



Case No: 8CT91587

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 30 November 2009

Before :

MASTER CAMPBELL, COSTS JUDGE

Between :

WILLIAM THOMAS	<u>Claimant</u>
- and -	
BUTLER AND OTHERS	
T/A WORTHINGTONS SOLICITORS	<u>Defendants</u>

Mr Clarke (instructed by **Routh Clarke**) for the **Claimant**
Mr Galway-Cooper (instructed by **Worthingtons**) for the **Defendant**

Hearing date: 13 October 2009

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Master Campbell:



1. This judgment addresses the following preliminary issues which the parties agreed should be resolved at the outset of the assessment of the costs of the Defendant

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Solicitors (“Worthingtons”) which they claim from the Claimant (“Mr Thomas”), their one-time client. Is Worthingtons’ retainer invalid on account of:

- i) failure to advise [Mr Thomas that he was] not being represented by a solicitor;
 - ii) filing/serving documentation stating that the conducting fee earner (unqualified) was a grade B fee earner;
 - iii) advice to the client that he would be put on a conditional fee agreement (“CFA”) ... [but] then keeping him on a private retainer;
 - iv) failure adequately to investigate legal expenses insurance (“LEI”);
 - v) failing to advise the client to use his existing LEI and/or to seek indemnity from an existing LEI provider;
 - vi) failing to get client’s the signature on the retainer ?
2. A further issue relating to estimates was not pursued. At the hearing, Mr Clarke appeared for Mr Thomas and Mr Galway-Cooper represented Worthingtons. The court heard evidence from Mr Thomas, his wife Jane and his son Jake who were all cross-examined on their witness statements, each dated 27 August 2009. Mrs Martha Nicholaou of Worthingtons gave evidence on behalf of her firm and was cross-examined on her witness statement dated 3 September 2009. An agreed bundle of documents was also before the court together with Worthingtons’ original working papers. I reserved judgment.

FACTS

3. On 30 November 2002 Mr Thomas was seriously injured in a road traffic accident involving his motor cycle. He consulted Irwin Mitchell Solicitors with a view to claiming compensation from the other driver. Irwin Mitchell acted for him under a CFA linked to an LEI policy with Lawclub Prestige Legal Expenses (“Lawclub”), which appointed the firm. Shortly before the limitation period was due to expire on 30 November 2005, Irwin Mitchell ceased to represent Mr Thomas on the grounds that the firm did not believe that he had reasonable prospects of winning the claim. On 29 November 2005 Mr Thomas issued proceedings against the other driver as a litigant-in- person. He also sought advice from the Law Society about the identity of a suitable firm of solicitors who would be willing to act on his behalf in place of Irwin Mitchell.
4. In early February 2006, Mr Thomas contacted Worthingtons by telephone. Through the firm’s receptionist, an appointment was made for him to see Mrs Nicholaou about taking over his case. The meeting took place on 7 February 2006. It was agreed that Mr Thomas would provide his papers for Mrs Nicholaou to look at. No charge was made for the meeting because Worthingtons offer a free initial appointment in personal injury claims.
5. On 8 February 2006, Mrs Nicholaou sent an authority signed by Mr Thomas the previous day to Irwin Mitchell authorising the firm to release their papers to Worthingtons. On about 1 March 2006, Irwin Mitchell’s papers arrived at

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Worthingtons and on 10 March 2006, Mr Thomas attended a further meeting with Mrs Nicholaou when the possibility of funding the claim by a CFA was discussed; Mrs Thomas and Jake also attended. It was agreed that Mrs Nicholaou would raise this potential option with Mr Barry Keating, a partner in the firm to see whether this would be possible. On 17 March 2006, Mrs Nicholaou and Mr Keating spoke but it is not clear from the attendance note (bundle page 107) whether CFA funding was actually mentioned; (in her evidence in chief, however, Mrs Nicholaou said that she had discussed an offer of a CFA with Mr Keating). On that date also, she wrote a "client care" letter to Mr Thomas setting out the terms of Worthington's business, only a copy of which can now be found.

6. On 21 March 2006, Worthingtons notified the prospective defendant's insurers, Groupama, that they had taken over conduct of Mr Thomas' claim from Irwin Mitchell. Those insurers appointed solicitors, Ford & Warren.
7. On 23 March 2006, Mr and Mrs Thomas (but not Jake) attended a further meeting with Mrs Nicholaou. At least one document was signed on that occasion, but the parties do not agree what it was.
8. On 23 March 2006, Worthingtons served the claim form and particulars of claim on Ford and Warren to which were annexed a GP's report and a schedule of special damages. The firm continued to act for Mr Thomas (it is agreed that Mrs Nicholaou was authorised to take instructions from Mrs Thomas as well).
9. On 15 February 2007 Groupama offered £50,000 plus 50% of the CRU together with all NHS charges to settle Mr Thomas' claim but that was rejected on 16 February 2007. On 28 February 2007 the claim came to trial before His Honour Judge Mitchell sitting in the Maidstone County Court. On 3 March 2007, Judge Mitchell gave judgment for Groupama's insured and ordered Mr Thomas to pay the costs of the action with an interim payment of £15,000 by 4 pm on 13 April 2007. Those costs were subsequently agreed in the sum of £24,000 (including the interim payment of £15,000) on 3 January 2008 and have been paid.
10. On 12 July 2007 Worthingtons submitted an interim invoice to Mr Thomas in the sum of £13,000 including VAT of £1,936.17. A final invoice in the sum of £5,952.58 plus VAT of £1,698.71 for disbursements was raised on 20 October 2007. On 19 September 2008 Mr Thomas applied for detailed assessment of both bills in a claim form issued under Civil Procedure Rule Part 8 in the Canterbury District Registry. On 5 December 2008, District Judge Hicks ordered that the bills be subject to a detailed assessment under the Solicitors Act 1974 Section 70 and that the matter be transferred to the Supreme Court Costs Office for further directions. On 6 July 2009 the assessment was balloted to me, and I gave directions on 31 July 2009 for the disposal of the preliminary issues set out in paragraph 1 of this judgment.

LAW

11. The costs are to be assessed on the indemnity basis under CPR 44.4. This provides;

“(1) Where the court is to assess the amounts of costs. It will assess those costs-

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- (a) on the standard basis or
- (b) on the indemnity basis,

but *the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount...*"
[emphasis added]

12. Under CPR 48.8(2), costs as between solicitor and client, the position here, are to be assessed on the indemnity basis.

THE PRELIMINARY ISSUES IN SUMMARY

13. The case for Mr Thomas is advanced on the basis that it was a term of the retainer with Worthingtons that a solicitor would act for him. Mrs Nicholaou is not a solicitor but a litigation executive. If he is right, Mr Thomas contends he will have no liability for any of Worthingtons' costs, applying *Pearless de Rougemont v Pilbrow* [1999] EWCA Civ 1011. In this respect Mr Thomas further relies on the fact that a statement of his costs prepared for the trial on 26 February 2007 expressed Mrs Nicholaou to be a grade B fee earner [solicitor with at least 4 years post qualification experience, or a legal executive] which she is not. It is further argued for Mr Thomas that there was a failure by Mrs Nicholaou to investigate the extent (if any) of Mr Thomas' insurance with Lawclub. If he is right about that, such a failure would constitute a breach of the Solicitors Costs and Information and Client Care Code 1999, entitling Mr Thomas to seek remedies on a complaint to the Legal Complaints Service at the Law Society (which can refer the matter to the Solicitors Regulation Authority). It is also Mr Thomas' case that the claim was conducted under a CFA backed by Lawclub, as had been the case when Irwin Mitchell represented him, so that if the litigation were lost, there would be no fees payable to Worthingtons and the insurance policy would cover the other driver's costs. Lastly, it is advanced on Mr Thomas' behalf that he never signed the "client care" letter that had set out Worthingtons' terms of business.
14. Mr Galway- Cooper for Worthingtons submits that Mrs Nicholaou was never held out as being anything other than a litigation executive. At no point did she represent herself to be a solicitor. So far as insurance is concerned, the possibility of LEI was investigated and none found. With regard to a CFA, Worthingtons do not transact business under CFAs, and the work conducted on behalf of Mr Thomas was carried out on a privately paid basis under the terms of the "client care" letter dated 17 March 2006, the original of which Mr Thomas signed but which cannot now be found. It follows that in principle, Worthingtons' fees have been validly claimed and are recoverable.
15. It is convenient to deal with each of these submissions in turn.

FAILURE TO ADVISE [MR THOMAS HE WAS] NOT BEING REPRESENTED BY A SOLICITOR

16. This issue turns on whether it was a term of the retainer that a solicitor at Worthingtons would act for Mr Thomas and that he was not told that Mrs Nicholaou was not a solicitor.

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17. Mr Thomas' evidence was contradictory on this point. Paragraph 4 of his witness statement states:
- “When I attended [at Worthingtons] I spoke to Miss [sic] Nicholaou and was provided with her business card. This confirmed to me that she was a lawyer.”
18. During cross-examination, Mr Thomas was shown the original of the business card, which appears at page 200 of the bundle. It says this:
- “Worthingtons Solicitors
- Martha Nicholaou
- Litigation Executive
- Member of the Association of Personal Injury Lawyers”
19. Mr Thomas said that “reading papers is not my game” but he subsequently accepted when Mr Clarke handed up the business card that this was the original that he had read when he met Miss Nicholaou for the first time. However he did not recall having seen the letter dated 17 March 2007 setting out Worthingtons' terms of business which too described Mrs Nicholaou as a litigation executive.
20. Mrs Thomas' evidence was that on a car journey with Mrs Nicholaou to Northampton on 4 November 2006 to see a witness, Mr Martin Rogers, her (Mrs Nicholaou's) legal background had been discussed. Mrs Nicholaou had told her that she had worked hard to get where she was and that, for her part, Mrs Thomas believed that she was a solicitor.
21. In fact, as she explained in her own evidence, Mrs Nicholaou had not taken the solicitors examinations, and although she had passed various legal executive papers she had never qualified as a legal executive. Whilst Mrs Nicholaou had nearly 25 years litigation experience working for law firms under her belt, she accepted that she was not qualified either as a solicitor or legal executive. That said, in her view, the extent of her then experience of 20 years undertaking litigation had justified the description “grade B” as set out in the statement of costs prepared for the trial. In any case, both her business card and her job description in the retainer letter as a litigation executive made it clear that she was not a solicitor.
22. For my part, I am satisfied that despite inconsistencies, the witnesses gave evidence honestly and to the best of their ability. In saying this I am mindful that the events about which the parties gave their evidence took place over three and a half years ago and allowances must be made for memories fading over the lapse of time.
23. In his submissions Mr Clarke relied on *Pilbrow* in which the Court of Appeal disallowed the entirety of Peerless de Rougement's costs because instead of complying with Mr Pilbrow's request that his case be handled by a solicitor, the firm had entrusted the matter to an unqualified member of staff. In my judgment, the facts here are different. In *Pilbrow*, the non-qualified case handler accepted that “there was no way that the client could know that she was not a solicitor”. That is not the

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position here. On the contrary, Mr Thomas accepted in evidence that he had been given Mrs Nicholaou's business card which clearly identified her not as a solicitor but as a litigation executive. As a witness I found Mr Thomas to be firm and direct. In my judgment, if he had wanted his case to be handled by a solicitor and nobody else, Mr Thomas would have said so when he met Mrs Nicholaou, read her business card and realised she was a litigation executive. That is sufficient to dispose of this limb of Mr Thomas' case in favour of Worthingtons.

24. For completeness, I should add that in his submissions, Mr Galway-Cooper drew my attention to the letter of 17 March 2007 in which Mrs Nicholaou states in terms "I am a litigation executive" and which, it is contended, Mr Thomas signed. For the purposes of reaching my decision, I do not need to decide whether Mr Thomas is right that he did not receive the letter because I am satisfied that no representation was ever made that Mrs Nicholaou was a solicitor, still less that there was any non-disclosure that she was not a solicitor. In his witness statement Mr Thomas merely says that he was never told of Mrs Nicholaou's actual qualifications but as I have said, he accepted in his evidence that he was mistaken in this respect because he had read her business card. That defeats any argument on non-disclosure.

FILING/SERVING DOCUMENTATION STATING THAT THE CONDUCTING FEE EARNER (UNQUALIFIED) WAS A GRADE B FEE EARNER

25. It makes no difference, in my view, that the statement of costs prepared for the trial a year later claimed Mrs Nicholaou's time as a grade B. That was a factor which could have had no bearing on Mr Thomas' decision to instruct Worthingtons in the first place. Likewise Mrs Thomas' evidence. What was said in the car would not have played any part in the decision to instruct the firm. Moreover Mrs Thomas accepted very frankly that Mrs Nicholaou did not say she was a solicitor either in the car or at any other time.
26. For these reasons I reject the submission that Mrs Nicholaou failed to advise Mr Thomas that he was not being represented by a solicitor and the *Pilbrow* point fails.

ADVICE TO CLIENT THAT HE WOULD BE PUT ON A CFA BUT [THEN] KEEPING HIM ON A PRIVATE RETAINER

27. Mr Clarke advanced this limb of Mr Thomas' case on the footing that the only terms upon which Mr Thomas would instruct Worthingtons was a "no win no fee" CFA as had been the case with Irwin Mitchell. Although Mr Thomas' points of dispute in the detailed assessment do not say so in terms, I infer that the consequence of this submission, if accepted, is that there are no fees payable to Worthingtons because the claim was lost and what he has paid must be repaid.
28. The high water mark of Mr Thomas' case on the CFA appears to be this: Irwin Mitchell acted under a CFA; he assumed that Worthingtons would do the same. He had £50,000 of legal expenses insurance available which would go "hand in hand" (his words). The documents he signed at the meeting on 23 March 2006 included a CFA. Accordingly, after the case was lost, it had come to him as a devastating blow when Mrs Nicholaou told him he was liable to pay not only his opponent's costs but also those of Worthingtons. He believed that under the CFA he had signed, there

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was no liability to Worthingtons because the case had failed and that his insurance would cover the costs of his opponent.

29. Mrs Thomas' evidence was that she was not prepared to put her family's home at risk over the case and for that reason the only way her husband would be willing to continue with the litigation was if the claim proceeded on a no-win-no fee basis. Jake confirmed Mrs Thomas' account that the possibility of a CFA was discussed at the meeting with Mrs Nicholaou on 10 March 2007 but he was not present at the 23 March meeting and could not give evidence about it.
30. Mrs Nicholaou's evidence was mostly to the contrary. She accepted that when funding was discussed at the meeting on 10 March 2006, the possibility of a CFA was mentioned and she had agreed to raise the matter with Mr Keating. This she had done on 17 March 2006 when she was told by Mr Keating in her discussion on that date that the firm could not offer a CFA and a funding arrangement of this nature would not be available for Mr Thomas. In these circumstances, no CFA was signed at the subsequent meeting on 23 March 2006. Rather, the purpose of the meeting was to finalise the Particulars of Claim and Schedule of Loss which needed to be served by 29 March 2006 at the latest, and it was these papers that Mr Thomas had signed.
31. In my judgment, Mr Thomas is mistaken in his recollection about what he signed. Whilst I am satisfied that (a) the possibility of a CFA was discussed at the meeting on 10 March 2006 and (as will become important for reasons given later in this judgment), (b) I accept the evidence of Mr Thomas, Mrs Thomas and Jake that they told Mrs Nicholaou that the claim must be dealt with on a no-win-no-fee basis, and (c) that taking the case on a CFA was discussed by Mrs Nicholaou with Mr Keating on 17 March 2007, in my opinion the question of CFA funding did not go beyond that. The attendance note makes clear that Mr Keating approved the plan to serve the proceedings by 29 March 2006 and, to that end, Mrs Nicholaou set up a meeting on 23 March 2006 for Mr Thomas to sign the Particulars of Claim and Schedule of Special Damages. Having heard the evidence, I find it is more likely than not that Mr Thomas did not sign a CFA on 23 March 2006 but, on the contrary, signed the Particulars of Claim and Schedule of Special Damages so that these documents could be served by 29 March 2006 lest otherwise the claim be defeated by the Limitation Act 1980.
32. Such a finding sits comfortably with the witness statements of Mr and Mrs Thomas which both refer to Mrs Nicholaou's secretary having brought papers into the meeting for signature. In my judgment, these papers were not a CFA but were the court documents which required an urgent signature and which Mr Thomas duly signed. Since there was no CFA, the submission that Mr Thomas has no liability to Worthingtons for their costs because case was accepted on a no-win-no-fee basis, fails on this point.

FAILURE TO INVESTIGATE ADEQUATELY LEI/FAILING TO ADVISE THE CLIENT TO USE HIS EXISTING LEI AND/OR TO SEEK INDEMNITY FROM AN EXISTING LEI PROVIDER

33. According to the Points of dispute served on 10 March 2008:

“At the time of instruction of Worthingtons the Claimant had the benefit of a pre-existing legal expenses policy with Law Club (now Allianz Cornhill) in breach of the Code the Solicitors failed to seek indemnity under the policy either for their own costs or for the costs of the other side.”

34. The reference to “the Code” is to the Solicitors Costs Information and Client Care Code 1999 which was in force until 30 June 2007. Paragraph 4 says this:-

“4. Advance costs information – general

The overall costs

- (a) The solicitor should give the client the best information possible about the likely overall costs, including a breakdown between fees, VAT and disbursements.

...

Client’s ability to pay

- (j) The solicitor should discuss with the client how **and when** any costs are met, and consider:
- (i) whether the client may be eligible and should apply for legal aid (including advice and assistance);
 - (ii) whether the client’s liability for their own costs may be covered by insurance;
 - (iii) whether the client’s liability for another party’s costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for the client’s liability for another party’s costs to be covered by after the event insurance (including in every case where a conditional fee or contingency fee arrangement is proposed); and ...”

35. Mr Thomas’ evidence on Lawclub was that he believed he had cover for £50,000 of legal fees, and that “Martha agreed to take that [the Lawclub] insurance on”. When he attended the meeting on 10 March 2006 he made it clear that if the claim was to go ahead, it must be under a CFA. It was his belief that if the case was lost, no fees were payable to Worthingtons and that “insurance pays” as he expressed the position so far as his opponent was concerned.
36. Mrs Thomas’ evidence was that she had made clear to Mrs Nicholaou at the meeting on 23 March 2006 that her family had fallen into debt as a result of the accident, and that she was not prepared to continue with the case if that would put her home at risk. For that reason she had made it plain to Mrs Nicholaou that if she was going to take

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the case, it could only be on a “no win no fee” basis (see her witness statement paragraph 4). Mrs Thomas also said that she and her husband had assumed that they were covered under the legal expenses insurance policy. Since this had been available when Irwin Mitchell had worked on the case, they believed the policy was still in place when Worthingtons took over.

37. In my view, both Mr and Mrs Thomas are confused. I have already found that Mr Thomas did not enter into a CFA with Worthingtons and I am satisfied they are both mistaken in their recollection of how the Lawclub policy worked. Mr Thomas was aware from the advice he had received from Irwin Mitchell that it was a term of the policy that the solicitor must act under a CFA. He knew too that Irwin Mitchell had withdrawn from the case because the firm did not consider that there were reasonable prospects of success. In my opinion he was mistaken if he believed that because he had located a favourable witness, that had revived the insurance cover he had with Irwin Mitchell and that it was now being used by Worthingtons. Having found that there was no CFA between Mr Thomas and Worthingtons, it follows that the conditions under which Lawclub would be obliged to provide insurance cover were never fulfilled. That all said, Mr Thomas’ confusion does not conclude this point in Worthingtons’ favour.
38. In her evidence, Mrs Nicholaou accepted that by 10 March 2006 she had received all the papers from Irwin Mitchell. On that date, she spent an hour with Mr and Mrs Thomas and Jake “considering evidence and files received from previous solicitors” (see breakdown of Worthingtons’ costs - bundle page 67). Those files included a copy of the CFA Mr Thomas had signed with Irwin Mitchell on 27 January 2003 (bundle page 178) together with a covering letter dated 17 January 2003 (bundle page 177) that contained an information sheet “explaining your position in relation to legal costs and your CFA and Lawclub Prestige Legal Expenses Insurance Policy”. The sheet said this:-

“There are a number of professional rules which apply to solicitors in relation to legal fees and expenses. Under those professional rules we are required to make it clear to you at the outset what your responsibilities are in relation to the payment of legal costs. We do however appreciate that you have taken out legal expenses insurance cover with Lawclub Legal Protection under the Carole Nash Scheme and we will explain the benefits of that insurance cover in this document.

Your Legal Costs

Firstly, as our client, you are primarily responsible for payment of the legal fees and expenses which we charge to you (your legal costs) under your Conditional Fee Agreement (“CFA”) with us. However, under your legal expenses insurance policy Lawclub Legal Protection will pay your legal costs provided that you comply with the terms and conditions of the insurance policy (see Section 3 of the policy) ...

Your Legal Costs – IF YOU WIN

It is a principle of English Law that “costs follow the event”. In practical terms this means that the loser pays the winner’s reasonable legal costs.

Your Legal Costs – IF YOU LOSE

If you lose your case you will not be liable to pay any fees to us as you have the benefit of a CFA. If we have incurred any disbursements these will be paid by Lawclub on your behalf.

Your Opponent’s Legal Costs

If you lose your case you will be primarily liable for payment for your opponent’s reasonable legal costs. However, in practice these will be paid on your behalf by Lawclub (see below).

Protection for Legal Costs under your Lawclub Prestige Policy

Having set out the basic principles in relation to your responsibility for your legal costs we will now explain the benefits that you enjoy under the terms of your legal expenses insurance policy provided by Lawclub Legal Protection. This policy gives you full cover in relation to your liabilities for costs in most circumstances. Under your policy you have the following benefits:

- If you win your claim Lawclub will pay your legal costs including our professional fees, VAT and disbursements to the extent that these are not paid by your opponent. This will ensure that you keep 100% of your damages.
- If you lose your claim Lawclub will pay your opponent’s legal costs which you would be ordered to pay by the Court, which means you do not have to pay out of your own pocket.
- If you win your claim but there are any Court orders for you to pay any part of your opponent’s legal costs Lawclub will pay such costs.

Exceptions

Although you have the benefit of legal expenses insurance there are certain circumstances where Lawclub will not pay and you could be liable to pay legal costs out of you own pocket, namely:

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- If the total amount of the costs exceeds the limit of the £50,000 indemnity provided under your insurance policy. We are not aware of any circumstances that would make this likely at present and we would of course advise you in advance if this becomes a serious issue.

...

- If during the course of your claim we and Lawclub believe that you no longer have a reasonable chance of success Lawclub would withdraw cover. If you were to continue your claim after termination of cover by Lawclub you would be liable for your legal costs and also the legal costs of your opponent if you fail to win your claim.

...

Our Assurance

It is highly unlikely that any problem will arise in relation to legal costs and of course we will keep you full informed of all relevant developments on your case and take every reasonable step to protect you as we proceed with your claim. Your Lawclub policy gives you very comprehensive insurance cover and you therefore can rest assured that you have excellent protection in relation to your legal costs and any liability for the costs of your opponent.”

39. The letter also contained terms of business intended to be read together with the CFA entitled “Lawclub CFA Accident Pack”. Paragraphs 3 and 4 said this:-

“3. Your opponent’s legal costs

If you lose your case the Court is likely to order you to pay your opponent’s legal costs. Also, in some circumstances even where you win your case the Court can order you to pay some of your opponent’s legal costs, for example if you lose an application which is made during the course of the proceedings. Your Lawclub Legal Protection policy will cover you for any costs which you are ordered to pay to your opponent provided you comply with the terms of the insurance policy.

4. Our Commitment to Quality

We are committed to providing a high quality legal services to all of our clients. As part of our commitment to quality the practice is registered to the international quality standard BS EN ISO 9001.”

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40. In her evidence Mrs Nicholaou accepted that she had never written to Lawclub. Her explanation was that when she met Mr Thomas on 23 March 2006, the claim was within a week of being statute barred, and her attention had been directed to the urgent task of completing the required legal documents so that they could be served by 29 March 2006. Thereafter, it was her belief that the letter of 17 March 2006 covered the terms of her firm's retainer with Mr Thomas and that the claim was thereafter being funded on a privately paid basis. Whilst Worthingtons no longer retain a signed copy of the client care letter, it was Mrs Nicholaou's evidence that this had been signed by Mr Thomas at the meeting on 23 March 2006, and had been returned to him with the other case papers when he withdrew his instructions. Mrs Nicholaou had subsequently attempted to obtain insurance cover for him but none had been available. This Worthingtons confirmed in the points of reply at 1 (b) (bundle page 55) - "reference will be made to the correspondence and attendances upon Carole Nash Insurers/Europe Assist. Despite the instructed solicitor's best attempts to "discover" pre-existing legal expenses insurance, none was identified". Mrs Nicholaou confirmed this in her evidence when she said "I used all my best endeavours to seek out legal expenses insurance."
41. After due deliberation I have concluded that Mrs Nicholaou's evidence should be treated with considerable care on this point. It is common ground that at the meeting on 10 March 2007, the possibility of funding the case under a no-win-no-fee CFA was raised but nothing could be finalised until Mrs Nicholaou had spoken to Mr Keating. A discussion did take place on 17 March 2007 and although Mrs Nicholaou's attendance note is silent on the point, she confirmed in evidence that Mr Keating (who did not give evidence) declined Mr Thomas' request to fund the case under a CFA. Thereafter, according to the attendance note of that date of a telephone call to Mrs Thomas:
- " until ...[I] was able to consider after the event insurance and a conditional fee agreement, William was on risk as to costs not only my costs but indeed the Defendant's costs".
42. I consider Mrs Nicholaou was at fault in this respect. Having discussed CFA funding with Mr Keating and been told it was not available, she did not tell the Thomas that, but instead appears to have left the matter open. Although it is right to say that she referred to "after the event" insurance rather than "legal expenses insurance", I do not believe that without an explanation, Mrs Thomas could reasonably be expected to know the difference. In my view, having not been turned down out of hand for a CFA, Mrs Thomas was entitled to assume from the conversation that this remained a possibility and would be taken further at the meeting on 23 March 2006. Had Mrs Thomas been told in terms "Mr Keating's decision is "no" ", Mr Thomas would have taken his case to a firm that offered the "no-win-no-fee" terms that he wanted.
43. The sequence of events was then as follows. On 17 May Miss Nicholaou wrote a file note in these terms:
- "DO
- (1) See if we can arrange some ATE insurance

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(2) Look at Mr Thomas' BTE and see if I can get some cover on it"

44. On 26 June 2006 Mrs Nicholaou wrote to Carole Nash Insurance the insurance brokers for Lawclub. The letter said this:-

"Mr Thomas is ... entitled to cover under his legal expenses insurance to continue. Mr Thomas would like to nominate this firm to act on his behalf in relation to the continuation proceedings."

45. The letter went on:

"As such, we are quite prepared to enter into a conditional fee agreement with Mr Thomas on the understanding that under the terms of the legal expenses insurance [sic]. As we understand the position if Mr Thomas is unsuccessful in his claim, then you will pay the costs arising out of the claim which is unsuccessful namely costs of the defendant's solicitors and in the case Ford & Warren Solicitors are instructed and our own legal costs...

We await hearing from you immediately in view of the fact that we need to secure funding in this matter urgently."

46. On the same date, Mrs Nicholaou notified Mr Thomas that:

"One final point I have agreed to look at is the issue of insurance and I have written a letter to Carole Nash in relation to the legal expenses insurance cover you had to see whether this is now available for this claim."

47. The following day, 27 June 2006, Mr Thomas spoke to Mrs Nicholau over the telephone. According to her attendance note he had found his policy with Cornhill Allianz (the re-styled name of Lawclub) which stated that he was insured for £50,000 legal fees to claim back uninsured losses.

48. On 27 June 2006 Carole Nash replied to Worthingtons in these terms:

"Our insured has legal protection included in their insurance policy with ARAG Plc. This is based on the provision that they enter into a conditional fee agreement with the solicitor. If any costs are required for dealing with our mutual client, please forward details to the address below.

Europe [sic] Assistance ...

Haywards Heath...."

49. On 30 June 2006, Mrs Nicholaou wrote to Europ Assistance Holdings Limited ("Europ Assistance") in these terms:

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“Mr Thomas requires financial assistance in accordance with his legal expenses insurance to continue pursuing his claim for damages for personal injuries ... at this moment in time Mr Thomas is privately funding this action but, under the terms of the legal expenses insurance, which was effective at the time of the accident, Mr Thomas is entitled to financial assistance and we require confirmation that you will provide such assistance. As you will see from the documentation enclosed, Mr Thomas would like this firm to continue its conduct of this action on his behalf.”

50. On 12 July 2007, Mr Bradbury, the Legal Services Manager at Europ Assistance contacted Mrs Nicholaou by email. He wrote:

“Although we provided legal expenses insurance to Carole Nash policy holders in 2004 and 2005 we did not in 2002. Accordingly there is no policy coverage for this accident which occurred in June 2002. Accordingly we regret we are unable to assist further.”

51. On 5 February 2007, Mrs Nicholaou replied to the email of 12 July 2006. She explained the delay by stating:

“Your mail became embedded in other correspondence and we have only recently had an opportunity to consider the same.”

52. The letter continued:

“... Mr Thomas is entitled to claim under his legal expenses insurance which was effective at the time of the accident. He is entitled to financial assistance. The trial is looming and under the terms of Mr Thomas’ policy we are now requesting appropriate cover ...”

53. According to Mrs Nicholaou’s attendance note, a conversation took place between a member of Worthingtons and Europ Assistance when the latter stated that there had always been a lack of evidence, that under the terms and conditions of the policy, Europ Assistance should have been kept regularly informed but they had heard nothing for eight months and that when Europ Assistance had taken over the papers from Carole Nash, there had been some kind of discrepancy about whether Mr Thomas was insured. However in an email dated 8 February 2007, Mr Bradbury agreed to look at the matter again and requested further documents including a copy of the insurance policy and counsel’s opinion on merits. Save for the opinion, the documents were provided by Mrs Nicholaou on 20 February 2007. No material is before the court to indicate what, if anything, happened next.
54. Having considered this course of events revealed by the contemporary documents, I am satisfied that Worthingtons did not comply with the Code and I reject Mrs Nicholaou’s evidence that she used her “best attempts to “discover” pre-existing legal expenses insurance, none was identified” as the points of reply contend. Whilst it may be correct that Mrs Nicholaou examined Mr Thomas’ home insurance policy for LEI

cover and found none, Mrs Nicholaou knew from the papers she had received from Irwin Mitchell that there was a policy with Lawclub. Accordingly she had a duty under paragraph 4(j) (ii) and (iii) of the Code to explore that policy further. Moreover, it was particularly important on the facts of this case that she did so because Mrs Nicholaou knew from the discussions that had taken place on 10 March 2007 that Mr Thomas had limited resources. Had that not been the case there would have been no reason on that occasion to have discussed the possibility of funding the claim by a CFA. Indeed it subsequently became of concern to Mrs Nicholaou that until such an agreement was in place "...William was on risk as to costs not only my costs but the defendant's costs".

55. Mrs Nicholaou was also aware that Mr Thomas would have qualified for exemption from court fees on financial grounds (see letter dated 25 April 2006, bundle page 114). She knew too that LEI might be available since the papers she had received from Irwin Mitchell contained Lawclub's terms of business. Indeed, it was her view that Mr Thomas was contractually entitled to cover, a fact she communicated to Carole Nash on 26 June 2007 and to Europ Assistance four days later (see bundle page 118). It follows, in my judgment, that Mrs Nicholaou did not direct her attention correctly to the question of how her costs and those of the other driver would be paid in the event of the claim being lost.
56. In my opinion, once the immediate peril of the case being statute barred had been avoided on 29 March 2007, it was incumbent upon Mrs Nicholaou to have explored the Lawclub cover as she had been instructed to do at the meeting on 10 March 2007. Although cover had been discontinued for lack of prospects, Mr Thomas had found Mr Rogers, the witness favourable to his case. That had changed merits back in his favour, which was the reason that Mrs Nicholaou agreed to take on the case (see costs breakdown- bundle page 3) and was behind her advice to reject the offer of £50,000 on 16 February 2007. Accordingly, in my judgment, it was open to her firm from the outset to enter into a CFA with Mr Thomas backed by the Lawclub policy since the contract of insurance was to provide insurance cover where reasonable prospects of success existed. In the event, it was not until three months later that Mrs Nicholaou took any steps to explore the insurance position. When she did so, she wrote not to Lawclub but to Carole Nash, who in turn, put her in touch with Europ Assistance with whom Mrs Nicholaou then corresponded. In my opinion it ought to have been plain to Mrs Nicholaou from the Irwin Mitchell papers that she had read by 10 March 2006 that Lawclub had been the underwriters in 2002 at the date of the accident and that it was to that company (or to Allianz Cornhill as Lawclub was now named) and not Carole Nash or Europ Assistance that she should have written.
57. The position deteriorated still further when Mrs Nicholaou did not follow up Mr Bradbury's email of 12 July 2006 until 5 February 2007, three weeks before the trial because it had been "embedded" in other correspondence (bundle page 127). Even at that point, no urgency was injected into the correspondence. Although she demanded a reply from Europe Assistance by return of post, Mrs Nicholaou did not respond to Europe Assistance's email of 8 February 2007 until 20 February 2007, despite the fact that the trial was listed to start on 28 February 2007. As I have said, the correspondence before the court ends there, but it appears to be common ground that no cover was ever provided, as a result of which Mr Thomas was obliged to pay

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out of his own pocket £24,000 in costs to Groupama when he lost at trial and £20,651.29 to Worthingtons.

58. My findings and conclusions are therefore as follows. First, Mr Thomas made it clear to Mrs Nicholaou that he wished Worthingtons to act for him on a CFA backed by his Lawclub insurance policy. In breach of the Code, Mrs Nicholaou failed to discuss funding options adequately and compounded the problem by omitting to contact Lawclub. The fact that she then delayed three months before writing to Carole Nash rather than Lawclub is not explained by her being under pressure to serve the Particulars of Claim. That pressure ceased on 23 March 2006 when the documents were served. When Carole Nash put her in touch with Europ Assistance, Mrs Nicholaou was not alert to the fact that it was Lawclub not Europ Assistance who were the underwriters at the date of the accident. Rather than take the matter up with Lawclub, she instead pressed Europ Assistance to cover the claim, albeit that she took a further eight months to do so and, apparently then did not pursue the matter further after 20 February 2007.
59. Mrs Nicholaou's position has also changed since she wrote to Carole Nash on 26 June 2006 expressing her firm's willingness to enter into a CFA (see paragraph 45 ante). After he had lost the case Mr Thomas instructed new solicitors, Routh Clarke. On 28 June 2007 Mrs Nicholaou told Routh Clarke that her former client:
- “... did sign a CFA with Messrs Irwin Mitchell solicitors and we were not in a position to offer a further CFA to him ...”
(bundle page 172)
60. By a letter of the same date, she informed Mr Thomas that:
- “I was not in a position to enter into a CFA as you had already entered into one with Irwin Mitchell.” (bundle page 173)
61. This contradictory evidence bears adversely on the weight I give to Mrs Nicholaou's evidence as a whole. In the event, the correspondence with Mr Bradbury was always likely to be futile, because Lawclub not Europ Assistance were the underwriters in November 2002. In my view, Mr Thomas is justified in his complaint that Mrs Nicholaou failed to carry out his instructions to handle the claim under a CFA backed by his Lawclub policy.
62. For completeness, I should add that these findings are not inconsistent with my rejection of Mr Thomas' contentions about having his signed a CFA and the *Pilbrow* point. In fact, I consider his conduct and actions during the retainer to be wholly consistent with his belief (albeit erroneous) that the case was covered by a CFA backed by the Lawclub insurance policy. Apart from £140 of disbursements (Mrs Thomas said that they were paid because “we did not know why, we just did”), Mr Thomas was not asked to pay any money on account, even in respect of counsel's fees for the trial. From his perspective that would have been on all fours with his belief that the case was “no-win-no -fee” – nothing to pay if he lost; costs paid by the other side if he won.
63. The impression which Mrs Nicholaou wished to give in her evidence (see witness statement paragraphs 15 and 17) was that she had kept Mr Thomas informed about

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her costs, that he had seen the statement of costs for the trial and her letter of 20 December 2007 had made clear that:

“Counsel will expect prompt payment ... once we have had the conference, counsel will deliver his fee note within seven days and expect payment shortly thereafter and the same following trial.” (bundle page 123)

so Mr Thomas knew he would be called upon to meet these liabilities sooner rather than later.

64. I reject that evidence. Firstly, it did not happen; the conference took place on 12 January 2007 but Mr Thomas was not asked to pay anything until 14 March 2007 after the trial had taken place and he had lost. In my opinion it is more likely than not that had the case been successful, Mrs Nicholaou would not have asked Mr Thomas for payment because his costs would have been met by Groupama. It follows that the reference in this letter to counsel expecting “payment shortly thereafter” was not to the fact that Mr Thomas would be required to pay promptly, but that someone else would, namely Groupama when he won. In this respect it is noteworthy that the letter does not say expect “prompt payment *by you*” meaning Mr Thomas but leaves the matter open.
65. So far as the statement of costs shown to Mr Thomas is concerned, in my judgment it was just that, a statement of the level of Worthingtons’ costs and counsel’s fees to date. What it was not was a demand for payment and I prefer Mr Thomas’ evidence that he believed (albeit mistakenly) he had a no-win-no-fee agreement and it was for that reason he did not take issue with the fees in the statement because he did not think he would ever be asked to pay them; Lawclub would. Accordingly, I reject Mrs Nicholaou’s evidence that simply providing Mr Thomas with a statement of her costs was the same as telling him that he was be liable to pay the sums set out therein promptly and out of his own pocket. Her evidence does not sit comfortably, either, with her case that the letter of 17 March 2006 embodied the terms of the retainer. After all, had she acted in accordance with those terms, Mr Thomas could have expected to receive “bills ...at regular intervals of the work carried out on your case” (bundle page 111). That never happened either and is persuasive in assisting me to prefer Mr Thomas’ evidence on this point.
66. It follows, for the reasons I have given, that I consider that Worthington’s costs have been unreasonably incurred in this case. Had Mrs Nicholaou followed the Code correctly and investigated the availability of the Lawclub policy as Mr Thomas had instructed her to do, he would not have been obliged to meet Worthington’s costs out of his own pocket; either the firm would have acted for him under a CFA backed by Lawclub or he would have taken his case elsewhere to another firm which would have done so. Under CPR 44.4-(1) the court “will not allow costs which have been unreasonably incurred.” (see paragraph 11 ante). Accordingly, the fees that have been unreasonably incurred must be disallowed and any sums that Mr Thomas has paid to Worthingtons fall to be returned to him with interest. So far as the costs that Mr Thomas paid Groupama are concerned, they too would have been within the limit of the indemnity (assuming that Irwin Mitchell’s costs did not exceed £5,348.71 thereby going above the indemnity of £50,000). This Court does not have power under Part III

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of the Solicitors Act to make an order in relation to these costs, but the parties have my view of where the justice lies on this point.

FAILING TO GET CLIENT'S SIGNATURE ON RETAINER

67. In view of the decision I have made about the LEI policy, it is not necessary to make a finding about whether Mr Thomas' signature was or was not put to the letter of 17 March 2006.

FORMAL ORDER

68. Worthington's bills are assessed at nil and the sum standing to Mr Thomas' credit in the cash account must be repaid to him with interest. Subject to any representation the firm wishes to make, I propose to order that Worthingtons pay Mr Thomas' costs of the reference on the standard basis to be assessed if not agreed. Whilst it is right that the firm succeeded on the *Pilbrow* and CFA points, in my judgment both flow from the failure of Worthingtons to comply with the Code from the outset and no reduction or proportion based order is appropriate to reflect that success. With regard to permission to appeal, Worthingtons may lodge submissions in writing within 14 days from the date this judgment is handed down if they wish to do so, in order to save costs of having to attend. Finally, it is appropriate to record that the insurance point apart, there is nothing to suggest that Mrs Nicholaou had anything but the best interests of her client at heart and that she worked conscientiously to achieve success for him at trial, which unfortunately for Mr Thomas did not happen.