can no longer continue to devote the necessary time to her case, and that therefore she should find alternative legal representation. After explaining why that was the position, and warning her that under the Limitation Acts she had until 23 December 2003 to start proceedings, the letter continued with the following paragraph: "Upon hearing from you, we shall be pleased to hand over to you, or to the solicitor appointed on your behalf, the preliminary paperwork in connection with the case. Should it be possible for you to take advantage of the existing insurance policy, we would appreciate an undertaking that you will use your best endeavours to claim back the cost of that policy from the third party, in the event that the claim is successfully settled. Subject to that, we would waive any claim for costs." 50. The second document that was said to be important was the handwritten letter sent by the Claimant to Mr Ettinger, on 28 September 2002, which reads as follows: "Dear Mr Ettinger I am in receipt of your letter dated 27th September 2002. I enclose herewith your New Client Questionnaire, duly filled in. I also enclose all documentation that I have from Boys & Maughan. The conditional fee agreement that my husband entered into (copy unsigned). I also enclose the "paperwork" referred to, this being apprenticeship records etc. On reading the conditional fee agreement it appears that Boys & Maughan are entitled to claim their costs, but I am unsure about the charge for the no win no fee insurance policy. Perhaps you could advise me. Yours faithfully B. J. Woolley (Mrs)" 51. 52. There is a p.s, but it merely relates to the Claimant's holiday arrangement. Significant though those documents undoubtedly became, the critically important documents were the two attendance notes of 23 and 24 December 2002, which read as follows: Approved Judgment Woolley v Haden (The first attendance note) "FILE NAME: David John Woolley SUBJECT: Industrial Disease DATE: REF: 23 December 2002 PH/CBE/EXM/00823337-1 DATE TYPED: 30 December 2002 CBE attending Mrs Woolley. Mrs Woolley told me they moved to Cliftonville in 1991. Her husband was 58 at the time. He was working with Duckhams. He gave up because the journey was too much. He was receiving State pension, plus £18 per week from Duckhams, plus £100 per week from Haydens (sic). This was at the time of his death. She would let me have the documentation verifying this. She was also receiving a State pension. They also had children but they had looked after two others since they were kids. This was Kim, who has Downs Syndrome and is now 35. It seems that she is quite able but just needs to have somebody around her to look after her. They also have Kwankou, who is blind, has cerebral palsy and seems terribly severely disabled. She says that she misses her husband in a number of respects concerning looking after these two. It seems that not only would he watch out for Kim but would also have to attend to Kwankou in getting him up in the morning. He also drove, she does not drive. This makes life particularly difficult for them. Kwankou is confined to a wheelchair. She says that he used to do much of the decorating, she used to hang the wallpaper. She said he could also repair machinery, for instance if the washing machine broke down then he could deal with it. We discussed the problems of the case. I said the central one was causation but, like her, I was fairly optimistic that we could resolve

this quite satisfactorily but I needed to get all the records. We also discussed funding and I gave her all the necessary information relating to CFAs. I then said that I would be involving an expert to go round and take a full statement from her dealing with all the losses.

Approved Judgment Woolley v Haden I said there was still some work to do but I was fairly optimistic that there would be a successful outcome. Time engaged – 40 minutes Time engaged reading through file in advance – 30 minutes. (The second attendance note) File Name: David John Woolley deceased Subject: Oral Explanation Given to Client Prior to Signature of CFA Ref: Date: PH/CBE/RN/00823337-1 24 December 2002 Colin Ettinger giving oral explanation to the client prior to entering into a Conditional Fee Agreement of the following matters:

1. Whether costs risk is insured Whether there is a policy of legal expenses insurance which could cover the client in relation to the risk of having to pay their opponent's legal costs in pursuing the claim. e.g. section under their motor insurance policy. RTA cases the client may have been covered by a e.g. cover under a section of their home insurance (your building and contents) policy. e.g. cover under a credit card company Advising the client to let us know if any of these apply so that we can contact them.
2. Other Methods of funding Enquiring whether the client is a member of a Trade Union or similar organisation which covers its members for legal costs when they are involved in claims for compensation.
3. Paying our costs Advising the client that if they do not have the benefit of legal expense insurance, and are not a member of a Trade Union, the best option would be for them to take advantage of our Conditional Fee Agreement. Approved Judgment
4. Assessment of our costs Woolley v Haden Advising the client that at the end of the claim Irwin Mitchell will seek to recover all the client's legal costs from their opponent. Sometimes an insurance company asks to have the costs assessed by the Court. The clients also has the right to ask Irwin Mitchell to have their costs assessed by the Court. The client also has the right to ask Irwin Mitchell to have their costs assessed by the Court. The client would have to notify us and we would then let you have the details of the procedure in writing.
5. Taking out insurance Explaining to the client that if they win then Irwin Mitchell gets paid by the opponent's insurance company. If IM lose their claim then although the client pays nothing to IM, the opponent's insurance company would be entitled to have their legal costs paid by the client. For this reason it is important to take out an insurance policy to cover the opponent's legal costs. Irwin Mitchell will take out a suitable policy on the client's behalf to protect them.
6. (Accident Cases Only) – The client keeps 100% of the compensation The most important benefit of using the Irwin Mitchell CFA 'no cost to you service' is that if the client wins their claim they should keep 100% of their damages. They are virtually assured of this, even though we can't give an absolute guarantee. The only circumstances in which the client

would have to pay anything would be if the client did not co-operate with Irwin Mitchell and they were in breach of the Agreement – which rarely happens. Total time engaged in providing oral explanation to the client – 5 units.” 53. 54. It will be observed that, whilst the earlier of these two documents is quite clearly an attendance note, and described as such, the other appears to be, and indeed was accepted by Mr Ettinger as being, a pro forma document generated for all cases of this nature, and which formed the basis of the discussion which he had with Mrs Woolley on 24 December 2002. During cross-examination Mr Brown made the point that there were no question mark signs in the document at all, which made it difficult to ascertain precisely what was discussed, and what was simply there because it was a pro forma document.

55. Mr Ettinger under cross-examination acknowledged the problem, but stated that various heads in the second final note would clearly have formed the subject matter of detailed discussions, as borne out by the fact that, on page 3 of the Claimant’s Approved Judgment Woolley v Haden Solicitors’ bill, it is contended that the conversation, which was originated by the Claimant, took 1 hour 12 minutes, of which 30 minutes was spent explaining Regulation 3 of the CFA Regulations, which followed the call the previous day from Mr Ettinger to the Claimant which took, according to the claim in the bill, 42 minutes.
56. Mr Brown sought to undermine Mr Ettinger’s credibility by pointing out that not only did the Claimant have BTE cover, but this was well known to Mr Ettinger, because it was contained in the CFA, which had been entered into by Messrs Boys & Maughan with the Claimant.
57. Mr Ettinger stated on several occasions, however, that it was, in his opinion, not adequate cover, and that, for the reasons given in the witness statement, it was important to put a CFA, with the requisite insurance cover, in place at an early stage. If this were not done, there would be considerable difficulties in obtaining the requisite insurance cover later, and, even if it was available, it would be considerably more expensive.
58. Mr Brown also queried how Mr Ettinger could contend that the Claimant was “highly intelligent” based on two, albeit lengthy, telephone conversations. 59. 60. 61. It was put to Mr Ettinger in re-examination by Mr Foy that this intelligence was clearly demonstrated in the fact that Mrs Woolley had clearly not only read the CFA entered into with Messrs Boys & Maughan, but had queried, in her letter of September 2002, what Messrs Boys & Maughan had meant in the last paragraph of their letter of 24 May, which Mr Ettinger readily accepted. I am satisfied, from the evidence that I have heard from Mr Ettinger, and the documents that I have read, that Mr Ettinger put to the Claimant the questions which he considered necessary to be answered by her before she entered into the CFA. Against that background I turn to consider the submissions made in relation to the relevant guidance given by the courts, and in that connection both Counsel relied on the relevant passage in *Sarwar v Alam* [2002] 1 Costs LR 37; [2001] EWCA Civ 1401, as interpreted by the Court of Appeal in the later case of *Garrett v Halton Borough Council* [2006] 5 Costs LR 798; [2006] EWCA Civ 1017. THE AUTHORITIES QUOTED 62. In the case of *Sarwar v Alam*, both Counsel referred me to this judgment, but relied on different paragraphs. The main references made

are paragraphs 45 to 50, and I set these out below: “45. In our judgment, proper modern practice dictates that a solicitor should normally invite a client to bring to the first interview any relevant motor insurance policy, any household insurance policy and any stand-alone BTE insurance policy belonging to the client and/or any spouse or partner living in the same household as the client. It would seem desirable for solicitors to develop the practice of sending a standard form letter requesting a sight of these documents to the client in Approved Judgment Woolley v Haden 46. 47. 48. advance of the first interview. At the interview the solicitor will also ask the client, as required by paragraph 4(j)(iv) of the client care code (see para 14 above) whether his/her liability for costs may be paid by another person, for example an employer or trade union. If these simple steps are taken, they ought to reduce the burden and extent of the inquiries about which some of the interveners expressed concern. The solicitor will then be able to read through the policy, and if BTE cover is available, if the motor accident claim is likely to be less than about £5,000, and if there are no features of the cover that make it inappropriate (for instance, if there are a number of potential claimants and the policy cover is only, say, £25,000), the solicitor should refer the client to the BTE insurer without further ado. The solicitor’s inquiries should be proportionate to the amount at stake. The solicitor is not obliged to embark on a treasure hunt, seeking to see the insurance policies of every member of the client’s family in case by chance they contain relevant BTE cover which the client might use. Now that motor insurance often contains provision for BTE cover for a claim brought by a passenger, the solicitor should ordinarily ask the client passenger to obtain a copy of the driver’s insurance policy, if reasonably practicable. Whether it is reasonably practicable to comply with the solicitor’s request is likely to be fact-sensitive. At one end of the spectrum is the driver who is a member of the same family or the same household (as with Mr Sarwar and Mr Alam). At the other is the unknown driver who gave a lift to a hitchhiker who got hurt in an accident and the driver then disappeared into the night. If the solicitor sees that the BTE cover contains a stipulation, like the BTE cover in this case, that the driver should consent to its use by the passenger, the solicitor should tell the client to obtain the driver’s consent before making a claim on the BTE insurer. It would be professionally inappropriate for the solicitor to do anything to induce the client to encourage the driver to withhold consent. If in due course there was any evidence that this had happened the court would normally disallow both the ATE premium and any success fee claimed. On the other hand, if the driver refuses consent for reasons of his/her own, then it is Approved Judgment Woolley v Haden 49. 50. common ground that the BTE cover would not be available. So far as credit cards and charge cards are concerned, we have received no evidence of the terms of LEI cover offered by the companies marketing these cards, and we do not know how easy it is for the cardholders to avail themselves of such cover in a case like the present. We are inclined to think that the time taken by a solicitor in assisting a client to identify and pursue such cover would at present be likely to result in this course proving more expensive than an ATE premium in this class of case. If, at some time in the future, credit card or charge card companies decide as a matter of business practice to make the extent of any BTE cover they provide readily available to solicitors (either through one of their professional journals or guides or on a

publicly accessible website), then the client should also be asked to bring to the first interview any credit card or charge card belonging to him/her and/or any spouse or partner living in the same household. The guidance we have given in this part of our judgment should not be treated as an inflexible code. The overriding principle is that the claimant, assisted by his/her solicitor, should act in a manner that is reasonable. The availability of ATE cover at a modest premium will inevitably restrict the extent to which it will be reasonable for a solicitor's time to be used in investigating alternative sources of insurance."

63. Turning to Garrett, again both Counsel referred me to the relevant extracts, which I consider to be paragraphs 70 to 75 inclusive, and which I set out below: "70. In our view, it follows that the regulation 4(2)(c) duty does not require solicitors slavishly to follow the detailed guidance given by this court in Sarwar. In particular, the statement at para 45 that a solicitor should normally invite a client to bring to the first interview any relevant policy should be treated with considerable caution. It has no application in high volume low value litigation conducted by solicitors on referral by claims management companies. As the Myatt cases show, the clients will often live far from the solicitor's offices, and face to face interviews may well not take place. Inconsistently with his primary submission, Mr Morgan submits that, if the solicitor does not meet the client, that is a reason for adopting Approved Judgment Woolley v Haden 71. 72. 73. more stringent standards than those suggested in Sarwar, since the opportunities for misunderstanding during a telephone conversation are greater than in face to face communications. So what guidance can be given as to the steps that a solicitor should reasonably take to discharge his obligation under regulation 4(2)(c)? A number of factors are relevant. What follows is not intended to be an exhaustive list. We emphasise that what is reasonably required of a solicitor depends on all the circumstances of the case. First, the nature of the client. If the client is evidently intelligent and has a real knowledge and understanding of insurance matters, it may be reasonable for the solicitor to ask him not only (i) whether he has credit cards, motor insurance or household insurance or is a member of a trade union, (ii) whether he has legal expenses insurance, but also (iii) the ultimate question of whether the legal expenses policy covers the proposed claim and, if so, whether it does so to a sufficient extent. Litigants such as the Myatt claimants and Ms Garrett plainly do not fall into this category: few litigants will. If the solicitor does ask such questions, he will have to form a view as to whether the client's answers to the questions can reasonably be relied upon. Secondly, the circumstances in which the solicitor is instructed may be relevant to the nature of the enquiries that it is reasonable to expect the solicitor to undertake in order to establish the BTE position. A good example of the application of this factor is to be found in Pratt v Bull, which was one of the five cases that was heard together with Hollins v Russell. In that case, the 80-year old claimant was injured in a road accident. A solicitor visited her while she was in hospital and a CFA was made. At the assessment of her costs, it was argued on behalf of the defendant that the possibility of legal expenses insurance under her home insurance policy had not been fully explored. At para 138, the court said that there were limits to what can reasonably be expected of the interchange between solicitor and client in such circumstances: "It would be ridiculous to expect a solicitor dealing with a seriously ill old woman in hospital to delay making a CFA while her

home insurance policy was found and checked.” It was sufficient that the solicitor had discussed it with her and formed a view on the funding options. Approved Judgment Woolley v Haden 74. 75. Thirdly, the nature of the claim may be relevant. If the claim is one in respect of which it is unlikely that standard insurance policies would provide legal expenses cover, this may be a further reason why it may be reasonable for the solicitor to take fewer steps to ascertain the position than might otherwise be the case. Fourthly, the cost of the ATE premium may be a relevant factor. This is the point made at para 50 of Sarwar. In our judgment, it is as relevant to a question of breach of regulation 4(2)(c) as to a question of the reasonableness of the premium for the purposes of an assessment of costs pursuant to CPR 44.4.” THE CLOSING SUBMISSIONS MADE BY MR FOY ON BEHALF OF THE CLAIMANT

64. Mr Foy emphasised that the criteria laid down in Sarwar v Alam did not purport to, nor should they be extended to, cases of this nature, but should be restricted to relatively small personal injury claims arising in road traffic accidents. As the Court of Appeal said, in paragraph 41 of their judgment, in Sarwar: “41. In this case we are concerned only with a relatively small personal injuries claim in a road traffic accident. We are not concerned with claims which look as if they will exceed about £5,000, and we are not concerned with any other type of BTE claim. We have no doubt that if a claimant possesses pre-existing BTE cover which appears to be satisfactory for a claim of that size, then in the ordinary course of things that claimant should be referred to the relevant BTE insurer.” 65. Also relevant, in Mr Foy’s submission, was the end of paragraph 43, and the beginning of paragraph 44, which read as follows: “43. ... On the other hand they considered that in larger cases, or those which raised unusual or difficult issues, it would usually be appropriate for a claimant to elect to purchase an ATE-based funding arrangement in preference to invoking a BTE policy, unless it could be shown that the latter was capable from the outset of providing what they described as a bespoke service adequate to the nature of the claim. 44. In this case we are not concerned either with a larger case or with a case which raised unusual or difficult issues. A judgment concerned with those types of case will have to await an appeal where an issue of this kind arises directly for decision.” Approved Judgment Woolley v Haden
66. Mr Foy submitted that the evidence showed that she was asked the second question from paragraph 72 of Myatt, but she was not asked the “ultimate question”. This file note, of 24 December 2002, was the pro forma used as an aide-memoire, and did not set out the question to be asked of the client, it set out the conclusion which was reached by the solicitor after interviewing the client. If there was any form of legal cover Mr Ettinger would have determined whether it covered this case.
67. Mr Foy further submitted that, by virtue of the nature of this claim, it was most unlikely that standard insurance policies would provide LEI cover. He submitted there was no evidence to contradict Mr Ettinger to the effect that asbestos exposure would not have been covered during the currency of any presently held insurance policy, household and motor policies do not cover for asbestos disease. In addition the limit on cover of a maximum of £50,000 would

potentially be a problem. 68. 69. He also submitted that the cost of the ATE premium, a modest £892.50, had already been incurred. In conclusion, he submitted that it was not necessary to see every insurance policy, and that Mr Ettinger had carried out all necessary enquiries, and that there clearly had not been a breach of Regulation 4(2), but, even if there had, it had no materially adverse effect on the protection afforded to the Claimant, or of the proper administration of justice. MR BROWN'S CLOSING SUBMISSIONS ON BEHALF OF THE DEFENDANT

70. Mr Brown submitted that the guidance in Sarwar was applicable to this sort of case, and maintained very strongly that Mr Ettinger had not done all that he could have done to ensure that there was no alternative insurance cover available. He should, at the very least, have insisted on the policies being sent to him by Mrs Woolley, before entering into a CFA with her. 71. He submitted that it was clear from the further information, of 20 August 2007, that the Claimant did indeed have household contents insurance cover, and that no request had been made by Mr Ettinger to see the policy documents.
72. Mr Brown also submitted that there was no warrant for attributing to the Claimant a degree of sophistication that might be appropriate to some other clients.
73. Mr Brown based his primary submissions on several clear breaches of the Regulations, and did not really address the issue of whether, if there had been a breach, it had had an adverse effect on the Claimant, or on the proper administration of justice; although this was briefly considered by both advocates at the end of the primary closing submissions which they made. MY DECISION 74. Having heard the evidence of Mr Ettinger, upon which I have commented already, having reconsidered the documents, and the totality of the evidence in the light of the submissions made to me, I have come to the clear conclusion in this case that there has been no breach of Regulation 4(2)(c). It seems to me that the guidance laid down in Sarwar v Alam is restricted to the small claims which were in issue in that Approved Judgment Woolley v Haden case, and nothing said by the Court of Appeal in Garrett extends the ambit of the enquiries that need to be made, to a case of this magnitude. 75. 76. 77. Accordingly, I find that there has been no breach of Regulation 4(2)(c), so as to invalidate the CFA. Even if I were to be held to be wrong about that, I am satisfied that there has been no materially adverse effect on the protection afforded to either the Claimant, or on the proper administration of justice by enforcing this CFA. Accordingly, this challenge by the Defendant fails, and the detailed assessment must now proceed. THE WAY AHEAD
78. When this judgment is formally handed down I will, of course, deal with the issue of costs, and any other consequential issues, but, subject to any representations that may be made to me at that hearing, my present inclination is to proceed with the detailed assessment as soon thereafter as it can be listed, starting with the other so called "preliminary issues", which in my judgment properly form part of the assessment, and can be dealt with summarily at that stage, because, even to the extent that they are successful, they will only serve to reduce, and not to eliminate, the Claimant's entitlement to costs.

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