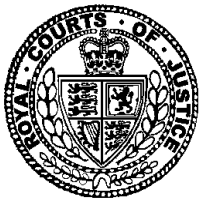

Neutral Citation Number: [2018] EWCA Civ 2347

Case No: B3/2016/4254 and B3/2016/4254(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Turner J
[2016] EWHC 2427 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LADY JUSTICE ASPLIN

- -

Between :

CATHAL ANTHONY LYONS	**Appellant**
- and -	
FOX WILLIAMS LLP	**Respondent**

- -
- -

Dominic Chambers QC and Carl Troman (instructed by **SGH Martineau LLP**) for the **Appellant**
Colin Edelman QC and Ben Lynch (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date : 3 October 2018

- -

Approved Judgment

Lord Justice Patten :

1. This is an appeal by the claimant, Mr Cathal Lyons, against the dismissal by Turner J of his claim against the defendant firm of solicitors for damages for negligence: see [2016] EWHC 2427 (QB). At the conclusion of the hearing we indicated that we proposed to dismiss the appeal for reasons which would be given later in writing. This judgment sets out my reasons for deciding to dismiss the appeal.

2. Mr Lyons was until 2009 the Chief Financial Officer and Managing Partner of Operations for Ernst and Young (CIS) BV ("EY") in Moscow. On 17 June 2006 he was involved in a road traffic accident whilst riding his motorcycle and suffered serious injury. Most of his right foot required to be amputated and his right shoulder and humerus were replaced with a metal prosthetic. He had to undergo a series of operations and a long course of physiotherapy and we were told by Mr Chambers QC that the effect of his injuries has been severe and life-changing.

3. At the time of his accident the claimant was covered by insurance which had been taken out by EY for the benefit of its employees. This consisted of cover under both Accidental Death and Dismemberment ("AD&D") policies and Long-Term Disability ("LTD") policies provided by Colonial Medical Insurance Company Limited ("Colonial") and AGF insurers ("AGF"). EY had AD&D and LTD cover for its employees with both insurers. As the names of the policies suggest, AD&D cover provides for the payment of a single lump sum in the event of injury and disability which is calculated as a percentage of a maximum benefit sum according to the severity of the category of injury. The amount payable does not depend on the degree of incapacity to work which the injury brings about. By contrast, LTD policies are designed to compensate the insured for the loss of income which he or she suffers as a result of being disabled by the accident. The scale of the payments varies as one would expect according to whether the employee's disability is short-term or long-term and on whether it is total or only partial. I shall come to this in a little more detail shortly.

4. It was obvious to EY that the claimant's injuries had occasioned permanent disability so as to trigger liability under the AD&D and potentially also the LTD policies. EY had therefore on 19 June 2006, only two days after the accident, requested their insurance brokers, Sherwood Solutions ("Sherwood"), to provide advice about possible AD&D and LTD claims.

5. Sherwood provided preliminary advice in October 2006. In relation to the AD&D cover, they were pessimistic. Colonial took the position that the loss of only part of his right foot meant that Mr Lyons did not qualify for payment under the terms of the polices relating to "loss of a foot". Sherwood advised that it did not appear that Mr Lyons would qualify for a payment under either of the AD&D policies. In February 2007 the claimant was put in touch with Mr Tom Custance, a solicitor in the defendant firm, in order to obtain advice about his AD&D claims. By then Mr Lyons had undergone several operations and had returned to work part-time but on full salary.

6. The terms of the defendant's retainer were set out in a letter of engagement dated 15 February 2007. So far as material, the letter stated:

> "**Re: insurance cover arranged for you by Ernst & Young ("E&Y")**

> Following our telephone discussion earlier this week, I confirm that Fox Williams LLP will be very pleased to act for you in connection with the above matter.
>
> The purpose of this letter is to set out the scope of our role …
>
> **Scope**
>
> You have explained that, following your accident in June 2006, it has become apparent that the insurance cover arranged on your behalf by E&Y does not provide the type or level of 'accidental death and dismemberment' ("ADD") cover which E&Y had previously represented to you was in place. I understand that the shortcomings in the cover in fact in place at the time of your accident can be demonstrated by comparing it with the cover which was arranged by E&Y when the insurance provider was changed with effect from 1 July 2006.
>
> I have suggested that the areas to be considered further are as follows: (1) to check the extent of the cover in fact provided by the insurance in place at the time of your accident to ensure there are no arguments available which E&Y have failed to take up with insurers on your behalf; (2) to compare that cover with the insurance put in place with effect from 1 July 2006; and (3) to obtain further details of the representations made to you by E&Y as to the 'ADD' cover supposedly in place at the time of your accident.
>
> In order to advise on these points, I will need to see the following: (a) copies of the relevant insurance policies; (b) all correspondence or emails between you and E&Y or insurers/brokers relating to the extent of the cover available for your accident, including in particular any emails/correspondence dealing with the meaning/interpretation of that cover; and (c) anything from E&Y which refers to the insurance benefits available to you in the event of death or serious accident. In relation to (c) you have explained that you were not provided with a copy of the presentation given to you by E&Y. However, you may have received at some stage at least a summary of the health / insurance benefits available to you.
>
> Depending on the outcome of my review of this material, the intention would then be to draft a letter to be sent to you to E&Y, in order to put some pressure on them either to extract the fullest cover to which you are entitled under the insurance in place at the time of your accident, and/or to compensate you for the disparity between that cover and the insurance which they represented to you as being in place. …".

7. By the time that Mr Custance was instructed the insurance position had been complicated by a change of insurers for both the AD&D and the LTD cover. The

Colonial and the AGF AD&D policies terminated on 30 June 2006 and were replaced by AD&D cover with a new insurer, Ingosstrakh LMT Limited Liability Insurance Company ("Ingosstrakh"), a Russian company. In July 2006 the LTD cover provided by Colonial and AGF was replaced by LTD cover with a single insurer, Generali Worldwide Insurance Company Limited ("Generali").

8. In respect of both the Colonial and the AGF LTD policies, Sherwood had confirmed in their report that Colonial was the primary insurer with a potential liability to pay up to $180,000 per annum. This would be supplemented by up to $120,000 per annum under the LTD policy with AGF. Both policies, however, provided for a waiting period of 52 weeks during which no benefits would be payable. At the end of this period, depending on the degree to which the claimant's injuries prevented him from performing his occupation and the likely duration of this condition, he would become entitled to either short-term or long-term disability benefits. But both insurance companies had indicated that no determination of the benefits payable would be made until after the expiry of the 52-week period.

9. Mr Lyons' more immediate concern therefore, as he accepted in his evidence to the judge, was to resolve the question of liability under the AD&D policies. By the time that Mr Custance came to be instructed Mr Lyons had begun to formulate a strategy under which he would seek compensation from EY for misrepresentation if it turned out that he was prevented from making a claim under the AD&D policies. His argument would be that EY had misled him into believing that the AD&D cover was more extensive than it in fact was. One can see this strategy reflected in the defendant's letter of engagement quoted above where Mr Custance sets out the areas which he would need to investigate as part of the retainer.

10. Although the dispute with the insurers about the scope of the AD&D cover continued for some years, it is not an issue on this appeal. Mr Custance, like the brokers, gave pessimistic advice to Mr Lyons about his claim under the policies but in fact neither he nor the brokers had bothered to read the policies themselves. Instead, they had relied on the summary of the cover contained in the Members' Booklet accompanying the policies which was either inaccurate or incomplete. The cover under the policies was wide enough to allow Mr Lyons's claim to succeed and ultimately he received a substantial sum under the AD&D policies. He then pursued a claim for damages against the defendant based on his unrecovered costs which has been settled, without any admission of liability, in the sum of £75,000.

11. The dispute about Mr Lyons's rights under the AD&D policies continued, however, for some time alongside his claims under the LTD policies. These claims eventually became entangled with the third aspect of the aftermath of the accident which is Mr Lyons's agreement in April 2009 to leave his current employment with EY and to continue as a consultant under a new contact. The negotiations which led up to the severance agreement signed on 17 April 2009 were, as the judge described, prolonged, tortuous and in many ways obscure. Under the terms of the agreement as eventually signed, Mr Lyons gave up his partnership status and his position as chief financial officer with effect from 30 June 2009 and entered into a new employment agreement as a consultant at a rate of $300 per hour with a minimum guaranteed 300 hours of consulting in the first year. The agreement also gave him the benefit of the CIGNA medical insurance available to EY partners and to additional payments for medical expenses up to $2m which was what the parties estimated would be the future cost of

his medical care. On his resignation from EY under the agreement Mr Lyons was to be paid compensation for his employment for the year ending 30 June 2009 and the repayment of his partnership capital.

12. The negotiations which led to the severance agreement are important because they seem to have had a direct impact on the claim under the LTD policies. On 13 April 2007 Colonial rejected Mr Lyons's claim on the ground that he had continued to earn more than 80% of his salary during the one year waiting or elimination period described earlier. In the end the claims under both the Colonial and the AGF LTD policies became time-barred by 2010 without a claim having been made to enforce whatever rights Mr Lyons had under the policies. In these proceedings he sued the defendant in negligence for failing to advise that the basis on which Colonial had rejected his claim was wrong and unfounded and that he had a claim for either Total Disability or Partial Disability payments; alternatively if it was well founded, for failing to advise him to reduce his salary during the waiting period so as to preserve his claim under the policies; and in any event for failing to advise him to bring a claim or otherwise to protect his claims and to prevent them from becoming time-barred.

13. In order to succeed in this claim it was obviously necessary for Mr Lyons to establish that it was part of the defendant firm's retainer to give advice about the LTD policies and how the LTD claims should be preserved and prosecuted. Although the February 2007 engagement letter makes no reference to the LTD policies in contrast to the AD&D cover, the judge heard extensive evidence from the claimant and others that was relied on by them as supporting the claim that the defendant firm had been engaged to advise on the LTD policies. The claimant contended that from the outset he had expected Mr Custance to advise him on his LTD claims; that he had various conversations with Mr Custance regarding the LTD cover and that, in the course of acting for Mr Lyons, Mr Custance was supplied with copies of the relevant LTD policies.

14. The judge rejected the contention that it was ever part of the defendant's retainer to advise Mr Lyons about the claims under the LTD policies. He found that the original letter of engagement did not include advice on this issue and rejected much of Mr Lyons's evidence that in subsequent emails and in conversations it was expanded to include these matters. He accepted, as was obvious from some of the e-mail traffic and was admitted by Mr Custance, that reference was from time to time made to the LTD claims which Mr Custance knew were proceeding at the same time as the claims under the AD&D policies. But when, for example, Mr Custance received documents in February 2007 including some relating to the LTD claims it was done to enable him to perform a sifting exercise which, as the judge put it, did not involve any consideration of the LTD material save to the very limited extent of characterising it as being irrelevant to his consideration of the AD&D issue. He also said (in relation to the material received at that time):

> "65…. The material relating to the Colonial LTD policy was not such as to raise any sufficient concern on its face as to mandate Mr Custance to seek to extend his retainer or give any warning."

15. In an e-mail of 22 March 2007 to Mr Custance the claimant referred for the first time to EY's managing partner, Mr Karl Johansson, wanting Mr Lyons out of the organisation. The judge (at [78]) accepted that Mr Custance did thereafter become

involved in the broader issue of the terms of what eventually became the severance agreement and this change in the scope of the defendant's retainer is relied upon for the purposes of this appeal even though it was not something pleaded or relied on by the claimant in the particulars of claim. But the judge was clear that this expansion of the retainer did not extend to Mr Custance being asked to advise on the LTD claims. He said:

> "80. The claimant made further reference to his concern about his future at EY in an email to Mr Custance of 25 April 2007. He said that if he were "dumped out of the firm as an invalid" he would have difficulty finding a new job and if he were not up to the job "then they should also be able to get me $300,000 per annum under our insurance".
>
> 81. On the following day there was a telephone discussion between the claimant and Mr Custance which the latter recorded in bullet point form which included a reference to: "earning [?] ca. 700k USD a year." The claimant's evidence was to the effect that he had asked Mr Custance to advise him on the $300,000 per annum claim but he was unable to give any detail as to what specific advice was asked for or when, if at all, it was given. On this issue, I accept Mr Custance's evidence that he had not been asked to advise on this point. It had merely been identified as part of the claimant's negotiating strategy. I find that even if Mr Custance had made specific enquiry of the claimant as to the extent of the advice he was expected to give this is what he would have been told."

16. The claimant's intention to use the LTD claims as part of his negotiating strategy in relation to the severance agreement is not entirely easy to understand. But we were told that Mr Lyons's thinking at this time, as explained to the judge, was that if his claim to proper compensation on his departure from EY was resisted on the basis that his disability prevented him from continuing to do his job then he would look to EY to secure alternative compensation in the form of the $300,000 payable under the LTD policies.

17. On 16 May 2007 Mr Lyons sent an e-mail to Mr Custance in which he set out a number of demands which he wanted to achieve in the negotiations with EY. They included a requirement that EY should pay $1.5m for his disablement if the insurers did not pay under the AD&D policies and compensation to reflect the fact that he had been a partner in Moscow for five years with almost three years still to go. Attached to the e-mail was a summary of what he described as his "minimum expectations". So far as material, they were:

> "1. Profit Distribution
>
> a. Current Year
>
> b. Remaining agreement for 2.5-3.0 years (minimum) – I will give you numbers.

c. Years notice (same as termination for previous CMP)

d. Immediate return of Capital & treasury loans and all interest owed.

e. As I am an invalid I am unemployable so I need to be compensated for this!

2. Insurance ADD - Including

a. $1.5 Million for dismemberment

b. $300k per annum from insurance as according to EY I must not be physically or mentally able to do the perform my job (see insurance policies)

c. repayment of non covered injury expenses."

18. Mr Custance then proceeded to draft a letter to EY requesting them to pay the amount due under the AD&D policies subject to the claimant assigning to them his rights against the insurers. In his e-mail to Mr Lyons of 18 May 2007 Mr Custance referred to the draft letter and then said:

> "I have not looked in any detail yet at the emails you have sent through to me today. It appears as if Jim is now trying to progress things with insurers, but I assume this doesn't alter the plan to get something signed off by Philipp in relation to the AD&D claim as soon as possible. As we discussed yesterday, other matters are probably best dealt with separately as part of some form of overall 'deal' with E&Y."

19. The reference to Jim is to Mr James Mandel, EY's General Counsel, who was a lawyer with some experience of insurance matters. Together with EY's brokers he was involved during this period with both Mr Lyons's LTD and AD&D claims. The judge's assessment of this evidence was as follows:

> "90. My interpretation of this email is that the claimant and Mr Custance had spoken earlier about the best strategy for achieving the claimant's "minimum expectations". Mr Custance's time records refer to a 30 minute telephone call which took place between him and the claimant on the previous day and it is very likely that the email of 18 May 2007 was intended to reflect what they had then agreed. Indeed, the email makes specific reference to what had been discussed. In effect, the AD&D/misrepresentation claim was to be presented first as a standalone demand. The claimant's other demands in the event of his leaving EY were be presented in due course as part of an overall deal. This approach would have had its attractions. The claimant was frustrated by the time it was taking EY to advance his AD&D claim and wanted a speedy resolution. If the AD&D/ misrepresentation claim had been presented as part of a

> comprehensive leaving package then any payments thereunder might be delayed. Since any AD&D/misrepresentation claim was not dependent on the claimant's departure it could be progressed promptly and discretely.
>
> 91. Ms Irwin asserted that she had spoken to Mr Custance about LTD and that he had suggested that it should be left for another day. I am satisfied that Mr Custance did indeed agree that presentation of the LTD claim should be postponed together with all of the other "minimum expectations" other than the AD&D/misrepresentation claim. However, I do not accept that this strategy carried with it the implication that Mr Custance had agreed to extend his retainer so as to advise on the substantive merits of the LTD claim. It would, of course, have been open to Mr Custance to volunteer to provide advice on the LTD claim but that does not make it negligent of him to have omitted so to do and I am not satisfied, in any event, that the claimant would have agreed that such advice was to be given or paid for."

20. The letter which Mr Custance drafted was sent to EY on 21 May 2007. It proposed that the $1.5m compensation due in respect of the AD&D claim should be paid in three instalments over the next two years. The letter concluded by saying:

> "For the avoidance of doubt, this letter deals only with our client's AD&D claim. The other insurance claims arising from his accident will need to be addressed separately.
>
> We are copying this letter to Jim Mandel."

21. It is clear from the e-mails and the letter to EY that the presentation of the LTD claims and for that matter the claimant's other "minimum expectations" were to be postponed only in the sense of not being dealt with in the letter of 21 May. They remained essential elements in the ongoing negotiations about the severance agreement and were clearly intended to be dealt with as part of those arrangements. The judge found, however, that the strategy adopted as of 21 May of separating out the AD&D claim from the other elements in the negotiations did not involve Mr Custance being instructed to advise on the merits of the LTD claims or his agreeing to do so. The judge has also found that this position did not change at any point in the subsequent history of the negotiations leading up to the signing of the severance agreement in April 2009 or thereafter.

22. It is not clear to me quite what was envisaged in respect of the LTD claims assuming that Mr Lyons was successful in the severance negotiations in relation to compensation for the early termination of his existing employment. The evidence before the judge was that Mr Lyons had calculated his profit distribution claim under the partnership at $5.926m and that he had reacted relatively calmly to the rejection by Colonial in April 2007 of his LTD claim. The judge's finding was that Mr Lyons was keen in the negotiations with EY to downplay his disability:

> "98. I find that the reason that the claimant was content to present his LTD claim in this way was that, at this stage, he did not want baldly to assert that he was unable to do his job lest this could be

seized upon by EY as a point to its advantage in the negotiations for his departure. Indeed, the claimant appeared to have made a relatively good recovery at this time. Thus he was prepared to leave the LTD cover as a contingent issue in the event that the negotiations were to flounder whereupon he would then, and only then, contend that the only justification for removing him would be his disability and so he would be entitled to cover under the LTD policies. I am satisfied that if the claimant had asked Mr Custance to advise on the scope and operation of the LTD policy then at least some more specific reference to this would have appeared from the documentation. Indeed the point can properly be made that if Mr Custance had given early advice on the LTD policies, albeit not referred to in the email traffic, then the suggestion that later email exchanges and documents forwarded amounted to a request for such advice is undermined by the fact that any such request would have been redundant because substantive advice had already been given. On the other hand, if no such advice had been promptly given then there would be clear evidence that it had been expressly chased - of which there is none.

…

101. As is evidenced in many other emails, the claimant is not a man, either by instinct or inclination, given to the suppression of any feelings of surprise, disappointment or frustration. The matter of fact way in which he passed on and presented the Colonial LTD rejection letter demonstrates that he considered the contents to be uncontroversial and unworthy of tactical or legal consideration. The proper inference from this is that the claimant, at this stage, did not regard his level of disability to be one which was likely to engage the LTD policies and that his paramount concern in this context was simply to preserve his future LTD cover as part of any deal under which he might leave EY in the future. I do not accept the assertion of the claimant and Ms Irwin that they heard that the Colonial LTD claim was going to be rejected before they received the letter and discussed this with Mr Custance. Again, I would have expected that at least some reference to such a discussion would have appeared in the contemporaneous email traffic. I consider that the allegation that the news that the claim was being rejected had broken before the letter arrived was an attempt, in a way now consistent with the claimant's case, to rationalise the otherwise baffling insouciance with which he greeted its receipt.

102. I reject the claimant's case, and the evidence of Ms Irwin, that at this stage he asked Mr Custance to advise on the LTD policies. It is not simply that no such advice appears in the contemporaneous documentation (indeed, no such advice is documented relating to the Colonial/AGF AD&D or

> misrepresentation claims) but, more importantly, there is no clear and unambiguous reference in the emails passing between Mr Custance and the claimant to any such advice having been requested or given. I am further satisfied that the absence of any email from the claimant chasing advice on the LTD claim is not because such advice had been given orally but because it was neither requested nor given in the first place. I accept that the reference to "2 hours per day physio…Insurance…won't get a job – 300k dollars a year" in Mr Custance's note of a conversation with the claimant at about this time evidences only that the claimant was outlining his intended strategy and not that he was asking for advice on LTD policy interpretation."

23. By 2009 relations between Mr Lyons and EY had deteriorated and his medical condition had worsened. This combination of factors seems to have acted as a spur to the negotiations and the severance agreement was signed in April 2009 on the terms referred to earlier. The claims against Colonial and AGF under the LTD policies (which were not renewed following completion of the severance agreement) became time-barred in 2010. Shortly after completion of the severance agreement Mr Custance appears to have taken some advice from a Russian lawyer about limitation under Russian law but there appears to have been no further contact between him and Mr Lyons until 2011. The pursuit of the LTD claims in the meantime continued to be dealt with by EY.

24. The next involvement of the defendant occurred at the beginning of 2011 when Mr Custance e-mailed Mr Lyons in respect of some outstanding fees. This led to various e-mail exchanges in the course of which Mr Lyons told Mr Custance that EY were proposing to cancel his medical insurance under the CIGNA policy whose continuation had been part of the severance agreement. On 9 March 2011 the defendant issued proceedings on behalf of Mr Lyons against EY in the Chancery Division seeking specific performance of the severance agreement. On 26 April 2011 EY purported to terminate the claimant's CIGNA coverage. The claim form was then served on 14 June.

25. By this time it was also becoming apparent to Mr Lyons that the LTD claims which EY were handling were running into difficulties. For reasons which are not clear (and which do not matter for present purposes), EY seems to have looked to Generali to satisfy the LTD claims under the cover which commenced in July 2006. The insurer's position was that it had no liability to Mr Lyons because his accident had occurred prior to that date. But, as the judge found, the claim against Generali had not been pursued on the advice of Mr Custance who had never had any express or implied retainer to advise on LTD issues: see [175].

26. On 16 September 2011 EY made an application for a stay of the Chancery Division proceedings on jurisdictional grounds. The severance agreement was, they alleged, governed by Russian law and the dispute about the agreement should be tried in Russia. Mr Lyons took the position that any question about choice of law and jurisdiction should have been pre-empted by the inclusion of a suitable clause in the agreement adopting English law as the proper law of the contract and opting for the jurisdiction of the English courts. New solicitors were instructed and Mr Custance's retainer came to an end. Ultimately EY's challenge to jurisdiction was withdrawn and the claim was

settled in November 2012 in the sum of £1.3m plus costs. This included any claims against EY in respect of the LTD cover.

27. As part of these proceedings Mr Lyons sought damages against the defendant for their alleged negligence in failing to include a jurisdiction clause in the severance agreement. The damages sought included the costs of the litigation against EY and the difference between what he accepted in settlement of the claim and what he alleged he would have received had no dispute arisen.

28. The judge found that Mr Custance was negligent in failing to recommend that the severance agreement should include an English law and jurisdiction clause but held that it had caused no loss. Mr Lyons was aware that the agreement did not include such a clause but chose to proceed in any event and EY would not have agreed to such a clause. He also held that Mr Lyons had failed to establish that the settlement sum was less than it would have been had there been no dispute about the 2009 agreement.

29. He also dismissed the claim for damages in relation to the LTD claims because it was never part of the defendant's retainer to advise on these claims or how they should be preserved and prosecuted. By way of Reply Mr Lyons had pleaded that even if it was not part of Mr Custance's retainer to advise on the LTD claims, it should have been obvious to him from his involvement in the negotiations and from the documents he did receive that there was a danger that the claims would be lost if not made in time. He ought therefore either to have advised Mr Lyons how to protect his rights or at the very least to have warned him that he needed to get advice about his rights under the LTD policies.

30. The judge rejected the argument that Mr Custance had at least an obligation to warn Mr Lyons that he needed to take advice on the LTD claims. The judge did so in a relatively brief part of his judgment at the end of his detailed analysis of the facts and his assessment that it was not part of Mr Custance's retainer to advise on the LTD issues. It appears from [190] of the judgment that the way that the case was put to the judge differs from the way that Mr Chambers has explained it on this appeal. The judge was asked to consider whether Mr Custance should have warned Mr Lyons to have regard to the scope and validity of the LTD policies. In the written closing submissions for the claimant emphasis is placed on the need for Mr Custance to have made clear that he was dealing only with the negotiating strategy of getting EY to obtain payment under the LTD policies and was not advising Mr Lyons about what his rights under those policies consisted of. It was not suggested that because the retainer had been expanded to include the negotiations and Mr Custance had advised Mr Lyons to include the LTD in those negotiations rather than in the letter of 21 May, Mr Custance was under a duty at the very least to warn Mr Lyons that he needed to get legal advice about his LTD rights. The judge dealt with the law in this way:

> "191. Circumstances may indeed arise in which a solicitor comes under a duty to warn his client of particular risks which may not necessarily fall squarely within his retainer. The position is summarised in *Jackson and Powell* at para 11-173:
>
> > "There is generally a duty to point out any hazards of the kind which should be obvious to the solicitor but which the client, as a layman, may not

> appreciate. In *Boyce v Rendells* the Court of Appeal accepted the following as a general proposition:
>
> "if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks".

To similar effect Bingham LJ stated in *County Personnel (Employment Agency) v Pulver* that: "If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further"".

192. Further, in Credit Lyonnais SA v Russell Jones & Walker [2002] EWHC 1310 Laddie J observed at para 28:

> "A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. … [T]he solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions. In relation to this I was struck by the analogy drawn by Mr Seitler. If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him".

31. As a preliminary criticism of his approach, Mr Chambers refers to the fact that there is no reference in this passage to the judgment of this court in *Minkin v Landsberg* [2015] EWCA Civ 1152 which is currently the leading authority on this area of the law. But in his judgment in that case Jackson LJ quoted the passage at [28] of the judgment of Laddie J in the *Credit Lyonnais* case which the judge himself quotes at [192] above and then said (at [38]):

> "(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
>
> (ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
>
> (iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
>
> (iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
>
> (v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed".

32. This passage was itself quoted by Turner J at [57] of his judgment and was undoubtedly well in mind when he came to consider the question of duty to warn. The explanation for the references to the judgments mentioned and quoted from [191]-[192] is simply that they were the authorities specifically relied on by leading counsel for Mr Lyons in his written submissions on this issue.

33. The judge set out his reasons why in his view there was no duty to warn in this case in [193]:

> "193. In my view, Mr Custance did not become aware of a risk or potential risk to the claimant arising out of the LTD policies and it was not objectively unreasonable for him to omit to flag up any such risk to the claimant. I take into account the following factors:
>
> i) the claimant was an astute, focussed and commercially minded business man;

ii) the claimant, particularly with Mr Mandel's assistance, was clearly using Mr Custance more as a targeted resource than as a general legal adviser. There was no legitimate expectation at the material times that he would undertake any sort of analysis of the LTD documentation falling outside the scope of his original express retainer;

iii) as the claimant himself went on to say in his witness statement made for the purposes of pursuing a claim against EY, that EY "had been actively leading the claim on the LTD insurance";

iv) the LTD policies were legally distinct from the AD&D policies. Perusal of and advice upon the latter did not require any knowledge of the scope or terms of the former;

v) mere knowledge of the existence of the LTD policies against the limited background context of which Mr Custance was aware would not have put him on the alert that there was a problem or risk which ought to have been pointed out."

34. The judge therefore held that there had been no breach of any duty of care by Mr Custance and that the claim therefore failed on the issue of liability. But he went on to deal with quantum in the event that he might be wrong on the first issue. The claimant's case was that had he been given competent legal advice by Mr Custance about his claims under the two relevant LTD policies he would have been told that his injuries qualified him for compensation either on the basis of total or partial disability. Under the terms of the LTD policies this required him to demonstrate with medical evidence that both during the 12 month waiting or elimination period and also for the next two years he was unable to perform all the material and substantial duties of his occupation on either a full-time or a part-time basis. He would therefore qualify for compensation even if he was able to work part-time during this period.

35. The Colonial policy also stated that to qualify for partial disability benefit the insured must be earning less than 80% of his pre-disability earnings "at the time partial disability employment begins". Mr Lyons continued to earn 100% of his pre-disability salary up to 30 June 2009. The judge construed this as relevant only to the calculation of the compensation payable and not to the insurer's liability to pay. But he accepted that it would have been open to Colonial to argue that if Mr Lyons continued to be paid 100% of his salary throughout the waiting period his entitlement to LTD benefits would have been extinguished. It would therefore have been necessary for Mr Lyons to agree to reduce his salary during the waiting period to less than 80% which in his case would have required him to forego at least $140,000.

36. The judge's conclusion on quantum was that it was unlikely that Mr Lyons would have agreed to a reduction in his salary prior to early 2007 but that from 2009 he would have agreed to do so. He therefore had to weigh up the prospects of Mr Lyons succeeding in his claim for LTD compensation against the opposition of Colonial and AGF based on his continuing receipt of full salary until 2009. The judge thought that there was a 50% chance of Mr Lyons recovering the full value of his LTD claim which was

assessed as being worth $5.53m. He would therefore have awarded Mr Lyons $2,765,095 had he found that Mr Custance was liable in negligence for breach of duty.

37. Mr Lyons sought permission to appeal against the dismissal of his claim for damages in respect of the LTD policies. The grounds of appeal challenged both the judge's findings that Mr Custance had not been instructed to advise on the LTD claims as part of the defendant's retainer and his dismissal of the claim based on a duty to warn. Jackson LJ refused permission to appeal on the first ground but granted it on the second. This was presented as a pure question of law which does not involve any challenge to the judge's findings of fact about the scope of the retainer. It was said to depend on whether the issues concerning the LTD policies were so closely linked with the subject-matter of the retainer that Mr Custance should have volunteered advice about the policies and the time limits for the claims.

38. In the light of the grant of permission to appeal on this ground the defendant has also applied for permission to appeal against the judge's decision on quantum. But Mr Edelman QC made it clear in his written submissions that the cross-appeal would only become live if we were to decide to allow the appeal on liability. In the circumstances, I would make no order on the application for permission to cross-appeal.

39. I can turn therefore to the substance of the claimant's appeal. As already explained, this is put in two ways. The alleged duty to warn which is said to have arisen when Mr Custance advised that the LTD claims be dealt with separately from the 21 May 2007 letter as part of the severance negotiations was, on the claimant's case, either a duty to warn in substantive terms about Mr Lyons's rights under the LTD policies and what needed to be done to prevent them from becoming time-barred or was simply a duty to warn him that he needed to obtain legal advice about the LTD claims. Mr Chambers submitted that had a warning of the second type been given then his client would undoubtedly have agreed to Mr Custance giving that advice and the difficulties about the time limits would then have been discovered and acted upon.

40. The judge was not really asked to deal with this second formulation of the duty. The submissions made to him in closing concentrated on the various occasions on which Mr Custance had been made aware of the nature of the LTD claims and, for example, the rejection by Colonial of any liability under its policy. But this was relied on in order to support an argument that Mr Custance's agreement to give advice about the severance negotiations with EY really required him to take on the duty of examining the LTD policies in order to understand what were the terms and conditions of the LTD cover. Once appraised of that it then became incumbent on him, it is said, to warn Mr Lyons about the time limits and the need to reduce his salary even though the conduct of the LTD claims against the insurers were being handled by Mr Mandel and others at EY.

41. The difficulty about the first line of argument is that it seems to me to fly in the face of the judge's findings of fact about the scope of the retainer. It is, I think, worth emphasising that although cases like *Minkin* are often cited as authority in support of a legal duty to warn, they are in fact decisions about the scope of a solicitor's duty based on a particular retainer. As Laddie J explained in his judgment in *Credit Lyonnais* which was approved in *Minkin*, the solicitor's obligation to bring to the client's attention risks which become apparent to the solicitor when performing his retainer does not involve the solicitor in doing extra work or in operating outside the scope of

his retainer. The risks in question are all matters which come to his attention when performing the tasks the client has instructed him to carry out and which therefore as part of his duty of care he must make the client aware of.

42. Neither *Credit Lyonnais* nor *Minkin* are authority for the proposition that the solicitor is required to carry out investigative tasks in areas he has not been asked to deal with however beneficial to the client that might in fact have turned out to be. Mr Custance could not have advised Mr Lyons about his rights under the LTD policies or any relevant time limits in relation to the claims unless he had carried out a thorough examination of the policies and a certain amount of legal research. Although Mr Custance received documentation relating to the LTD policies including copies of the policies themselves, the judge has found that he was never instructed to do this and Mr Lyons has been refused permission to appeal against the judge's findings in this respect.

43. The answer therefore to the way in which the case was put to the judge is that the advice which Mr Custance was allegedly under a duty to give is co-extensive with his alleged retainer to advise on the LTD issues. The two therefore stand or fall together. If Mr Custance was never instructed to advise on the LTD policies he cannot have been under a duty to examine them in order to find out whether the position taken by EY or the insurers was correct and whether anything needed to be done to prevent the claims becoming time-barred. The judge has expressly rejected the submission that it was necessary for Mr Custance to examine the LTD policies as part of his retainer in respect of the AD&D claims or, for that matter, the severance agreement; or that Mr Custance did in fact become aware of a risk in relation to the LTD claims which should have been notified to his client. The judge was therefore correct in my view to reject the claimant's alternative case (as put to him) based on a duty to warn.

44. The second way of putting this alternative claim as developed before us also faces what in my view are insuperable difficulties both in terms of liability and causation. Permission was given for this appeal on the basis that there was arguably a direct link between Mr Custance's advice to "postpone" dealing with the LTD claims and a duty to preserve those claims during that intervening period. Mr Chambers submitted that the duty to give a suitably phrased warning to Mr Lyons that it was imperative for him to obtain advice on the LTD claims arose as early as May 2007 once Mr Custance had advised that only the AD&D claims should be included in the 21 May letter and the balance of Mr Lyons's minimum expectations should be dealt with in due course as part of the severance negotiations. It is said that what Mr Custance was advising was that the claimant should, so to speak, park the LTD claims pending negotiations over the severance agreement and that this made it incumbent for him to warn his client that the claims might have time limits and that he needed advice on how they should be handled and deployed in the negotiations. Had a suitable warning been given in these terms Mr Lyons, it is said, would have agreed to Mr Custance looking at the policies and giving such advice.

45. The difficulty about the claim, even as formulated in this way, is that it contradicts the circumstances in which the duty to warn is said to have arisen and Mr Lyons's likely reaction to any such warning. As is clear from the e-mails referred to earlier, further consideration of the LTD claims was not postponed to a later and indefinite date. The only advice which Mr Custance gave under his extended retainer was that the 21 May letter should deal with the AD&D claims alone. But the negotiations about the

severance agreement in which the LTD claims featured were ongoing and continued. Further consideration of the LTD claims was not postponed to some indefinite point of time in the future.

46. The judge has found that the discussions between Mr Lyons and Mr Custance which led to this strategy did not involve Mr Custance being asked or instructed to advise on the LTD claims. They continued, to the knowledge of both parties, to be dealt with by EY and the substance of the LTD claims against the insurers was not something which as part of the negotiating strategy with EY needed to be examined in any detail. EY clearly believed that the claims were viable and, as far as Mr Lyons was concerned, they only featured in the negotiations with EY about the severance agreement as back-up for his claim that he should be paid proper compensation by EY. The LTD claims themselves were against the insurers, not against EY, and Mr Custance was not asked to deal with the LTD claims against the insurers.

47. In these circumstances I do not accept that either the expansion of the defendant's retainer to include the negotiations on the severance agreement or the specific advice not to include any reference to the LTD claims in the 21 May 2007 letter triggered a duty on the part of Mr Custance to give a warning of the need to obtain advice on the LTD claims and any relevant time limits.

48. This alternative way of putting the case also fails, in my view, on the issue of causation. The judge has made a finding of fact (at [91]) that had Mr Custance offered to provide advice on the LTD claims Mr Lyons would not have agreed to his giving it or being paid for it. The claimant was relying on EY to negotiate his claims against the insurers and used Mr Custance as what the judge described as a targeted resource: see [193]. Further, I note that Mr Lyons did not renew his claims under the LTD policies (which were still within time) once the settlement agreement had been reached.

49. For these reasons, the judge was right in my view to have found that there was no legal duty to warn as alleged and that no liability on that basis was established. I would therefore dismiss the appeal.

Lord Justice David Richards :

50. I agree.

Lady Justice Asplin :

51. I also agree.