Neutral Citation Number: [2017] EWCA Civ 314

Case No: B2/2015/1436

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LEEDS
His Honour Judge Saffman
9OL00362

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2017

Before :
LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE MCFARLANE
and
SIR STEPHEN TOMLINSON

Between :

Frank Perry — **Appellant/ Claimant**

- and -

Raleys Solicitors — **Respondents/ Defendants**

Jonathan Watt-Pringle Esq QC and John Greenbourne Esq (instructed by **Mellor Hargreaves Solicitors**) for **Mr Perry**
Ben Quiney Esq QC (instructed by **Berrymans Lace Mawer LLP**) for **Raleys Solicitors**

Hearing dates : 24 November 2016

Approved Judgment

Lady Justice Gloster:

Introduction

1. This is an appeal by the appellant/claimant, Mr Frank Perry ("Mr Perry") against the judgment ("the judgment") of His Honour Judge Saffman ("the judge") sitting in the County Court at Leeds dated 15 April 2015. By his order of the same date the judge dismissed Mr Perry's claim for damages against his former solicitors, the respondents/defendants, Raleys ("Raleys"), on the grounds that Mr Perry had not established that their admitted negligence in the conduct of Mr Perry's claim for compensation for Vibration White Finger ("VWF") against his employer had in fact caused Mr Perry to settle his claim at an undervalue.

2. Mr Jonathan Watt-Pringle QC and Mr John Greenbourne appeared on behalf of Mr Perry. Mr Ben Quiney QC appeared on behalf of Raleys.

Factual background

3. Mr Perry was born on 8 October 1950. According to the judge's findings, he was unsophisticated and uneducated[1]. He left school and became a miner in 1966, as an employee first of the National Coal Board, and then of its successor, the British Coal Corporation. As a result of using vibratory tools he developed VWF, a form of Hand Arm Vibration Syndrome ("HAVS"). He continued to work in the industry until he took redundancy in 1994 and has not worked since. In 1996 he instructed Raleys, to pursue on his behalf a claim for damages as a result of developing this condition.

4. As is well known, the Department for Trade and Industry ("DTI"), which had assumed responsibility for the liabilities of the National Coal Board/British Coal Corporation liability, set up a compensation scheme ("the Scheme") in 1999 to provide tariff-based compensation to miners who had been exposed to vibration and in consequence suffered from VWF. Mr Perry was entitled to claim under the Scheme.

5. The Scheme was administered for the DTI by IRISC Claims Management ("IRISC") in accordance with the terms of a Claims Handling Arrangement ("CHA") dated 22 January 1999 and amended from time to time. The CHA was an agreement between IRISC and firms of solicitors, including Raleys, who belonged to the VWF Litigation Solicitors Group ("VWFLSG"). Raleys held themselves out as possessing the necessary expertise to handle miners' claims for compensation and handled many thousands of such claims.

6. So far as relevant to this case, the Scheme operated as follows:

   i) When making a claim, a claimant had to submit a completed questionnaire concerning his work history. IRISC would then allocate him to a particular occupational group, depending on his likely exposure to vibration. Thereafter he would undergo a medical examination in accordance with a defined Medical Assessment Process ("MAP") by doctors appointed under the Scheme. The examination and the resulting MAP1 report followed a standard

[1] Judgment paragraphs 16 to 18 and 136.

format CHA Schedule 4(2) medical report form. The purpose of the examination was to determine whether the claimant suffered from VWF and, if so, to define the severity of the condition by reference to the stagings of a scale referred to as the Stockholm Workshop Scale. A claimant could challenge the findings of the MAP1 report, but there was no provision for IRISC to do so.

ii) Within 56 days of receipt of the MAP1 report, IRISC was obliged to make an offer of compensation or to reject the claim with reasons. The Scheme provided for compensation to be paid for pain, suffering and loss of amenity ("General Damages"), handicap on the labour market, and other financial losses ("Special Damages") including past and/or future loss of earnings.

7. The Scheme was supplemented by a Services Agreement of 9 May 2000, which came to be incorporated in the CHA as Schedule 7(1). It recorded the agreed approach to compensation for services. The respective medical experts of the parties to the Scheme rejected the idea that there should be an individual assessment of each claimant's ability to carry out particular household tasks. Instead, in the interests of consistency and efficiency, they agreed "that once the condition had reached a certain level(s) causation should be presumed and that a man could no longer carry out certain tasks without assistance". There were for this purpose 6 tasks, identified at paragraph 3.3 of Schedule 7(1) as follows:

> "(a) gardening work, including planting, heavier garden work, grass cutting, pruning etc, summer and winter;
>
> (b) window cleaning, summer and winter;
>
> (c) DIY, normal household repairs including changing fuses, plugs, etc;
>
> (d) decorating, including paper hanging and painting inside and out;
>
> (e) car washing summer and winter;
>
> (f) car maintenance, the basis servicing, changing plugs, points, oil, anti-freeze and other similar tasks."

8. The procedure for making a services claim under the Services Agreement was as follows:

i) The experts produced a matrix identifying in respect of each staging of 2V and 2Sn late, or higher, which tasks a claimant would be presumed to require assistance with.

ii) Once he had a staging of at least 2V or 2Sn late, a claimant was entitled to a services award if he had previously performed one of the identified tasks, but now required assistance to do so as a result of his VWF. A claimant did not have to show that his condition wholly disabled or prevented him from carrying out the relevant task. It was enough that he could no longer carry it out without assistance: see per Tomlinson LJ in *Procter v Raleys* [2015] EWCA Civ 400: [2015] PNLR 24 at paragraph 11 (iii).

iii) Factual evidence concerning the services claim would be presented by means of a simple questionnaire. Since it would be impracticable to investigate individual claims in any detail, the Scheme provided that:

> "broad assumptions will be made about the average assistance that would be required for the particular task by the individual at the relevant stage".

iv) In addition to the claimant, his current or most recent helper(s) would also complete questionnaires.

v) A claimant would then be sent for a further medical examination ("MAP2"), which was solely concerned to consider whether there were any other conditions which, of themselves, would have prevented the claimant from undertaking the task in question

vi) A claimant was not usually contacted by IRISC concerning his claim, but the helpers would be. This normally consisted of a telephone interview, which might last 15 minutes, during which the helper would be asked whether he/she had assisted with the tasks claimed and, if so, when they started to do so. Even where the helper was out by a few years on dates, the information in the questionnaire would still be accepted.

vii) On receipt of the questionnaires, IRISC would consider each claim on its merits, adopting a pragmatic approach. If IRISC did not accept the claim entirely, it had to set out in detail the reasons for rejecting the claim in whole or part.

viii) The compensation was calculated by application of a multiplier/multiplicand approach, and an index-linked tariff was set in respect of each task according to the particular staging.

ix) IRISC could reject a claim for services in whole or in part if a claimant's work history after leaving the mining industry was such as to indicate that his ability to carry out the relevant tasks was not impaired. However, in order to be entitled to rebut the presumption that a man with a particular claimant's stagings could not carry out the relevant task without assistance, IRISC had to discharge the burden of establishing that the work actually carried out by the claimant was such as to demonstrate that he could not reasonably be expected to carry out all aspects of the task without assistance.

x) Pending resolution of the services claim, the claimant was entitled to receive an interim payment in respect of his claim for general damages and handicap on the labour market. By February 2001 the size of the interim payment had increased to 92.5% and by 20 November 2002 an agreement had been reached that it would be 100% of the claim.

9. Unlike ordinary civil litigation, claims under the Scheme were not subject to a particularly robust process of assessment: see paragraph 148 of the judgment.

10. With Raleys' assistance, Mr Perry pursued a claim for compensation against his former employers. Initially the claim started as a normal personal injury claim with legal aid. Raleys obtained a medical report from a Professor Kester dated 6 October 1997 in which he concluded that Mr Perry was suffering from VWF with stagings of 3V and 3Sn bilaterally. After the CHA came into effect on 22 January 1999, Mr Perry's claim continued under the Scheme. He did not undergo a MAP 1 as Professor Kester's report was accepted by IRISC. On 5 November 1999 the DTI made an offer to settle his claim for £11,660. This sum was for general damages only; there was no element to compensate for any inability to carry out services. On 25 November 1999, on the basis of Professor Kester's report, Mr Perry agreed to settle his claim for compensation for VWF by accepting the offer of £11,660. If he had proceeded with a claim for a services award, Professor Kester's conclusions that he was suffering from VWF with stagings of 3V and 3Sn bilaterally would have resulted in an assumption being made that he could not perform the relevant tasks without assistance, but that assumption could have been challenged by the DTI on co-morbidity or other grounds.

11. On 3 February 2009 Mr Perry issued proceedings against Raleys. He claimed damages in respect of the loss of opportunity to claim a services award in respect of heads of damage available under the CHA, namely gardening, window cleaning, DIY, decorating, car washing and car maintenance in the sum of £17,300.17 (plus interest) as set out in the schedule and particulars of claim. This sum was said to represent what he would otherwise have obtained pursuant to a successful claim under the CHA in respect of all the stated heads of damage.

12. As their re-amended defence dated 24 April 2014 shows, Raleys put forward a raft of defences to resist Mr Perry's claim. The first defence which they took was a limitation defence but the defence then went on to deny every possible aspect of his claim. Amongst numerous other asserted defences, Raleys denied that they had been negligent or had been in breach of contract. Whilst Raleys accepted, as was inevitable, that Mr Perry "satisfied the criteria set out" in the CHA "to be accepted as an applicant" and accepted "as a matter of record" the contents of Professor Kester's report, they denied that the report actually represented an accurate summary of Mr Perry's condition as at the date of the settlement *and they put him to strict proof of his actual condition at the time and that he did in fact suffer with HAVS to the extent contended for*[2]. Inconsistently, they also asserted (see paragraph 15 of the re-amended defence) that at all material times:

> "ii) the claimant had been unemployed since 1990 as a result of chronic back pain and it is averred that this condition alone would have prevented him from establishing entitlement to a services award at common law;
>
> iii) at all material times the claimant would have required assistance in any event with all the tasks covered by the service claims matrix as a result of his generally poor state of health".

They contended that Mr Perry was unlikely to have instructed them to pursue a claim for services as at November 1999 and that, in any event, if such a claim had been pursued, it was not likely to have been accepted by the Scheme, by reason of Mr

[2] All italicised text in this judgment represents my emphasis.

Perry's co-morbid conditions, including his back condition and gastric dyspepsia. Raleys further contended that Mr Perry had not established any requirement for the provision of the relevant services or that he was in fact in receipt of assistance for such services. They further contended that in 1999 the CHA Scheme was not operational and that there was a likelihood that the original evidence obtained from Professor Kester as to Mr Perry's alleged disability might have been challenged by the DTI. In other words, the defence mounted a full-scale challenge to Mr Perry's claim.

13. It was only 2 days before the trial, on 26 March 2015, that Raleys for the first time admitted that they had negligently failed to advise Mr Perry about the potential for a services claim.

The trial and the judgment

14. The judge summarised what he saw as the relevant issues at paragraph 15 of the judgment as follows:

a. "Whether the claim is statute barred.

b. If not, whether the admitted breach of duty caused or materially contributed to the claimant's alleged loss. In the context of this case, did the breach cause the claimant to settle his claim at an undervalue because, on balance, if properly advised, and on the assumption that he acted honestly, he would have made a claim for a Services Award? **On the basis of Mr Quiney's analysis of the issues this, and c. below essentially boil down to a determination of the question of what level of disability the claimant suffered, the extent to which it prevented him from undertaking the services tasks, if at all and whether any disability was caused by his back problems rather than VWF or a combination of VWF and back problems constituting a co-morbidity.**[3]

c. Has the claimant lost something of value in the sense that his prospects of success in a claim for a Services Award were more than negligible?

d. If the claimant has lost a claim with more than a negligible prospect of success what is a realistic assessment of what the prospects of success were?

e. What is an appropriate assessment of the likely value of the claim having taken account of the prospects of success?"

15. In paragraphs 88 -96 the judge, under the headings "Causation" and "Loss of a chance", referred to a number of cases on causation and loss of a chance. These included *Brown v KMR Services* [1995] 4 All E.R.598; *Gregg v Scott* [2005] UKHL 2; *Dixon v Clement Jones Solicitors (a firm)* [2004] EWCA Civ 1005; *Mount v Barker Austin* [1998] PNLR 493 at 510; and *Sharif v Garrett and Co* [2001] EWCA Civ 1269 [2002] 1 WLR 318. It is not clear to me what principles of law the judge was seeking to distil from these authorities. The only two propositions of law which he articulated were at paragraphs 88 and 91:

> "88. The onus is on the claimant to establish causation on the balance of probabilities. The claimant therefore must establish

[3] All references in citations in bold are my added emphasis.

> on balance that he would have acted differently if properly advised and the lack of opportunity to do so has caused him loss. In other words the claimant must establish that the breach of duty actually caused him loss.
>
> .....
>
> 91. The issue that then arises is, if the claimant had acted differently and had made a claim for services, what were the chances of his claim being successful?"

16. The judge went on to deal with what he regarded as the relevant causation issues at paragraphs 114 and 115 of the judgment as follows:

> "114. I therefore now turn to the issue of whether the breach caused the claimant to settle his claim at an undervalue because, on balance, if properly advised and on the assumption that he was acting honestly he would not have acted differently and would not have made a successful claim for a Services Award.
>
> 115. The defendant's argument is that he would not, either because he was not unable to perform the Services notwithstanding his contention otherwise or that, even if he could not, that was as a result of the back condition from which he suffered and not the VWF. In other words, the back condition eclipsed his VWF to a far greater extent than simply making them two comorbid conditions. ....."

For the sake of completeness I mention that it was not disputed that Mr Perry, before the time when he claims to have become unfit to do so, had carried out without assistance all the tasks which he was alleging that he could no longer carry out without assistance.

17. On 15 April 2015, following a two-day trial on 30 and 31 March 2015, the judge handed down his reserved judgment. The judge ruled against Raleys in respect of their limitation defence and in relation to their defence that the settlement of Mr Perry's claim had been prior to the introduction of the services claim regime. There is no respondent's notice relating to these issues and I need not address them further. However, the judge also held that Raleys' negligence had not caused Mr Perry to settle his claim at an undervalue. That was because he concluded that Mr Perry had not established that he "honestly" met the "factual matrix[4]" for making a claim for "services". That was because, having heard evidence, the judge did not accept that Mr Perry could not perform unaided the tasks which he did carry out unaided before the onset of VWF. In other words, the judge held that Raleys succeeded in their defence as summarised above.

18. The judge went on to hold that, had Mr Perry satisfied him on the issue of causation, namely that the "factual matrix applied and that he would have acted differently if he

[4] This was described by the judge at paragraph 25 of the judgment.

had received competent advice", he would have held that Mr Perry should receive 80% of the value of his net services claim to reflect his prospects of success. That decision appears to have reflected the judge's views in relation to the comorbidity issue arising out of Mr Perry's back problems; see paragraphs 137 -144 of the judgment. On the appeal, it was agreed by the parties that, in the event that the appeal was allowed, this court should quantify damages in an agreed sum of £14,556.15, plus interest from 1 December 2006. There was no agreement as to the appropriate rate of interest.

The appellant's arguments on the appeal

19. Mr Watt-Pringle accepted that, in order to succeed in his claim against Raleys, Mr Perry had to prove that, if properly advised, he would have made a genuine claim for services under the CHA. Mr Watt-Pringle emphasised that it had never been Mr Perry's case that he could succeed against Raleys on the basis that even a dishonest services claim under the CHA had a real chance of success, because the assessment and investigation process was not particularly robust. Thus, Mr Watt-Pringle accepted that it would be contrary to public policy for a claimant to recover against his former solicitors for loss of the chance of being compensated for inability to carry out tasks, if the notional claim for services would have been based on a dishonest assertion that he was impaired in his ability to carry out the task as a result of the condition of his hands arising from VWF. He accepted that Mr Perry could only succeed if: (a) the condition of his hands was a material cause of inability on his part to carry out without assistance relevant tasks which he had previously carried out unassisted; and (b) he genuinely believed that the problem with his hands was due to VWF. If such was not the case, then Mr Watt-Pringle accepted that, in those circumstances, Mr Perry would not succeed in his claim against Raleys.

20. In summary, Mr Watt-Pringle submitted as follows:

Ground 1 - wrong approach to causation

i) The judge either misunderstood or misapplied the test of causation in considering whether Mr Perry had lost a real chance of succeeding on a services claim. Effectively, he conducted a trial of what would have been the underlying claim against the DTI, had it refused to accept a services claim by Mr Perry under the Scheme. The judge should have applied the approach of this court in *Hanif v Middleweeks* [2000] Lloyd's Rep. P.N. 920 and not conducted a trial within a trial. That approach was consistent with the approach adopted by this court in another HAVS case, *Barnaby v Raleys* [2014] EWCA Civ 686.

ii) The determination of this issue involved two separate questions.

a) If Mr Perry had been properly advised as to the making of a claim for services, would he have made such a claim or would he (as he in fact did) have accepted the offer of £11,660 in full and final settlement of his claim for VWF? The question was whether he would in fact have acted differently. This was to be determined on the balance of probabilities.

b) If Mr Perry had in fact made a services claim, would it have had a real and substantial rather than a merely negligible prospect of success? If so, what was the prospect of success? That was a claim for loss of a chance and did not fall to be determined on the balance of probabilities.

iii) Although the judgment included lengthy quotations from the authorities on the issue of causation, the judge wrongly elided the two questions and asked himself at paragraph 114 (the emphasis not having appeared in the judgment itself, but being that of Mr Watt-Pringle):

> "**whether** the breach caused the claimant to settle his claim at an undervalue because, **on balance**, if properly advised and on the assumption that he was acting **honestly he would have acted differently and made a successful claim for a Services Award.**"

Mr Watt-Pringle submitted that the emphasised words showed that the judge had wrongly directed himself that, in order to prove causation, Mr Perry had to prove on the balance of probabilities that he would have made a *successful* claim, if he had been properly advised.

iv) Although there were subsequent references by the judge to the case as being one of loss of a chance, that did not correct his approach or render immaterial his error on the crucial question of causation.

Ground 2 - failing to attach sufficient weight to the high grading of Mr Perry's VWF by the experts

v) Mr Watt-Pringle submitted that the judge's conclusion on causation was surprising, to say the least, given the high grading of Mr Perry's VWF made both by Professor Kester in his report dated 6 October 1997 and by Mr Tennant, the jointly instructed expert vascular surgeon, in his report dated 14 February 2013 and the opinion expressed by Mr Tennant that Mr Perry's VWF/HAVS caused him to be seriously disabled from carrying out the services tasks.

vi) That was particularly surprising given that, pursuant to generic case management directions, Mr Tennant had been instructed to prepare a report stating his opinion as to whether the claimant

> "is and was at any time from the date of onset of HAVS symptoms:
>
> (1) disabled by HAVS as a matter of fact and, to the extent that he was, unable to carry out (in whole or in part), without assistance, the tasks which he alleges would have formed the basis of his Services Claim; and
>
> (2) suffering from any co-morbid medical condition which would, in any event, have affected his ability to carry out those tasks without assistance."

vii) Mr Tennant in his report expressed the view that Mr Perry had at all times been, and remained, completely disabled by HAVS in relation to all the relevant tasks except car maintenance, in respect of which the disability was moderate. The descriptive labels "complete" and "moderate" had been taken from those used in the CHA to describe the extent of impairment resulting from comorbid conditions.

viii) Mr Tennant did not at any time resile from his opinion that HAVS had had a very serious effect on Mr Perry's ability to carry out the services tasks. Although Mr Tennant subsequently altered his view as to comorbidity to Mr Perry's disadvantage, he did not seek to modify his view as to the effects of the VWF itself on Mr Perry's ability to perform the tasks (which was based on his examination of Mr Perry).

ix) Mr Tennant was thus saying that, in his view as an independent and jointly instructed expert, based on his examination of Mr Perry, Mr Perry was at all material times completely disabled by HAVS from carrying out all the tasks except car maintenance (in respect of which he was disabled to a lesser but still substantial extent). He did not modify that opinion at any time.

x) In those circumstances, it was remarkable that the judge came to the conclusion that he could not believe the evidence of Mr Perry and his family in relation to the services that he was unable to carry out without assistance. Such a conclusion was against the weight of the evidence and wrong.

Ground 3 - failure to apply the principle that a claimant did not have to be entirely disabled

xi) Mr Watt-Pringle submitted that the judge either misunderstood or failed to apply a principle which was fundamental to the Scheme, namely that a claimant did not have to be disabled entirely from carrying out a task in order to be entitled to a services award. He would be entitled to an award if there were aspects which he could not carry out without assistance. That was implicit in the wording "without assistance" in the CHA. The word "task" in the context of the CHA meant the category of task, e.g. gardening. One did not have to regard every aspect of gardening (e.g. weeding) as a separate task. If a man needed assistance in carrying out one or more aspects of a category of task, then he could not carry out the task without assistance. As Tomlinson LJ had said in *Procter v Raleys* [2015] EWCA Civ 400 at paragraph 11(iii)).

> "It is plain that a claimant did not have to show that his condition wholly disabled or prevented him from carrying out the relevant task. It was enough that he could no longer carry it out without assistance."

xii) But Mr Watt-Pringle submitted that the judge misunderstood the effect of the CHA and wrongly considered that, unless Mr Perry could not carry out any aspects of a task without assistance, he was not entitled to claim in respect of that task.

xiii) Further Mr Watt-Pringle submitted that the judge wrongly accepted (at paragraph 119 of the judgment) Raleys' submission that the question for him to decide was:

> "has the claimant succeeded in persuading the court that he actually suffered sufficient disability that he could honestly say "I cannot carry out these services?" "

xiv) Because the judge had erroneously concluded in relation to certain aspects of Mr Perry's evidence that the latter was claiming that he was prevented from carrying out *all* aspects of gardening, when that was not in fact the case, that led the judge wrongly to conclude that Mr Perry and his family were dishonest witnesses.

Grounds 4 – 6 conclusion that Mr Perry did not honestly meet the factual matrix was against the weight of the evidence and wrong

xv) Mr Watt-Pringle submitted that the judge's apparent conclusion that Mr Perry did not honestly meet the factual matrix (at paragraph 133) was against the weight of the evidence and wrong. Mr Watt-Pringle gave detailed examples of numerous respects in which the judge had reached wrong or mistaken conclusions on the evidence before him.

xvi) The judge's conclusion necessarily involved him finding that Mr Perry, his wife and two sons had all given false evidence. That was not justified.

xvii) The judge was wrong in drawing adverse inferences from the absence of other people who were not called to give evidence, for example that no evidence had been forthcoming from any of the other people involved in the fishing trips to the effect that Mr Perry was not involved in the fishing.

xviii) Generally, the judge failed to make proper allowance for Mr Perry's lack of sophistication and made insufficient allowance for that in considering inconsistencies and variations in the details of what he has said or is reported to have said on various occasions and in various documents over a period of nearly 20 years since 1996 about events going back even further to 1992 when he first began to have symptoms of VWF.

xix) Finally, if it really had been Raleys' case that Mr Perry would never have made a claim, because to do so would have been dishonest since he did not have trouble doing the relevant tasks, and that accordingly the negligence claim was a dishonest one, then that allegation of dishonesty should have been put fairly and squarely to Mr Perry.

The respondents' arguments on the appeal

21. In summary, Mr Quiney QC submitted as follows:

This court should not overturn the judge's findings of fact

i) The appeal was fundamentally one seeking to overturn HHJ Saffman's findings of fact. That should be resisted as a matter of both principle and on

the merits. On the issue of principle, Mr Quiney relied on the statement of Lloyd LJ in *Cook v Thomas* [2010] EWCA Civ 227 (at paragraph 48) that:

> "In a case in which the judge has had the benefit of oral evidence from the witnesses, has made findings of fact which are rationally explained, has described in detail his assessment of the respective witnesses as regards their reliability, and where his findings of fact differentiate with care as to what evidence from which witness is accepted in relation to which part of the history, no one witness being accepted as wholly reliable or rejected as wholly unreliable, an appellant who seeks to show that the judge's findings of fact, or some of them, are unsustainable faces a seriously difficult task."

ii) The present case was one where the judge decided the outcome having made findings of fact based on his assessment of the credibility of the witnesses. In short he did not believe Mr Perry. Nor did he find the evidence of Mr Perry's wife and sons salvaged Mr Perry's case. The decision was based on credible contemporaneous evidence and a series of adequate explanations. That was precisely the sort of case in relation to which Lloyd LJ considered an appellant should face a seriously difficult task.

iii) Mr Perry's acceptance in his skeleton argument that, if he was not believed at trial that he needed assistance due (wholly or in part) to his VWF, then he could not recover damage, should lead to the end of the appeal. That was because that was precisely what HHJ Saffman had found at trial.

Ground 1 – the test of causation

iv) The judge did not err in dealing with the legal test of causation. Mr Perry's argument was founded on a misreading of paragraph 114 of the judgment. In order to make that argument Mr Watt-Pringle wrongly focused on the use of the word "successful" in that paragraph. The judge identified the correct case law and applied it. The judge then identified the correct primary question, being whether on the balance of probabilities Mr Perry could prove he would have acted differently, had he been advised properly. He considered that question properly and decided that Mr Perry would not have advanced a services claim as he was not suffering an inability to carry out the tasks in question as a result of VWF disability (see paragraphs 118-120 of the judgment).

v) The second question, had the judge been required to answer it, was what would have happened if Mr Perry had advanced a services claim. In the event this second question was irrelevant to the outcome of the trial, and so ground 1 of the appeal was pointless. In any event, HHJ Saffman did not state that, in order to prove causation Mr Perry then had to prove that he would have been *successful* in proving a claim for services had he been advised to do so. On the contrary, the judge was clear throughout his judgment that Mr Perry would have to demonstrate that he would have pursued a services claim and as such had lost a chance to do so and then assess the value of the lost chance. This is precisely what the judge did at paragraphs 145 to 148.

Ground 2 – failure to attach more weight to the medical evidence

vi) As to ground 2, Mr Quiney submitted that Mr Watt-Pringle was wrong to assert that the judge should have attached more weight to the medical evidence and that this should have led to a different outcome. That was wrong because: first, the judge did properly consider the evidence; second, he properly considered the weight; and third, in any case the medical evidence was far from conclusive on the question of HAVS related disability and Mr Perry's ability to perform services tasks without assistance.

Ground 3 - failure to apply the principle that a claimant did not have to be entirely disabled

vii) Mr Quiney submitted that Mr Perry's precise points under this head appeared to be that the judge should have found that Mr Perry experienced a need for assistance with tasks such as gardening in whole or in part because of the VWF he was suffering. Mr Quiney submitted that the judge plainly understood that Mr Perry did not have to prove that the VWF he suffered was the *sole* cause of his disability. That was plain from his consideration of the relationship between the VWF and Mr Perry's back injury in the context of there being a co-morbidity between the two conditions.

viii) In any case the judge was clear that he simply did not believe Mr Perry required assistance on account of his VWF (see paragraphs 118-120 and 136-137 of the judgment). The real core of ground 3 was, like the other grounds, an appeal to this court to find that the judge should have believed Mr Perry. But the judge had been right to disbelieve Mr Perry.

Grounds 4 – 6 - conclusion that Mr Perry did not honestly meet the factual matrix was against the weight of the evidence and wrong

ix) Mr Quiney submitted that grounds 4 to 6 were a clear attempt to rehear the trial without the benefit of any live evidence, which should fail at the outset. However, the appellant's points, even on their own terms, could not succeed. That was because, as the judge's careful analysis at paragraphs 46-73 and 114-136 showed, it was clear from the evidence that Mr Perry should not be believed. Mr Quiney then carried out a detailed examination of the judge's analysis.

x) Mr Quiney also submitted that, in addition to those specific points, the oral evidence, as a whole, presented an unpersuasive picture. This was not the case of unsophisticated witnesses doing the best they could, as Mr Watt-Pringle's submissions sought to suggest. It was a clear picture of evasive witnesses that lacked the ability credibly to explain the obvious problems with their accounts. More importantly what was missing from any of the witnesses' testimony was a sense of grievance or passion – there was no sense that they truly believed that Mr Perry had suffered any real disability as a result of his VWF. That was precisely the impression that the judge appeared to have gained from the demeanour and quality of the oral testimony.

xi) Accordingly, the appeal should be dismissed.

Discussion and determination

22. The critical factual finding[5] by the judge was that although:

i) he accepted that Mr Perry

> "does and did suffer at the time of his examination by Professor Kester from VWF at 3SN bilaterally as well as suffering of vascular deficit;

ii) that he was not "inclined to go behind [Professor Kester's] findings" that Mr Perry had a sensorineural deficiency of 3SN and a vascular deficiency of 3V;

iii) and that accordingly it followed that the claimant "clearly did suffer from VWF to a high degree",

it did not by any means follow that Mr Perry could not perform the service tasks without assistance. The judge came to the conclusion[6] that Mr Perry had not established that, in reality, any loss of function manifested itself in an inability to carry out the tasks. He regarded the question as one of credibility and came to the conclusion, notwithstanding his finding that Mr Perry "clearly did suffer from VWF to a high degree", that he was not satisfied that Mr Perry had persuaded him that "he actually suffered sufficient disability that he could honestly say "I cannot carry out these services."" He therefore concluded[7]:

> "133. I am not satisfied that the evidence of Mrs Perry or Scott Perry is sufficiently cogent to dissuade me from my conclusion that the claimant has not established that he honestly met the factual matrix by reason of his VWF either in respect of what tasks he used to do and [sic] those which he could not do without assistance at the time of settlement of his original claim. Indeed I go further, I am satisfied that in so far as the burden is on the defendant to establish its assertion that the claimant did not meet the matrix, it has discharged that burden."

23. However, as I have said, he went on to hold that if, contrary to his conclusion, and, on the assumption, as he put it, that Mr Perry would have met "the factual matrix" (i.e. could have made an honest claim), then, accepting in this respect the evidence of Mr Tennant, any comorbidity problems arising in relation to Mr Perry's back problems should only reduce the loss of the chance by 20%.

24. The most recent Court of Appeal case addressing the circumstances in which an appellate court is entitled to overrule the factual findings of a trial judge is *Grizzly Business Ltd v Stena Drilling Ltd & Anor* [2017] EWCA Civ 94. The relevant passage is as follows:

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[5] See paragraph 118 of the judgment
[6] See for example paragraphs 119-121 of the judgment.
[7] See paragraph hundred and 33 of the judgment

"39. The parties were broadly agreed upon the relevant law in the light of the recent Supreme Court decisions of *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 the latter of which cited with approval *Hamilton v Allied Domecq Plc* [2006] SC 221, paragraph 85. In the latter case it was said:-"

"If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate court to reverse the decision made at first instance."

In *Henderson* the Supreme Court (paragraph 62) also said:-

"It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

We have also had regard to the last three reasons why appellate courts are warned not to interfere with findings of fact unless compelled to do so as enumerated by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:-

"iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

40. **There will be (and have been) rare cases where an appellate court is compelled to set aside findings of fact made by an experienced trial judge but we are far from convinced that that is the case here. None of the challenged findings can be said to be unsupported by the evidence and the decision is certainly not one that no reasonable judge could have reached.** The case was not an easy one for the judge but he grappled with all the potential difficulties of the evidence and came to a conclusion which, we feel able to say (although our own opinion is immaterial) was probably correct."

41. For these reasons the first appeal will be dismissed.""

25. *Henderson* is important because it explains what is meant by "plainly wrong". In that case, Lord Reed (with whom Lord Kerr, Lord Sumption, Lord Carnwath and Lord Toulson agreed) said:

> "58. The principles governing the review of findings of fact by appellate courts were recently discussed by this court in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477; 2013 SLT 1212. There is no need to repeat what was said there. There may however be value in developing some of the points which were made in that judgment.
>
> 59. In the present case, the Extra Division cited earlier authorities of the highest standing. Lady Paton referred in particular to the well-known dictum of Lord Thankerton in *Thomas v Thomas* 1947 SC (HL) 45, 54; [1947] AC 484, 488:
>
> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."
>
> As I have explained, Lady Paton found the reasons given by the trial judge to be unsatisfactory; and I have also explained why I take a different view.
>
> 60. Her Ladyship also cited a dictum from the opinion of Lord President Hamilton in *Hamilton v Allied Domecq plc* [2005] CSIH 74; 2006 SC 221, paragraph 85, concerned with the situation where "findings of fact are unsupported by the evidence and are critical to the decision of the case". She considered that that test also was met in the present case (paragraph 89). **As this court explained in *McGraddie* at paragraph 31, however, that dictum was concerned with the situation where a critical finding has been made which is unsupported by any evidence, rather than the situation where the appellate court disagrees with the overall conclusion reached by the Lord Ordinary upon the evidence**. It was therefore not in point in the present case.
>
> 61. Lady Paton also cited the dictum of Lord Macmillan in *Thomas v Thomas* 1947 SC (HL) 45, 59; [1947] AC 484, 491, where, after mentioning some specific errors which might justify the intervention of an appellate court, his Lordship added that the trial judge may be shown "otherwise to have gone plainly wrong". As Lady Paton noted, that dictum was cited by Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, paragraph 16, where he also cited Lord Shaw of Dunfermline's statement

in *Clarke v Edinburgh and District Tramways Co Ltd* 1919 SC (HL) 35, 37 that the duty of the appellate court was to ask itself whether it was in a position to come to a clear conclusion that the trial judge was "plainly wrong". Lady Paton considered that that test also was met in the present case (paragraph 89).

62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone "plainly wrong", and considered that that criterion was met in the present case, **there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.**

63. In *Thomas* itself, Lord Thankerton, with whose reasoning Lord Macmillan, Lord Simonds and Lord du Parcq agreed, said that in the absence of a misdirection of himself by the trial judge, an appellate court which was disposed to come to a different conclusion on the evidence should not do so "unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion": 1947 SC (HL) 45, 54; [1947] AC 484, 487-488.

64. Lord du Parcq's speech is to similar effect. Distinguishing the instant case from "those very rare occasions" on which an appellate court would be justified in finding that the trial judge had formed a wrong opinion, he said:

"There are, no doubt, cases in which it is proper to say, after reading the printed record, that, after making allowance for possible exaggeration and giving full weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong." (1947 SC (HL) 45, 63; [1947] AC 484, 493)

65. Viscount Simon, while disagreeing as to the result of the appeal, also emphasised the need for the appellate court to consider whether the trial judge's decision could reasonably be regarded as justified:

"If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived

> **at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight." (1947 SC (HL) 45, 47; [1947] AC 484, 486).**
>
> **66. These dicta are couched in different language, but they are to the same general effect, and assist in understanding what Lord Macmillan is likely to have intended when he said that the trial judge might be shown "otherwise to have gone plainly wrong".** Consistently with the approach adopted by Lord Thankerton in particular, the phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified.
>
> 67. It follows that, **in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."**

26. Having considered the respective submissions of counsel, I am satisfied that this is indeed one of those very rare cases where an appellate court should interfere with the factual conclusions of the trial judge. My reasons may be summarised as follows:

i) the judge made a material error of law in his approach to the determination of the causation question as to whether Mr Perry would have made a claim;

ii) he wrongly assumed that the burden of proof was on Mr Perry;

iii) he demonstrably failed to consider, or misunderstood, relevant evidence; and

iv) his decision (that Mr Perry could not honestly have claimed in 1999 and thereafter that he was unable to perform the relevant tasks without assistance) cannot reasonably be explained or justified.

Material error of law in the judge's approach

27. In my judgment, the real issue here is whether it was appropriate for the judge to have conducted a trial within a trial as to whether, on the balance of probabilities, Mr Perry was in fact unable to carry out the relevant tasks without assistance, which would or might have been a relevant issue in any proceedings against the DTI, had it challenged the assumptions under the Scheme that Professor Kester's findings in

relation to Mr Perry's VWF staging meant that he was entitled to a services award. The judge clearly thought that he was entitled to carry out such an enquiry on the balance of probabilities, when investigating, as a question of causation, the issue as to whether Mr Perry would ever, or could ever honestly, have brought a services claim. He did not regard the honesty issue as one that should be taken into account by the court at the stage of calculating the chances of the success of any such claim. Rather, he regarded the honesty issue as one which Mr Perry had to establish as part of what he referred to as "the factual matrix".

28. In my judgment, the judge was wholly wrong, both as a matter of principle and in the particular circumstances of this case, to have engaged in the kind of factual determination which he did as to whether, on the balance of probabilities, Mr Perry could have brought an "honest" services claim. In reality the judge carried out a determination on the balance of probabilities as to whether Mr Perry would have succeeded in his services claim against the DTI.

29. It might be said that the authorities are not altogether clear as to the circumstances, on the one hand, in which a causation enquiry is carried out in a negligence action on the balance of probabilities and, on the other, when any doubts about the claimant being able to succeed are simply reflected in the court's evaluation of the chances of success. I can best illustrate the problem by reference to extracts from Jackson and Powell on Professional Liability, 8th edition. At paragraph 11-294 the editors state:

> "Where solicitors fail to issue proceedings within the limitation period, it is not always possible to discover what is the "loss" which the claimant has thereby suffered. … The court trying the professional negligence action can only speculate about the outcome of the original proceedings. The intended defendant to the original proceedings is not a party to the professional negligence action, although he may be, and quite commonly is, called as a witness in that action. The correct approach to such cases was considered by the Court of Appeal in *Kitchen v Royal Air Force Assoc.* …The court rejected the argument that it should determine on balance of probabilities, whether the plaintiff would have succeeded in the original action. Lord Evershed MR (with whom Parker and Sellers LJJ agreed) continued:
>
> "If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. **On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence.** I would add, as was conceded by [counsel for the plaintiff], that in such a case it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilized as to

> extract something from the other side and they would have had to pay something to me in order to persuade me to go away.
>
> The present case, however, falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try 'the action within the action' … In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."

30. At 11-296 under the heading "Presumption in favour of the claimant" the editors state:

> "The fact that the defendant solicitors were bringing or intending to bring the action is evidence that they thought it had some prospect of success, so that if they wish to say that the case was hopeless they will need good evidence to rebut the initial factual presumption. In *Mount v Barker Austin (A Firm)*, … a claim which was struck out for want of prosecution, Simon Brown LJ considered that the applicable principles were as follows: (1) **the legal burden lies on the plaintiff to prove that he has lost something of value, that is a case with real and substantial rather than merely a negligible prospects [sic] of success; (2) the evidential burden lies on the defendants to show that despite acting for the plaintiff in the litigation it was in fact of no value to their client…**; (3) if the court has greater difficulty in discerning the strength of the plaintiff's claim than it would have at the time of the original action, that counts against the defendant solicitors and not the plaintiff; (4) one would expect the court to be generous to the plaintiff in assessing his prospects of success."

31. Further, at paragraph 11 – 299 the editors state:

> "It might be thought, consistent with Lord Evershed MR's dictum in *Kitchen v Royal Air Force Assoc*, … and *with Sharif v Garrett & Co (A Firm)*, … **that where a fair trial is possible, the original action should be tried in the normal way, and the loss of chance approach should not be followed. Two cases make it clear that this is not correct.** … In *Hanif v Middleweeks*, … the claimant's counterclaim against his insurers for an indemnity for the loss of his night club by fire was struck out. In the professional negligence action, the judge determined that the claimant had only a 25% chance of proving that he had not set fire to the nightclub. **The Court of Appeal held that the judge had and should have determined the chances of proving the claimant's dishonesty in the**

> **original action rather than whether the claimant had in fact set fire to his property. ... The court stated that the fact of delay or absence of witnesses was only one set of reasons why the court assesses the prospects of success on a percentage basis, and only if the evidence or law showed that the prospects were overwhelming or negligible would a claim be assessed at 100% or nothing.** Other reasons included the fact that other witnesses may have been called at a notional trial, the judge at the notional trial may have taken a different view of the matter, and that account should be taken of the prospects of settlement. ...Following that analysis, Rix LJ held in *Dixon v Clement Jones Solicitors (A Firm)*... that:
>
> **"there is no requirement in such a loss of a chance case to fight out a trial within a trial, indeed the authorities show as a whole that is what should be avoided. It is the prospects and not the hypothetical decision in the lost trial that have to be investigated."**
>
> That case concerned lost litigation against accountants, where the judge assessed the value of the lost claim at 30% because he thought that the claimant would on balance have pressed on with what turned out to be a disastrous business venture even if the accountants had given her the negative advice they should have done. The Court of Appeal upheld this conclusion."

32. It is worth setting out the relevant passages from the judgments of this court in *Hanif v Middleweeks* to which Mr Watt-Pringle referred us. That was a case where the appellant solicitors (defendants in the action) were challenging the first instance finding that the claimant should have damages for loss of the chance of recovering from the insurance company assessed at 25%. In dealing with appellant counsel's submission that the trial judge did, or should have determined, one way or another what would have been the outcome of the liability trial against the respondent's insurers (i.e. whether the respondent or his associate had been guilty of burning down the insured property), Mance LJ, having cited from Lord Evershed MR's judgment in *Kitchen,* said:

> "13. It is the sentences in which Lord Evershed says that 'There may be cases where it would be quite impossible to try "the action within the action"' and 'It may be that for one reason or another the action for negligence is not brought till, say, twenty years after the event and in the process of time the material witnesses or many of them may have died or become quite out of reach for the purpose of being called to give evidence' upon which Mr Gibson places principal reliance. He does so, however, by inverting the sense of the sentences. **In his submission**, although Lord Evershed quite clearly did not consider *Kitchen* [1958] 2 All ER 241 [1958] 1 WLR 563 itself as such a case, **Lord Evershed was suggesting that in cases where the considerations of delay or absence of witnesses to which he referred did not apply, then it would or might be**

appropriate for the trial judge to determine one way or the other what would have been the outcome of the previous trial.

14. I doubt, myself, whether this was what Lord Evershed meant. It seems to me that it is more likely that he was giving one set of reasons why it is that, in a case such as the present, the court only assesses prospects and awards damages on a percentage basis - **unless it is overwhelmingly clear on the material before the court that the claimant was almost bound to succeed or had, conversely, only a negligible prospect of success, in which case the court may move to a 100% or nil award.**

15. Whatever the explanation of those sentences in Lord Evershed's judgment, they find very limited (if any) echo and no apparent application in subsequent authority, except in the sense which I have mentioned; **that is that, if the evidence or the law is so clear that the subsequent court can treat the prospects as overwhelming or negligible, then the claim against the negligent professional may be assessed at 100% or nil.**

16. That is also how *Kitchen* [1958] 2 All ER 241 [1958] 1 WLR 563 is treated in *Jackson & Powell* at paragraph 4-222. *Jackson & Powell* go on to contrast in paragraph 4-223 the approach taken in *Fisher v Knibbe* (1992) 3 Alta LR (3d) 97 by the Alberta Court of Appeal. We were shown that authority. It does not seem to me to reflect current English law or practice, although it purports to apply *Kitchen*.

17. **There would, in fact, be some odd consequences if one were to accept Mr Gibson's submission in relation to situations where the prospects lay between the overwhelming and the negligible. A judge could then be invited to hold a trial within a trial regarding the facts or matters in issue in the previous litigation. He could reach a firm conclusion about that on the balance of probability (the civil test) and, even if it was only quite a narrow balance, he could then give effect to that as a finding one way or the other entitling the claimant either to a 100% award in the present litigation, if the balance of probability was in his favour, or to no damages at all if it was against him.**

18. **I would reject Mr Gibson's submissions. In my view, the judge's role here, and the only role which he assumed, was to assess whether there were any, and if so what, significant prospects under the original counterclaim.** Further, and in any event, I do not think that it follows from his judgment or from an analysis of the issues that the trial of the counterclaim

would have followed anything like the same path, necessarily, as the trial before the judge. ....

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

33. Roch LJ, who agreed with Mance LJ, said as follows:

"53. The appellants do not seek to go behind the judge's first two findings. The appellants say, first, that the judge adopted the wrong approach to the third issue. **Secondly, the judge should have dismissed the respondent's action for reasons of public policy, having found on the balance of probabilities that Mr Sheikh and Mr Adams had started the fire. This point is another aspect of the appellants' first ground.** Thirdly, the overall assessment of the respondent's prospects of success was erroneous because the judge left out of account the risk of the respondent failing on the first and second defences to his counterclaim pleaded by the insurers.

54. On the first ground, the appellants' counsel argues that the judge should not have been assessing a chance; **he should, having decided that on the evidence before him it had been shown to be more likely than not that the fire had been started by Mr Sheikh and Mr Adams, have dismissed the respondent's claim against the appellants.**

55. As he so found, then the appellants' negligence had not caused the respondent any loss. The judge could not have found that the respondent had a 25% chance of succeeding on his counterclaim, if he found that it had been proved, on the balance of probabilities, that Mr Sheikh and Mr Adams had started the fire.

56. I **do not accept this analysis. This is a case of an omission or omissions by the appellants as the respondent's solicitors: the failure to prosecute his claim with due diligence which led to his counterclaim being struck out. Had that omission not occurred, the fate of the counterclaim would have depended on several factors: the witnesses called for the respondent and for the insurers, which might not have been identical to the witnesses heard by His Honour Judge Tetlow; whether witnesses would have given evidence and submitted themselves to cross-**

> **examination; their performance in the witness box; and, ultimately, the decision taken by the judge trying the issues which would have arisen between the respondent and his insurers.**
>
> 57. There can be no certainty as to the outcome of those proceedings. Consequently, His Honour Judge Tetlow was correct, in my judgment, that what he had to assess was the chance of the respondent succeeding on his counterclaim.
>
> 58. The judge was right to rely on the decision of this court in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, where, at page 1611 of the latter report, dealing with the third of the possible situations which can arise, Stuart-Smith LJ said:
>
> '(3) In many cases the plaintiff's loss depends upon the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. **In such a case, does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?**
>
> **Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.**'
>
> 59. I have no doubt that this is the exercise that His Honour Judge Tetlow was performing. Four short citations from his judgment will suffice. .....
>
> 63. That, in my judgment, is sufficient to dispose of the first and second grounds of the appellants' appeal."

34. Thus the correct approach, based on this court's analysis in *Hanif v Middleweeks* and *Dixon v Clement Jones Solicitors (A Firm)*, is that, in a negligence claim against solicitors for negligent omission as a result of which no claim against a third party is pursued:

> "the court only assesses prospects and awards damages on a percentage basis **unless it is overwhelmingly clear on the material before the court that the claimant was almost bound to succeed or had, conversely, only a negligible**

prospect of success, in which case the court may move to a 100% or nil award".[8]

The uncertainty to which I refer above perhaps lies in deciding *when* the case is so "overwhelmingly clear on the material before the court" that a judge can decide that there is no realistic prospect of success in the postulated claim.

35. In such a case a judge should not, in my judgment, in the context of determining in the negligence action the simple causation issue, "would the claimant have brought a claim if properly advised?" determine on the balance of probabilities what would have been a, if not the, principal issue in any underlying claim. Here, in my view, the judge should not have attempted to determine the issue as to whether, under the Scheme, the claimant, in the light of his VWF condition, was genuinely (i.e. honestly) unable to carry out the relevant tasks without assistance and therefore entitled to a service award. Nor can the defendant raise the issue of the claimant's alleged dishonesty for determination on the balance of probabilities on the grounds that it raises an issue of public policy; see *Hanif v Middleweeks*.

36. There are sound public policy reasons for such an approach. It is far too easy for negligent solicitors, or, perhaps more pertinently, their insurers, to raise huge obstacles to claimants such as Mr Perry from pursuing their claims, if the latter are required, effectively, to prove in the litigation against solicitors that they would have succeeded in making such a claim against the third party. Raleys' defence in the present case is an unfortunate exemplar of insurers putting the claimant to proof of every issue in the underlying claim. Such an approach is intellectually unsound; it requires the court, inevitably many years later, to investigate whether a claimant, who as here, may be unsophisticated and not have kept records, to prove what he would have done many years earlier. In cases of admitted or proven negligence, on the part of solicitors or other professionals, that should not be the correct approach. Nor, in my view, do the authorities support it.

37. Thus, in the present case, there was, in my judgment, no way in which rationally the judge could have regarded this as a case where it could have been said that it was "overwhelmingly clear on the material before the court" (certainly not before the trial began and even after all the evidence had been heard) that the claimant had only a negligible prospect of success. The medical reports of Professor Kester clearly supported Mr Perry' case that, unless the DTI rebutted the assumption, Mr Perry satisfied the factual matrix for a services claim under the Scheme as it evolved. Likewise, the subsequent evidence of the jointly instructed medical expert, Mr Tennant, clearly supported Mr Perry's entitlement to a services award. Facebook entries dating from 2011 (i.e. some 10 years after any claim would have been made), showing Mr Perry holding a fish on a fishing holiday, did not on any basis justify a factual enquiry as to whether Mr Perry could have honestly made a claim in 1999.

38. Reading the judgment as a whole, I have no doubt that the exercise upon which the judge embarked in relation to the causation issue was in reality an enquiry as to whether, if the DTI had challenged Mr Perry's services claim, the claim would have succeeded. In effect, the judge asked himself the question whether, as at the date of the trial in 2015, he was satisfied on the balance of probabilities that Mr Perry had

[8] Per Mance LJ in *Hanif* at paragraph 14.

established that he could not carry out the relevant services without assistance - effectively whether he could have made a *successful* claim; see paragraphs 114 and generally paragraphs 115-136 of the judgment. Or, as the judge put it, whether *he had proved* that he would have satisfied "the factual matrix". The reality was that the judge, in his analysis of the facts, approached the determination of this question on the basis of what he found Mr Perry was able to do in 2015. That was not the right question. The right questions were:

i) First, whether, as at the date of settlement of his claim, in 1999, Mr Perry, if properly advised, would have acted differently and made a claim for a services award. That question did not involve an enquiry as to whether such a claim would have succeeded. In my judgment the answer was obvious, Mr Perry would, and could, clearly have made a claim.

ii) Second, if Mr Perry had in fact made a services claim, what would have been its chances of success? That claim for loss of a chance did not fall to be determined on the balance of probabilities. That was an evaluation exercise to be carried out by the judge.

39. In my judgment, although the judge approached (and answered) the second question correctly, his approach and answer to the first question was wrong. In reality he investigated and purported to answer (on the balance of probabilities) the question whether Mr Perry could have made a successful services claim if the DTI had challenged it under the Scheme. He did so without regard to the critical feature as to what was the appropriate date for such an analysis. For that reason alone, I would allow this appeal.

The judge's errors in other respects

40. However, it would not in my judgment be appropriate to remit this case for a further hearing before another trial judge. That is because, irrespective of the fact that the judge adopted the wrong approach to the determination of the relevant issues, the judge clearly went wrong in his assessment of the evidence relating to Mr Perry's ability to make a claim. For that reason I am satisfied that this court can, in the circumstances of this case:

i) overrule the judge's findings in relation to causation; and

ii) conclude, consistently with the judge's findings as to loss of chance, that Mr Perry has lost a chance with an 80% success rate of making a services claim.

41. First, the judge appears to have taken the view that the burden of proof was on Mr Perry to establish that he would have been acting *honestly* in making a claim. That was wrong. As I have already said, whether or not Mr Perry would have succeeded in making an honest claim was not an issue for the judge to decide. In so far as Raleys were contending that Mr Perry would have been dishonest in 1999 if he had claimed a services award, and that that factor should have been taken into account in assessing Mr Perry's chances of success, the burden of establishing that Mr Perry, even if he had been told about the availability of the services award, would not, or could not, have made such a claim, because it would have been dishonest of him to have done so, lay fairly and squarely on Raleys. That was not just because it was incumbent

upon Raleys, as the party making the assertion of dishonesty, to prove it. It was also because, in the circumstances of this case, the medical reports of both Professor Kester, and the joint expert, Mr Tennant gave rise to the presumption, not just under the Scheme but also evidentially, that Mr Perry's particular level of VWF staging prevented him from carrying out the relevant services, and that, accordingly, he would have qualified for a services award under the Scheme. In those circumstances, there was a heavy evidential burden upon Raleys to prove their allegation that he would never have made a services claim, because it would have been dishonest for him to have done so.

42. Although the judge in paragraph 133 of the judgment paid lip service to the notion that, even if the burden had been on Raleys to establish its assertion "that the claimant did not meet the matrix, it has discharged that burden", in fact he gave no, or no adequate, reasons for reaching the conclusion that Raleys had discharged the burden of proof.

43. There were a number of points which, in my judgment, the judge failed to appreciate in this context.

44. Although, along with every other possible defence, paragraph 15a of the defence put Mr Perry to strict proof that he in fact suffered with HAVS to the extent contended for, and paragraph 16(i) averred that "he had failed to establish" that he had a requirement for the provision of the relevant services and was in fact in receipt of assistance for them, there was no express allegation of dishonesty in the defence: i.e. that it would have been dishonest for Mr Perry to have made such a claim. On the contrary the thrust of the defence, on any objective reading, was that the defence were going to argue that it was Mr Perry's chronic back pain that was the reason why he would have required assistance with the tasks covered by the services claim. Although the service of Raleys solicitor's statement would have made it clear that the defence were challenging Mr Perry's alleged functional disability, nonetheless this was a case where, if serious allegations of dishonesty were being made, it should have been made absolutely clear to Mr Perry in cross-examination that such was the case.

45. It was significant, in my view, that Mr Quiney, as counsel for Raleys at trial, never challenged in cross-examination Mr Perry's evidence that he would have made a claim for a services award, if he had been properly advised. It was never suggested to Mr Perry, for example, that, even if he had been advised about the possibility of a services claim, he would have never mentioned to Raleys that he required assistance with the relevant tasks, because in fact he did not require such assistance and was not in receipt of it. It was never put fairly and squarely to Mr Perry that it would have been dishonest for him to have made such a claim. Moreover, it was never suggested to him in cross-examination that, when interviewed and examined by Professor Kester or Mr Tennant, he had been lying or exaggerating his difficulties in relation to his hands and fingers or the tasks which he could perform. In order for there to have been a proper assessment of Mr Perry's credibility, and given his lack of sophistication, he should have been given a proper opportunity to address the allegations of dishonesty being made against him.

46. Apart from the reference to the Facebook photographs and entries relating to Mr Perry's fishing activities, Mr Quiney's cross-examination amounted to an extensive analysis of some, but certainly not all, of the various historical medical records, going

back many years, in which Mr Perry had made complaints about various matters, and, in particular, back pain. It was perhaps not surprising that an unsophisticated witness such as Mr Perry, who the judge did not regard as an impressive witness, had little recall and was unable to give satisfactory explanations of what he had said to various medical practitioners so many years ago. Indeed, this was one of the obvious vices of the approach which the judge adopted in effectively trying the issue as to whether the claim would have ultimately been successful. In my judgment, the judge placed far too much weight on the detail of the inadequate answers which were given by the appellant in this respect and failed adequately to assess, in light of all the evidence, whether Raleys had actually proved what amounted to very serious allegations of dishonesty.

47. Moving on to the appellant's second ground of appeal, I also conclude that the judge gave no proper reasons for disregarding the reports of Professor Kester or Mr Tennant as to Mr Perry's disability and for basing his view on the very anecdotal evidence of Mr Perry and his witnesses, almost exclusively by reference to his cross-examination at trial on past medical records and Facebook entries, topics to which I will return in due course. In particular, I conclude that the judge demonstrably failed to consider the effect of Mr Tennant's evidence, which had been specifically obtained in the context of the litigation as a result of His Honour Judge Hawkesworth QC's direction that Mr Tennant should be instructed as a joint expert to prepare a report.

48. That was particularly surprising given that, pursuant to generic case management directions, Mr Tennant had been instructed to prepare a report stating his opinion specifically as to whether the claimant

> "is and was at any time from the date of onset of HAVS symptoms:
>
> (1) **disabled by HAVS as a matter of fact and, to the extent that he was, unable to carry out (in whole or in part), without assistance, the tasks which he alleges would have formed the basis of his Services Claim;** and
>
> (2) suffering from any co-morbid medical condition which would, in any event, have affected his ability to carry out those tasks without assistance."

49. As Mr Watt-Pringle submitted, and indeed as was the case, Mr Tennant in his report expressed the view that Mr Perry had at all times been, and remained, completely disabled by HAVS in relation to all the relevant tasks except car maintenance, in respect of which the disability was moderate. Mr Tennant did not at any time resile from his opinion that Mr Perry's VWF/HAVS had had a very serious effect on Mr Perry's ability to carry out the services tasks. Although Mr Tennant subsequently altered his view as to comorbidity to Mr Perry's disadvantage, he did not seek to modify his view as to the effects of the VWF itself on Mr Perry's ability to perform the tasks (which had been based on his examination of Mr Perry).

50. Those findings by Mr Tennant were based on his detailed medical examination of Mr Perry (as indeed were Professor Kester's findings to similar effect). They were not simply based on what Mr Perry had told Mr Tennant. That is clear from Mr Tennant's

disability grading schedule, contained in his report, which only in respect to "Car maintenance" states that his views were based on Mr Perry's statements. In my judgment, if Raleys were seeking to assert that the expert views of Mr Tennant, as a jointly instructed expert, in relation to this specific issue of disability, could not be relied upon, because they were exclusively or materially based upon Mr Perry's own statements, and what mattered was the judge's own views of the credibility of Mr Perry in cross-examination as to whether he could or could not perform the relevant tasks without assistance, Raleys should have insisted upon Mr Tennant having been called as a witness and cross-examined him to that effect.

51. In the absence of any such cross-examination I regard the view of the judge in paragraphs 118 and 119 of his judgment as to what he regarded as the critical question for him to answer as unsustainable. The judge said:

> "118..... I acknowledge that the staging of 2 doctors supports the view that he has a significant loss of function but I repeat that the question is whether the claimant has established that in reality any loss of function manifested itself in an inability to carry out the tasks.
>
> 119. That is a question of credibility. Am I satisfied that the claimant originally undertook the services but could no longer do so without assistance? As Mr Quiney put it, has the claimant succeeded in persuading the court that he actually suffered sufficient disability that he could honestly say "I cannot carry out the services?" Only if the claimant satisfies me as to that do I need to consider whether his inability to do so is referable to the VWF *and* the back problem or simply the back problem."

52. Apart from the fact that, as I described above, the judge was clearly adopting the wrong approach to the determination of the relevant issues, it is clear that the judge based his conclusion entirely on what, on any basis, was a partial and unsatisfactory cross-examination of Mr Perry, based on anecdotal evidence and historical, incomplete records of visits to his general practitioner. In coming to this conclusion, the judge demonstrably failed, in my judgment, to give due weight to the medical evidence of Mr Tennant (and indeed Professor Kester) or to the fact that no attempt had been made by Raleys to establish the extent to which, contrary to the prima facie conclusions in his report, Mr Tennant's expert opinion had been grounded on what Mr Perry told him, rather than the former's expert evaluation of Mr Perry on examination.

53. Of course, it is open to a trial judge to reject the evidence of a single joint expert. Thus in *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223 the Court of Appeal decided that where a witness of fact gives evidence on an issue that is contrary to that of the single joint expert, the judge should make a considered choice as to which evidence to accept, but that it should be unusual to disregard the expert's evidence. But here, in my judgment, there was no, or certainly no proper, consideration by the judge, as to the basis on which, or as to the reasons why, he was disregarding what was compelling evidence in Mr Perry's favour as to his disability in performing the relevant tasks without assistance - particularly in the absence of any cross-examination of Mr Tennant. Had he properly considered the

matter, he could not logically have come to the conclusion that such medical evidence should be disregarded in its totality, when assessing Mr Perry's honesty.

54. I also accept, for the reasons which Mr Watt-Pringle gave, that the judge appears to have misunderstood or failed to apply a principle which was fundamental to the Scheme, namely that a claimant did not have to be disabled entirely from carrying out a task in order to be entitled to a services award. That was implicit in the wording "without assistance" in the CHA. Thus the word "task" in the context of the CHA meant the category of task, e.g. gardening. One did not have to regard every aspect of gardening (e.g. weeding) as a separate task. If a man needed assistance in carrying out one or more aspects of a category of task, then he could not carry out the task without assistance: see per Tomlinson LJ in *Procter v Raleys* [2015] EWCA Civ 400 at paragraph 11(iii)). I agree that the impression given by the judge was that he wrongly considered that unless Mr Perry could not carry out any aspects of a task without assistance, he was not entitled to claim in respect of that task.

55. I also accept Mr Watt-Pringle's submissions in relation to grounds 4 - 6. The judge in my opinion could not rationally have reached the conclusion that Mr Perry, his wife and two sons had all given false evidence. That conclusion was not justified on the basis of what, on any analysis, was flimsy evidence relating to the Facebook evidence and speculative and assertive cross-examination about the fishing trips or Mr Perry's ability to perform the other tasks. I consider that the judge was wrong to infer that seriously adverse inferences could be drawn from the absence as witnesses of other people, who were involved in the fishing trips. The fact that a man suffering from VWF may be unable, or find it difficult, to attach a fly or a lure to a fishing line does not mean that he is unable to hold a fish or indeed to participate to some limited extent in a fishing holiday. Likewise, the selective cross-examination of certain inconsistencies and variations in the details of what Mr Perry had said, or was reported to have said, on various occasions and in various medical records over a period of nearly 20 years since 1996 about events going back even further to 1992, when he first began to have symptoms of VWF, could not rationally have justified the judge's conclusion that Mr Perry would have been acting dishonestly in making a services claim.

56. It is not necessary for me to rehearse the further detailed criticisms made by Mr Watt-Pringle of various of the judge's other findings of fact. It is enough to say that I agree with them. I am satisfied that not only did the judge engage in the wrong exercise in seeking to answer the question whether Mr Perry "has established that in reality any loss of function manifested itself in an inability to carry out the tasks", but also that he could not *rationally*, on the material before him, come to the conclusion that Mr Perry was dishonest in contending that he was unable to perform the relevant services without assistance. The unchallenged medical evidence of both Mr Tennant and Professor Kester, which in my view the judge wholly failed to consider, or adequately to consider, and the evidence of Mr Perry and his family, albeit unsatisfactory in various respects, could not and should not have led to the conclusion that any services claim by Mr Perry under the Scheme would have been dishonest and therefore could not have been made.

57. Nor should such evidence have led to any conclusion that the value of Mr Perry's services claim, under the Scheme in the context of his claim against Raleys, should be liable to any further percentage discount to reflect the possibility of such a claim

failing, beyond the 20% discount (after the appropriate deduction to take account of comorbidity to the extent found by Mr Tennant) which the judge considered appropriate to reflect Mr Perry's prospects of success, on the assumption that Mr Perry would have been acting honestly if he had made a claim.

Disposition

58. Accordingly I would allow the appeal and would quantify damages in the agreed sum of £14,556.15, plus interest at the appropriate rate from the agreed date of 1 December 2006.

The appropriate interest rate – the arguments

59. It was common ground that an award of simple interest pursuant to section 69 of the County Courts Act 1984 in respect of the period pre-judgment is a matter within the court's discretion and that in this case the discretion should be exercised in favour of the appellant. However, what was the appropriate rate was not agreed.

60. Mr Watt-Pringle submitted that the appropriate rate of interest was the Judgments Act rate (currently and at all relevant times 8%), which the preponderance of authority indicated is the appropriate rate in cases of negligent solicitors or surveyors, particularly in cases where the award is made many years after the loss was incurred: see *Pinnock v Wilkins & Son* (CA transcript, 29.01.90); *Watts v Morrow* [1991] 1 WLR 1421, at 1443H - 1444C and 1446A - B and 1446E; *Hamilton-Jones v David & Shane* [2004] 1 WLR 924, paragraph 81, Neuberger J; *Credit Lyonnais SA v Russell Jones & Walker* [2003] Lloyd's Rep PN 7, paragraphs 41-42. Although in other cases the Special Account rate had been applied, that rate had been only 0.5% since 1 July 2009[9] and would not properly compensate Mr Perry for being kept out of his money for 10 years.

61. Mr Quiney, on the other hand, submitted that the appropriate rate was the special account rate: he relied on *Harrison v Bloom Camillin (No 2)* [2000] Lloyd's Rep PN 404, at 408 – 410, per Neuberger J; and *Griffiths v Last Cawthra Feather* [2002] PNLR 27, at p.622, per HH Judge Grenfell. He submitted that the special account rate was the appropriate rate because: it was fair and did not over compensate Mr Perry; it was the typical rate in personal injury claims, such as the underlying claim in this case; and, as this claim was one of many similar claims, particular care needed to be taken in deciding this point "fairly and justly", as it could affect a number of other claims.

The appropriate interest rate – determination

62. In my judgment, the appropriate interest rate, in the particular circumstances of this case, for the entire period from 1 December 2006[10] to the date of judgment in this court is the judgment rate of 8% per annum. My reasons are as follows.

63. Had it not been for Raleys' negligence, the reasonable chances are that by 1 December 2006 at the latest, Mr Perry would have received the sum of £14,556.15

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[9] The rate was 6% until 31 January 2009, 3% from February to May 2009, and 1.5% in June 2009.

[10] December 2006 is the date by which any services claim submitted by Mr Perry would have been determined by the DTI under the Scheme: see paragraph 10A of the re-amended particulars of claim.

from the Scheme as a services claim award. This would have included an element of interest at the Scheme rate up until December 2006. If he were only to be awarded simple interest thereafter at the special account rate - 6% until 31 January 2009, 3% from February to May 2009, 1.5% in June 2009 and 0.5% from 1 July 2009 until judgment - he would not, in my judgment, be adequately compensated for the lack of the use of that money in the intervening period not least because of the erosion of the value of the fund due to inflation.

64. In *Pinnock v Wilkins & Son* the Court of Appeal was divided as to whether or not the judge who had awarded interest at the judgment debt rate had exercised his discretion in a way which should be interfered with by the Court of Appeal. Ralph Gibson LJ, in the minority, held that it was a wrong exercise of the discretion as he would have awarded interest at the short term investment/special account rate. Nicholls LJ, with whom Fox LJ agreed, upheld the judgment debt rate, concluding that the judge exercised his discretion in a way which could not be criticised. At page 16 of the transcript, having set out the relevant short-term investment account rates and judgment debt rates, he said as follows:

> "When considering these figures, and noting that for the past four and a half years the Judgments Act rate has been higher than the special account rates, and considering whether it is just to award the higher rate, it is to be borne in mind that under Section 35A of the Supreme Court Act 1981 only simple interest can be awarded, however long the period may be. To be contrasted with this is the special account and the lower rates of interest payable on this account. The interest payable from time to time on money in the special account is compound interest, the interest accruing twice-yearly: see rule 27 of the Courts Funds Rules 1987[11]. So an award of simple interest at the special account rate will not put the judgment creditor in the same position as having received the money and paid it into the special account as an investment, for had he done so he would effectively have received the higher rate which compound interest would have yielded for him."

65. Although the judgment probably went no further than holding that the judge exercised his discretion in a proper manner, and that the Court of Appeal should not interfere with it, Nicholls LJ nonetheless went on to say the following:

> "Of course, whatever rate a judge may choose as a convenient starting point, he will consider all the circumstances of the case when making his decision. In particular, if a plaintiff and his advisers have not been diligent in commencing the proceedings and vigorous in pursuing them, the court will be astute to take that into account appropriately in determining what the justice of the case requires regarding interest.
>
> I turn to the facts in the present case. The judge awarded interest for the period of five years and ten months from March

[11] The current Court Fund Rules 2011 provide to similar effect.

1983 to January 1989 at the rate payable on judgment debts from time to time over the period: 12 per cent. for the two years up to April 1985 and 15 per cent. for the following three years and ten months. That is equivalent to an average rate for the whole period of approximately 14 per cent. per annum. Before allowing for the interim payment of £10,000 made in May 1987, that rate of interest produces an interest award in the sum of £36,650. In this Court the defendants contended that the rate should not be higher than the special account rate. Application of that rate for the whole period would produce, on a capital sum of £45,000, an interest award of £31,081, the equivalent to an average rate of 11.8 per cent. per annum. A third figure canvassed before us was the Judgments Act rate current in March 1983 when, but for the solicitor's negligence, Mr Pinnock would have received his £45,000. That rate was 12 per cent. per annum, and would produce an interest award of £31,500.

Criticism was made of some of the judge's observations and reasoning. In particular it was said that the judge's reasoning should have led to an award of interest at the Judgments Act rate current in March 1983, as the rate which would have applied to a judgment obtained then. Thus, on his own reasoning, the judge should have awarded interest at the rate of 12 per cent. throughout the 70-month period, and not at a fluctuating rate.

I do not find it necessary to pursue these criticisms. Let me assume in favour of the defendant that these criticisms are well-founded. The consequence of that would be that, the judge having misdirected himself, it is for this Court to exercise its own discretion regarding the appropriate rate of interest. **For my part I think that the appropriate rate in this case is the rate which, over the relevant period, was payable from time to time on judgment debts. There is nothing abnormal or special about this rate which requires special factors to justify its use. If a special reason were needed, there is one here. The period of nearly six years came on top of an initial lapse of time of four and a half years. Because of his solicitor's negligence, Mr Pinnock did not receive payment until January 1989 for injuries sustained in an accident over ten years earlier, in September 1978. That was a factor which impressed the judge, and I agree with him.**

Counsel for the defendants told us that in personal injuries cases the use of short term investment account rate is "hallowed" . Whether this is so or not, this is not a personal injuries case. It is a case of professional negligence in the conduct of a client's personal injuries claim, and the interest under consideration is interest payable after the amount of the

> damages which would have been recoverable in March 1983 for personal injuries had first been calculated in the usual way."

66. In *Harrison v Bloom Camillin* Neuberger J had to consider the appropriate rate in a case where claimants sued their previous solicitors for negligence in allowing their claim against their former accountants to become time-barred. Negligence had been admitted. In the relevant passages of his judgment he cited from the Fourth Edition of *Jackson and Powell on Professional Negligence.* It was there suggested that, although the trend had previously been in favour of the judgment debt rate, nonetheless the judgment debt rate was usually higher than that awarded in respect of pecuniary losses in, for example, personal injury actions and that accordingly the appropriate rate in claims against professionals in cases such as the present should be the special account rate. Neuberger J concluded[12], albeit with some hesitation, that the short-term investment rate was the right rate to select. That was because:

> "It is more flexible and therefore, unlike the judgment debt rate, it better reflects changes in value of money and changes in interest rates more realistically. Furthermore, judgment debt rate tends to be high, for the reasons given by Bingham LJ and the editors of *Jackson and Powell* and there is no reason to penalise the defendants in the present case. The fact that the period of time involved in the present case is long seems to me to cut both ways."

67. The current edition of *Jackson and Powell on Professional Liability* Eighth Edition, at paragraph 3 – 024 merely states:

> "Interest is awarded to compensate the claimant for being deprived of his damages for a period of time, not as compensation for the damage done to him[82] or as a punishment for the defendant. For this reason the nature of the transaction giving rise to the claim will be material to the choice of the rate of interest. A commercial transaction will more readily attract a commercial rate of interest than a domestic house purchase. The decisions of the Court of Appeal in *Pinnock v Wilkins & Sons*[83] and *Watts v Morrow*[84] establish that the court may take the rate applicable to judgments by s.17 of the Judgments Act 1838. However, that is only an option and should not be applied without considering whether some other, more flexible rate is more appropriate.[85]"
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> 85. For a detailed critique of these decisions see paragraphs 1-182 to 1-188 of the 4th edn of this work. In *Harrison v Bloom Camillin (No.2) [2000] Lloyd's Rep. P.N. 404* (Neuberger J); and *Griffiths v Last Cawthra Feather (A Firm) [2002] P.N.L.R. 27* (HH Judge Grenfell sitting in the TCC) interest was awarded on damages awarded against solicitors at the short term investment rate."

68. In my judgment, I consider that it is wholly appropriate to adopt the judgment debt rate in the present case. That is not just because the judgment debt rate more

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[12] At page 410.

adequately compensates Mr Perry for the fact that he has been kept out of his money for so long, but also because the conduct of Raleys (or their insurers), in their long drawn-out defence of this claim, deserves appropriate sanction. This is a case where Raleys refused to accept that they were in negligent breach of duty until two days before trial; where the defence which they filed to Mr Perry's claim raised every conceivable defence, including putting Mr Perry to proof that he would have succeeded in his claim under the Scheme; where Raleys effectively sidelined the findings of the jointly instructed sole expert, Mr Tennant, and attempted, contrary to clear statements in the authorities, to conduct a trial of the underlying issues in the hypothetical claim under the Scheme, based on a superficial cross-examination of an unsophisticated claimant by reference to historical medical records going back many years. If that is the manner in which Raleys, and/or their insurers, propose to conduct what Mr Quiney referred to as "many similar claims", then they should be under no illusion that, at least in my judgment, a fair and just result justifies interest being awarded on the judgment debt basis. I note that it was not suggested in argument that Mr Perry or his advisers had been responsible for any delay in the resolution of the litigation.

Lord Justice McFarlane

69. I agree.

Sir Stephen Tomlinson

70. I too agree.