

# Duty to Warn in Co-extensive with a Solicitor's retainers

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**Cathal Anthony Lyons v Fox Williams LLP [2018] EWCA Civ 2347**

The Court of Appeal on 25 October 2018 dismissed an appeal which challenged a judge's finding that a solicitor was not under a duty to warn a client. In so doing, the appellate court has clarified that a duty to warn is co-extensive with a solicitor's retainer and cases often cited as authority in support of a legal duty to warn, are in fact decisions about the scope of a solicitor's duty based on a particular retainer.

DAC Beachcroft (Phil Murrin and Parminder Badhan) acted for the successful firm of solicitors and their professional indemnity insurers.

## Facts

Mr Lyons (the claimant) suffered significant injuries in 2006 whilst riding his motorcycle in Moscow. At the time he was Chief Financial Officer and Managing Partner of Operations of the Moscow arm of Ernst & Young (EY), with annual earnings of around US\$700,000. Mr Lyons was covered by EY's group insurance which consisted of cover under both Accidental Death and Dismemberment (AD&D) policies and Long-Term Disability (LTD) policies.

Mr Lyons sought to make claims under the policies assisted by others, with his immediate concern being the question of liability under the AD&D policies. In 2007 Mr Lyons retained the City law firm Fox Williams (FW) to obtain advice in respect of his AD&D claims, and this was reflected in FW's letter of engagement. It was common ground that the retainer was later expanded to include advice on the terms of a severance agreement (signed in 2009) pursuant to which Mr Lyons ceased his employment with EY.

The claims under the LTD policies (being handled by EY) became time-barred by 2010, and Mr Lyons sued FW in negligence for (amongst other things) failing to advise in respect of his claims under those policies. It was alleged that FW's retainer included advice to Mr Lyons on the LTD claims; alternatively FW came under a duty to warn him on LTD issues. The claim for damages in relation to the LTD claims was over US\$6m.

## Findings on scope of retainer and duty to warn

At first instance, Turner J held that there was no breach of any duty of care by FW and the claim therefore failed on the issue of liability. In summary, the judge found that FW had not been instructed to advise on the LTD claims as part of its retainer, and there was no duty to warn Mr Lyons that he needed to take advice on the LTD claims. In so doing, the judge had regard to cases including *Minkin v Landsberg* (2015) which is currently the leading authority on this area of the law, as well as *Credit Lyonnais SA v Russell Jones & Walker* (2002).

Regarding the scope of retainer, the judge found it was never part of FW's retainer (express or implied) to advise on the LTD claims or how they should be preserved and prosecuted. The letter of engagement did not cover advice on this issue, and the judge rejected much of Mr Lyons's evidence that in subsequent emails and in conversations it was expanded to include these matters. In particular, Mr Lyons' intention to use the LTD claims as part of his negotiating strategy with EY in relation to the severance agreement, was found not to extend the retainer to advice on the LTD claims.

## Appeal on duty to warn

Mr Lyons' appeal challenged the dismissal of his claim based on the alleged duty to warn (permission to appeal was refused against the judge's findings that FW had not been instructed to advise on the LTD claims as part of the retainer). This ground of appeal was presented as a pure question of law not involving 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 FW should have volunteered advice about the policies and the time limits for the claims (the first formulation of the alleged duty to warn). A second formulation of the alleged duty to warn (which the judge was not asked to address) was that there was simply a duty to warn Mr Lyons that he needed to obtain legal advice about the LTD claims.

The appeal was unanimously dismissed, on the basis the judge was right to have found there was no legal duty to warn as

alleged and that no liability on that basis was established. The first formulation of the alleged duty to warn was addressed by Lord Justice Patten (with whom the other justices agreed) in the following way:

[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. [FW] could not have advised Mr Lyons about his rights under the LTD policies or any relevant time limits in relation to the claims unless [it] had carried out a thorough examination of the policies and a certain amount of legal research. Although [FW] received documentation relating to the LTD policies including copies of the policies themselves, the judge has found that [it] 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 [FW] was allegedly under a duty to give is co-extensive with [its] alleged retainer to advise on the LTD issues. The two therefore stand or fall together. If [FW] was never instructed to advise on the LTD policies [it] 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 [FW] to examine the LTD policies as part of [its] retainer in respect of the AD&D claims or, for that matter, the severance agreement; or that [FW] did in fact become aware of a risk in relation to the LTD claims which should have been notified to [the] 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.

The second formulation of the alleged duty to warn was also considered by Lord Justice Patten to face insuperable difficulties both in terms of liability and causation, the latter on the basis the judge made a finding of fact that had FW offered to provide advice on the LTD claims, Mr Lyons would not have agreed to it giving it or being paid for it.

## Comment

Solicitors' duties are governed by the scope of their retainer, although it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. It is for this reason that matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer. The retainer encompasses a general duty to warn against particular risks which should be obvious to the solicitor but which the client may not appreciate.

It is not uncommon for claimants to argue liability based upon undischarged duties to warn, and solicitors and their professional indemnity insurers should welcome an appellate case where such attempts have failed. The Court of Appeal has also helpfully clarified that a duty to warn is co-extensive with a solicitor's retainer, and has emphasised that although cases such as *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.

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