[2022] EWHC 2252 (Ch)
Case No: BL-2020-LIV-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
BUSINESS LIST (ChD)

Liverpool Civil and Family Courts
35 Vernon Street,
Liverpool L2 2BX

Date: 27 July 2022

Before :

HHJ CADWALLADER

- -

Between :

CAROL MILLER — **Claimant**

- and –

IRWIN MITCHELL LLP — **Defendant**

- -
- -

Ben Elkington QC and William Thorpe (instructed by **Bond Turner**) for the Claimant
Andrew Warnock QC and Andrew Spencer (instructed by **Kennedys**) for the Defendant

Hearing dates: 5, 6 and 7 April and 27 July 2022

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JUDGMENT

HHJ Cadwallader sitting as a Judge of the High Court :

Introduction

1. In April 2014 Peter Miller booked a holiday for himself and his wife Carol, the claimant, with an online travel agency called Lowcostholidays Spain S.L.U. ("Lowcost"), a subsidiary of Lowcosttravelgroup Limited. It was an all-inclusive package holiday at the Summer Sun and Beach Hotel in Bodrum, Turkey, and included flights, accommodation, airport parking and transfers.

2. Lowcost did not own or operate the hotel but booked it through a third party known as LTS, which operated as an intermediary between Lowcost and the hotel. It was LTS, rather than Lowcost, which had representatives in Turkey.

3. On 1 May 2014 Mr and Mrs Miller flew to Turkey for their holiday. They had arranged travel insurance with 'Top Dog' insurance. On 13 May 2014 they had their evening meal at the hotel restaurant, which was at first floor level. In order to return to their hotel room, they had to walk down a flight of steps. Mrs Miller fell and broke her left leg badly, suffering an open fracture. She claims that her accident was attributable to the hotel's breach of local standards, and that in consequence Lowcost was in breach of contract. That is not an issue for determination at this stage, however.

4. Mrs Miller went with her husband to hospital in an ambulance. She needed an emergency operation to avoid permanent damage. She underwent surgery in the early hours of 14 May 2014, and they returned to the hotel that morning, where they spoke to the hotel manager, and Mr Miller showed him the steps where the accident had happened. Through their travel insurer, Mr and Mrs Miller arranged an alternative flight to take them home on 15 May 2014. She went to

the James Cook Hospital in Middlesbrough, which assessed her and put her in for an x-ray on 19 May 2014, a Monday, but her condition had deteriorated over the weekend and on 19 May 2014 she was kept in hospital. While she was there, she saw a television advertisement for the defendant's Legal Helpline and she called it on 19 May 2014, leaving a message and asking for a call back. The same day Ms Victoria Halliwell called her back. Ms Halliwell was a Legal Helpline advisor. She told Mrs Miller that she was referring the matter to the defendant's Travel Legal Group.

5. Ms Halliwell then referred the matter to Ms Victoria Pegg at the defendant's International Travel Litigation Group ("ITLG"), and on 20 May 2014 Ms Pegg left Mrs Miller a voicemail message, and sent her a letter.

6. Mrs Miller suffered a chronic infection in her injured leg requiring regular attendance at hospital, and she underwent a number of further operations and admissions to hospital. Her son-in-law, Darren Holt, had some contact with the defendant in the meantime. Unfortunately, Mrs Miller developed serious complications, as a result of which in November 2015 her leg was amputated above the knee. Her claim was therefore passed on to a team dealing with higher value claims and by January 2016 the matter had been transferred to Lesley Edwards in the defendant's multitrack team. On 25 January 2016 Ms Edwards sent Mrs Miller the conditional fee agreement that the defendant was willing to enter into with her. On 22 February 2016 Ms Edwards sent a letter of claim to Lowcost containing the following passage.

> "Please confirm the identity of your insurers. Please note that your insurers will need to see this letter as soon as possible and it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if

> you do not send this letter to them. For this reason, a copy of this letter is attached for you to send to your insurers. Please do so immediately."

7. Lowcost forwarded the letter of claim to its insurer, HCC International Insurance Company PLC ("HCC"). On 8 March 2016 HCC wrote to the defendant reserving its position pending further information. On 11 March 2016 Plexus Law wrote to the defendant on behalf of Lowcost asking among other things whether Mrs Miller had reported her accident to Lowcost at the time. She said she had not, and on 13 April 2016 Ms Edwards emailed Plexus to say so. On 28 April 2016 HCC wrote to Lowcost declining to indemnify it in respect of claims arising from the incident on the ground that although Lowcost had been formally notified of the claimant's accident by LTS on 15 May 2014, Lowcost had failed to notify HCC of it until March 2016 (a delay of nearly 2 years), so that Lowcost was in breach of General Condition 7 of its insurance policy, which was a condition precedent to its insurance. On 21 July 2016 Plexus informed the defendant that cover had been declined, and added for good measure that Lowcost had gone into administration. The defendant instructed counsel, who advised that HCC was entitled to decline cover. The defendant agrees with that. On 7 March 2017 the defendant wrote to Mrs Miller stating that due to the decision of HCC and the administration of Lowcost "there is no viable source of compensation for your claim and we will be unable to proceed with it". On 28 April 2017 the defendant wrote to Mrs Miller confirming that it was closing its file. Unable to prosecute her claim against Lowcost, Mrs Miller now seeks a remedy against the defendant in these proceedings.

Summary of issues

8. The claimant's case against the defendant is in summary that in breach of duty to her the defendant failed to advise her to notify Lowcost of her claim or the circumstances giving rise to it, and itself failed to notify Lowcost of those matters; that if it had done so, then shortly after 19 May 2014 Mrs Miller would have written to Lowcost to do so or instructed the defendant to do so on her behalf; and if that had been done, Lowcost would have notified HCC, and HCC would have indemnified Lowcost for its liability to the claimant; but that because it was not done, Mrs Miller lost the opportunity to recover compensation for her injury. She claims damages for that.

9. The defendant's case is in summary that it was not in a position to take any steps in connection with Mrs Miller's case until 8 April 2015 when it received sufficient documents to carry out a conflict check, establishing that it was able to act for Mrs Miller; that Mrs Miller had not entered into a retainer with it until 25 January 2016; that the defendant owed her no duty before a retainer was entered into; but even if she had been advised as she said she should have been, Mrs Miller would neither have written to Lowcost notifying it of her claim, nor have instructed the defendant to do so on her behalf. It denies that even if Lowcost had been notified, it would have notified HCC; and alleges that even if Lowcost had notified HCC, the insurance policy had an annual aggregate deductible of £560,000 of which only £8000 had been paid at the time of Lowcost's administration, so that no payment could have been made.

Preliminary issues for determination

10. The matter was listed before me for 3 days before the trial of the following preliminary issues.

i) Whether, and if so the date on which, a contract of retainer between the claimant and the defendant was formed or a like duty assumed

ii) if such a retainer was formed or a like duty assumed, the terms and scope of the retainer between the claimant and defendant at the point it was formed and, if relevant, the point at which the scope of the retainer changed

iii) if such a retainer was formed or like duty assumed, whether the defendant had an obligation to take steps to notify Lowcost and/or advise the claimant to notify Lowcost of the claimant's accident

a) during the initial call between the claimant and the defendant on 19 May 2014; or

b) on or before 8 April 2015 when the defendant received the claimant's documents, and if so when; or

c) before the letter of claim was served on 22 February 2016; and if so, when.

iv) Whether the defendant acted in breach of the duties identified at issues i) and ii);

v) whether Lowcost's insurance policy would have responded to the claimant's claim had it been notified:

a) immediately following the initial call between the claimant and the defendant on 19 May 2014; or

b) between 8 April 2015, when the defendant received the claimant's documents and 22 February 2016, when the letter of claim was served

vi) [omitted]

vii) the proper construction and effect of the annual aggregate excess clause within Lowcost's policy with HCC

viii) what information the claimant provided the hotel and/or Lowcost and/or Lowcost representatives and/or any other relevant third party about the accident and when.

The trial of the preliminary issues

11. At the trial of those issues, I heard evidence from Carol Miller and her husband Peter; and from Fawad Mir, Alex Lloyd, and Louise Strutt on behalf of the defendant. No evidence was given on behalf of the defendant by Miss Halliwell, Pegg or Edwards.

12. The summary of the facts which I have given so far is uncontroversial. It is now time to consider the course of events in greater detail.

The facts as documented

Accommodation invoice and voucher

13. The holiday was to start on 1 May 2014 and to finish on 15 May 2014 as appears from the accommodation invoice and the flight summary. The accommodation voucher sets out the in resort contact details. It says,

> "In the unlikely event that you experience any issues whilst away, would ask that you please initially speak to reception to see if they can resolve your query. If they cannot assist you, please contact us straight away… To speak to a member of our team who will be happy to help you as much as possible. Lowcost Holidays Spain S.L.U. and Lowcostbeds.com AG do not provide representatives in resort…"

Thus, Mr and Mrs Miller had been directed to speak to the hotel or, if it could not help, to Lowcost in the event of difficulties.

Holiday terms and conditions

14. Lowcost's terms and conditions for the holiday contained the following relevant passages.

> "Although [Lowcost] are a Spanish company, we are happy to make our terms and conditions for our customers in the UK subject to English law and the jurisdiction of the English Courts. This is to help you be certain of your rights."
>
> "Your contract and any matters arising from it will be governed by English law and any disputes will be dealt with in the courts of England and Wales."
>
> "If you book a flight with accommodation and/or other travel product(s), we voluntarily accept that this is a "Package" falling within the Package Travel, Package Holidays and Package Tours Regulations 1992 ("the Package Travel Regulations'). We voluntarily accept this because strictly speaking they are not packages."
>
> (The parties to these proceedings agree that those Regulations apply.)
>
> "Complaints. If you are not satisfied with any aspect of your Package you must complain immediately to the relevant supplier – i.e. airline or hotel reception – in writing and keep a copy. If they are unable to resolve your issue immediately please and [sic] contact the 24-hour emergency phone number shown on your travel documentation. If you do not do this, neither we nor your suppliers have the opportunity to put matters right. If you fail to discuss complaints with either your supplier or us while you are away this is likely to affect adversely your rights to compensation. If, having complained and spoken to us, matters are still not resolved to your satisfaction please then immediately upon your return, and in any event within 28 days, write to us at the address shown at the start of these booking conditions or by email to customerrelations@lowcostholidays.com giving your booking reference and copies of all other relevant information."

Thus, again, in the event of difficulties Mr and Mrs Miller had been directed to speak to the hotel or, if it could not help, to Lowcost.

Notification to Mailbox in Resort

15. At 09:23 on 15 May 2014, the day after Mr and Mrs Miller returned from hospital to the hotel and spoke with the manager, LTS (the intermediary between Lowcost and the hotel) emailed an address described as "Mailbox in Resort". This was agreed to be the email address of the local representative of LTS, and I take it that the email was the result of communication between the hotel manager and LTS. It was assigned high importance. The email read "Guest's leg was broken so they have to stay in hotel longer, normally their c/out is today. Please could you call them and send me their extension ASAP". The response, at 12:44 was as follows, "we've have [sic] spoken to guest and will be travelling back today as normal. As the guest has informed me that the accident happened in hotel restaurant, I will need a full report from hotel when and how it happened. Please could you lease [i.e. liaise] with hotel for this information". Thus the local representative of LTS asserts they have spoken to the Millers who have told them something of the circumstances of the accident. The response to that at 13:42 was, "They [that is, the hotel] will make late checkout as free of charge and hotelier will send report regarding this issue, I will forward asap". There is no evidence that the hotelier ever did send a report.

Lowcost's insurance policy

16. It is not in dispute that the policy which was in evidence before me covered Lowcost. The schedule to the insurance policy of Lowcost mentioned, as the insured, several companies, including some mentioned by reference. The period

of insurance ran from 28 September 2013 to 27 September 2014. For public/products liability, the limit of liability was stated to be £10 million for any one occurrence, and in the annual aggregate in respect of products. The Excess was stated to be "Non Ra[n]king £10,000 per person (Inclusive of Costs) with an annual aggregate of £400,000". There was an endorsement dated 26 September 2014 extending the insurance to 31 January 2015 and altering the aggregate retention to £560,000 for the policy period.

17. The general exclusions from liability provided that HCC would not be liable for the Excess(es) stated in the Schedule, and General Condition 4 provided that HCC would not make any payment until such time as the Insured had paid and exhausted the Excess.

18. It is agreed between the parties that on the face of things the policy would have responded to a claim in respect of Mrs Miller's accident had HCC been notified promptly. General Condition 7 read, so far as relevant, as follows.

> "It is a condition precedent to insurers' liability under this Insurance that the Insured [i.e. Lowcost] shall immediately… give written notice to Insurers of the occurrence of any Bodily Injury or damage to Property, or of any circumstance(s) that might give rise to a claim against the Insured, and for which there may be liability under this insurance."

It is common ground that a provision of this kind is standard in such policies. It is because Lowcost did not give prompt notice of Mrs Miller's injury that it was uninsured in respect of it.

The Irwin Mitchell television advertisement

19. The advertisement to which Mrs Miller responded was played in court. Effectively, it was an invitation to ring the Legal Helpline to see if the defendant could help.

Mrs Miller's initial call to the Legal Helpline: 19 May 2014

20. The note of the call made on behalf of the defendant is available. It is dated 19 May 2014 and records a telephone message from Mrs Miller at 13:39 to the effect that she would like a call back about an accident she had in Turkey where she sustained a broken leg. The note refers to an inbound document attached to the record, which is likely to be a recording of that telephone message, since no other document has been identified. The note records that at 13:55 the practice area had been identified as ITLG and that at 14:00 Ms Halliwell returned Mrs Miller's call. She made a note of the facts recounted by Mrs Miller, including that the accident happened on 14 May 2014; that she had broken her leg and that there had been an open rip of 20 cm in her leg; that she required surgery; that following her return to the UK the leg looked likely to be infected and that she had an appointment on 20 May 2014 to see the orthopaedic doctor; and that she was on a package holiday booked with Lowcost Holidays in Turkey. Under the heading 'advice', she records Mrs Miller was advised of the scope of the Legal Helpline; was given some account of personal injury law in terms of duty, breach and causation, and that there was a three-year limitation period; and, as was common ground, that the call ended by Ms Halliwell stating that she would refer the matter to the ITLG of the defendant.

The Legal Helpline Proforma

21. I was referred to a document of the defendant entitled LEGAL HELPLINE PRIVATE REFERRAL PROFORMA: Personal Injury (ITLG). It was a form for the use of helpline advisors. The guidance notes in it contain the following passages:

> - "In order for the caller's legal service options to be dealt with as quickly as possible the legal advisor will complete this form to capture information on the legal matter
> - The legal advisor will provide legal advice as required to explain the reasons for capturing the information on the form in order to complete the initial assessment
> - Capture of the information at the initial stage will assist with the practice area completing a further detailed assessment should the caller agree to instructing Irwin Mitchell".

22. The Proforma which Ms Halliwell completed as a result of the initial call with Mrs Miller was in evidence. It described her both as a caller and as a client. The information recorded included the name and address of the hotel, the departure date and return date, the name of the tour operator and travel agent, the fact that the holiday was a special occasion (being a late Christmas present), the number of persons in the party, the date of the accident, the fact that the injury sustained was a fractured leg with ongoing problems, and that Mrs Miller did not know how long it would take to make a full recovery. The record of the call to which I have already referred formed part of section 2 of the Proforma.

23. Section 1 of the Proforma recorded the fact that Mrs Miller had no other solicitor. Moreover the form contained the question whether there were tour representatives in regular attendance at the hotel, and whether she complained to the tour representative regarding the accident, and if so what was the response, whether she filled in a complaints or accident report form, and

whether Mrs Miller had any letter which she had sent or received from the tour operator. Those parts of the Proforma were not completed.

24. Towards the end of the form, under the heading "Legal Advisor Assessment Outcome: Service Proposal", was a tick list, which was uncompleted, opposite a list of things which the legal advisor might or should have done. Among those were the following.

> "Legal Advisor has identified the correct area of law and legal need for the customer
>
> Legal Advisor has confirmed all relevant information captured on Proforma
>
> Legal Advisor has explained reasons for capture of information and assessed the enquiry
>
> Legal Advisor has provided initial legal advice as required to engage with the customer
>
> Legal Advisor has provided information on colleagues in the specialist practice area teams".

25. Finally, under the heading "Service Options Menu", the Proforma recorded that Mrs Miller's enquiry fell into the category of an accident claim within the target jurisdiction, which was either a fatality or an injury exceeding 4 weeks' length, had been assessed as suitable for referral, and was allocated to the Birmingham Fast Track contacts team. The Proforma was completed by Victoria Halliwell and the copy before me is dated 8 April 2015, although that seems likely to have been the date when the form was reprinted, rather than when it was completed, in view of subsequent events: I take it, and I understood it to be agreed, that it was completed on the day of the call.

Referral onwards, and response: 19 or 20 May 2014

26. On 19 or 20 May 2014 the matter was referred to Victoria Pegg. Her file note, which was recorded as having been typed on 20 May 2014, headed with a file reference ending 001 (PB). That suggests the opening of a new electronic file. The initials PB were probably, according to the claimant, and as I accept, a reference to Philip Banks, the supervising partner. As the claimant points out, he is still with the defendant, and in fact signed the statement of truth on the Defence, but was not called to give evidence.

27. The file note referred to an outgoing telephone call from Ms Pegg to "client/client's advisors" for the purposes of updating the "client". It recorded the telephone call went straight to voicemail, and that Ms Pegg had left a message with her details, requesting a call back. I have no doubt that the reference to client/client's advisors was a standard reference available to those filling in a file note, rather than Ms Pegg's own words, since she knew from the Proforma that there were no advisors of the client, unless it be the defendant.

28. On the same day, she wrote a letter to Mrs Miller on the defendant's headed notepaper, heading the letter "INJURY CLAIM. INCIDENT DATE: 14 May 2014". It referred to her having unsuccessfully attempted to contact Mrs Miller by telephone and asked her to call back "so we can discuss your accident in more detail". It went on to say,

> "In the meantime, may I take this opportunity to thank you for approaching Irwin Mitchell to act on your behalf. I was sorry to hear of your accident.
>
> In order for me to accurately assess the prospects of your case and to establish whether we will be able [to] achieve a successful outcome for you, I will need copies of all documentation relevant to the accident."

Among the information sought was insurance documents, in case legal expenses insurance could be used to fund the case, which would be explained in more

detail "once we have the opportunity to fully investigate the method of funding". It also asked for "Any complaint forms which you may have completed following the accident" and "Any complaint letters you may have sent to the Tour Operator, and their responses". The letter concluded,

> "Please feel free to contact me if you wish to discuss any of the above or if you have any queries. I have enclosed a prepaid envelope for your convenience.
>
> Once I have taken the opportunity to review the above documentation, I will contact you to discuss whether we are able to accept your case."

It is noteworthy that it sought any complaint forms and letters, and any responses. I would not accept that the letter assumed that Mrs Miller had completed complaint forms notwithstanding that by email letter dated 23 October 2020 its solicitors asserted that the defendant had done so (presumably with a view to alleging that it was entitled to do so), and that by its Letter of Response dated 10 August 2020 to the Letter of Claim its solicitors asserted that the letter dated 20 May 2014 assumed it. It is perfectly possible that Ms Pegg had made such an assumption; but her letter does not proceed upon that basis, because it refers, for example, to "any complaint forms which you may have completed" [my emphasis].

29. In my judgment, the request was made for the purpose, not of getting to a position where advice might be given about whether the insurer had been notified or ought to have been notified, but as a means of gathering the most contemporaneous evidence of the way in which the accident was described. As the evidence made clear when the letter of claim was served, it was not the practice of the defendant to require that information until that stage; and how rapidly one reached that stage, if at all, would depend upon the provision of

information, and the conduct of conflict checks which had not yet been provided or undertaken.

Follow up: 7 July 2014

30. On 7 July 2014 Ms Pegg wrote to Mrs Miller again to ask for the documents as soon as possible. In cross-examination, Mrs Miller explained that it was not she who was dealing with the documents, but her son-in-law Darren, who was working full-time, and awaiting and considering documentation from third parties (this is borne out by the file note dated 5 August 2014 to which I refer later). The delay was not attributable to any indecision on her part whether to use the defendant's services. I accept this evidence.

Follow up: 22 July 2014

31. On 22 July 2014 Ms Pegg wrote again, saying unless she heard from Mrs Miller within the next 14 days, she would close the file. The letter contained a passage in bold type stating,

> "You must be aware that no action has been taken by my firm to establish what limitation period would apply to your claim or to protect your right to take any legal action in any jurisdiction".

Mrs Miller accepted that she would have seen this letter, though she did not remember the warning message in bold type. She did not remember what happened about the letter. She rejected the suggestion that the failure to respond promptly to the defendant's enquiries showed that she would not have contacted Lowcost even if she had been advised to do so. I accept that evidence. It is inherently plausible. There is a substantial difference between being told that it is urgent to contact Lowcost and/or its insurers to preserve insurance cover in

order to protect payment of claim (which is more or less the opposite of what she was actually told later, which was that it did not matter), and being asked for documentation in order to get the process going, when she was in and out of hospital, as I accept she was, (and as the file note dated 5 August 2014 records Darren as having told Ms Pegg).

Timesheets

32. At this point, it is relevant to consider the defendant's timesheets, which for present purposes have been printed from its electronic systems. They consist of a number of headings, including for the work date, fee earner name, work hours, work rate, work amount, no charge, WIP (i.e., work in progress) rate, WIP amount, billed, invoice number, time type, and narrative. The timesheets record, among other things, chargeable work done, the fee earner, and the amount chargeable. In Mrs Miller's case they date back to well before the date upon which she entered into the conditional fee agreement. There is no suggestion that any of these charges were billed at the time, and I take it that they were not. Nor could there be any suggestion that the defendant could have billed Mrs Miller for any of this time at the time: no agreement about fees had been made between them, and there might never be any such agreement.

Conversation with the claimant's son-in-law: 5 August 2014

33. By a further file note typed on 5 August 2014 under the same reference, Ms Pegg recorded missing, and returning, a telephone call from Mrs Miller's son (actually, her son-in-law) Mr Darren (not Kevin) Holt. It records that he told her that he was calling in response to the defendant's 14-day letter of 22 July 2014 to say that Mrs Miller had not had a chance to respond to date as she had been

going in and out of hospital. Ms Pegg said that to assess whether there was a claim for the defendant to pursue, she would need to speak with Mrs Miller, as well as having the documentation for which she had asked. The note continues,

> "He advised that he contacted the travel insurance LEI - they confirmed she was covered but she did not have freedom of choice of solicitor - I asked if he could please send over the policy booklet and I would be able to check if there is anything we can do - either request permission to act/specific type of CFA to offer to her.
>
> He advised that she called initially regarding her fall - he advised that she has now discovered that the surgery she had in Turkey was performed incorrectly -apparently the bones were left as two points and the doctors here have told her that they will not knit together like that - she has had to have a 13 hour operation since getting back to the UK and is likely to need two more - she has had to have 4 cm of bone removed to fix what they did wrong.
>
> I advised that we would be able to look into this for her - I would need any documentation given to her at the Turkish hospital and then any documentation from the hospitals in the UK - he advised that they have asked her doctor to write a letter with his opinion - he will send this as soon as it is received."

So at this stage the defendant became aware that the value of the claim was likely to have increased, and that there might be a medical negligence claim relating to Mrs Miller's care in Turkey.

Conversation with the claimant and her son-in-law: 15 August 2014

34. On 15 August 2014 a further file note records that one Amerinder Paul rang Mrs Miller to see if there was any update on the documents which were still awaited, and she passed him on to Darren Holt, who said that he actually had all the documents but was waiting for a specialist opinion letter so that he could include it in the claim. He wanted to pursue two claims, one for clinical negligence in Turkey, and the other for personal injury from the accident.

35. The defendant continued to chase the documents from time to time, including contact from Mrs Miller's daughter, Danielle. In her oral evidence, Mrs Miller was unable to explain why the documents were not sent, and why, as it appears, the defendant was not getting responses to these enquiries. I infer that it was because the individuals in question were busy, and that there did not appear to be urgency. I understood that to be Mrs Miller's evidence too. Certainly, nothing the defendant had said had indicated that there was urgency. Mrs Miller's evidence was, and I accept, that she herself was not dealing with the paperwork, but she was unwell, and concentrating on that. She does appear to have seen at least some of the paperwork at some point, but she was unable to assist with when that happened. She did not dispute, but did not remember, receiving messages herself from the defendant on, for example, 9 April 2015.

26 February 2015 -1 May 2016

36. By February 2015 the defendant must have been thinking about closing the file. On 26 February 2015 a file note records a case management discussion actioned by one Helen Phillips from which it appeared that there was a small balance of WIP on Mrs Miller's file so that it could not be closed. At some point it appears to have been written off, and the file was then closed. A new file (with a number ending 002) was opened on or about 8 April 2015 when a conflict approval check had been completed and Darren Holt eventually supplied the defendant with the booking documents it had been requesting since May 2014.

Supervisory file reviews

37. On 1 May and again on 16 June 2015 Mrs Miller's file was subject to a supervisory review, on the ground (as the PI file review form recorded) that

there had been no time recording in over 28 days. The case handler was still Victoria Pegg. Various proposed corrective actions were summarised, including (on 16 June) emailing counsel to request advice on documents as per a discussion on 5 May 2015. The guidance which it recorded was that there was a need to keep on top of this new enquiry to convert it as soon as possible to a retainer or close it.

Action following review of booking documents

38. On 19 June 2015 Ms Pegg wrote to Mrs Miller having reviewed the booking documents, saying that she wanted to seek advice from a barrister as to whether the holiday qualified as a package holiday, and asking for the Top Dog insurance policy booklet. In her oral evidence, Mrs Miller did not remember that letter, but agreed readily that she had not discussed how the claim would be paid for. The defendant chased the policy booklet again by letter dated 8 July 2015.

Counsel's advice

39. Ms Pegg wrote again to Mrs Miller on 21 September 2015 to confirm that she had received advice from the barrister instructed by the defendant that under the terms and conditions of her booking, Lowcost accepted contractual liability for personal injury as a result of negligence by suppliers, that is, the hotel so that the defendant would pursue a claim for breach of contract against Lowcost accordingly. However, in order to proceed they still needed to establish funding for her claim. Ms Pegg had reviewed Mrs Miller's travel insurance but it excluded cover for legal expenses claims against a tour operator. So she asked if there were any other legal expenses insurance. If not, then the defendant was

happy to offer her a CFA, the nature of which she explained briefly. If Mrs Miller was interested in entering into a CFA, Ms Pegg would send her out the necessary documents.

40. In her oral evidence, Mrs Miller said she remembered something having been mentioned about Top Dog, but she did not understand why the solicitors were asking about insurance, and she did not realise that an agreement was needed for them to be paid. She accepted she had not agreed anything at this stage.

Ambit of proposed CFA: 1 October 2015

41. On 1 October 2015 Mrs Miller responded to ask whether the CFA was about her claim against Lowcost only, or whether it would include the medical negligence claim. Ms Pegg confirmed that the CFA was only being offered in respect of the claim against Lowcost, but said she would check whether the defendant could assist with the claim for medical negligence. She did so, but a file note of the same date records that it was considered uneconomic to pursue the medical negligence claim, though there was a hope that any compensation she recovered from the claim against Lowcost would be the same as if she had pursued a medical negligence claim. In oral evidence, Mrs Miller accepted that she did not now remember this call. Having been able to observe her giving her evidence, I accept that she did not recall it while giving her evidence. However, her witness statement refers to her remembering it particularly. I accept that at the time of the statement she did. In her statement she says that Ms Pegg said that they did not want to rush things, and that they would not do so in a case which involved only a broken leg, which was when she told her about the amputation. I accept this evidence too though not the sense that Ms Pegg was

treating a broken leg as if it did not matter. From Ms Pegg's perspective, given that there were ongoing problems, although she did not know about the amputation until she was told, there would have been no particular hurry, subject to limitation. In her oral evidence Mrs Miller said that both she and Ms Pegg were at fault, and that Ms Pegg had not exactly rushed to look after her. In my judgment that is not a fair assessment: I do not find Ms Pegg to have been at fault since she had made extensive attempts to obtain the documents from Mrs Miller.

42. Mrs Miller also said in her oral evidence that as far as she was concerned, she was concerned only to make a claim against Lowcost. I accept that this is now her recollection, but it is plain from this file note that she is mistaken, and that she was at the time interested in a claim for medical negligence too.

Transfer to multi-track team; amputation: October – November 2015

43. On 3 November 2015 Mrs Miller called Ms Pegg for an update and explained that she was now going to have her leg amputated. She explained that she had only been told a couple of days beforehand. I accept this. She cannot be criticised for not having mentioned it to the defendant earlier. In this call Mrs Miller agreed to proceed against Lowcost alone, under a CFA. Ms Pegg explained that her injury was a lot more serious than the defendant had first thought, she would have to pass a claim onto a different team. So far as the defendant was concerned, this was the first reference to a potential amputation.

44. On 9 November 2015 Ms Pegg called Mrs Miller to confirm the position. Accordingly, at about this stage the matter was transferred from the fast-track

team to the multitrack team. The operation to amputate Mrs Miller's leg took place in November 2015.

Contact from the multi-track team; admitted retainer: January 2016

45. Lesley Edwards, of the multitrack team, then contacted Mrs Miller on 22 January 2016 to explain she would be dealing with her case and asked about the current position and sought a meeting.

46. On 25 January 2016 she wrote to her saying,

> "Thank you for choosing Irwin Mitchell as your legal advisors to support and represent you with your claim.
>
> We are pleased to inform you that we are ready to proceed with your claim. The next step is to complete the funding arrangements which will enable us to help you fund your legal costs."

She then explained about the CFA.

47. It is at this point that, according to the defendant's pleaded case, a retainer first arose, and that, for the first time, the defendant owed the claimant any duty. As I have already found, certain limited duties had already arisen. But I accept that at this stage, Mrs Miller had communicated her decision to instruct the defendant, and the defendant had communicated its willingness to accept those instructions, subject to funding.

Conditional Fee Agreement

48. A draft CFA was prepared the schedule to which identified Mrs Miller's claim as falling into the medium risk category so that the stage 1 success fee would be 50%. The key factors for the medium risk category were described in the schedule to the draft CFA in the following terms.

> "We have some independent evidence in addition to client testimony. The identity of defendant is known or obtainable but it is likely that they will raise a defence to claim on liability."

The percentage prospects of success assessed for Mrs Miller's case were 60% to 75% for stage 1. Stage I was defined as relating to cases settling at any time prior to 3 months from (that is, before) the date of the trial or the date of the trial window. After that would come stage II, for which the success fee would be 100% if the claim then settled or was successful at trial. There was also a form for Mrs Miller to sign, by which she would confirm that she had instructed the defendant to represent her in relation to her claim under the CFA and to start work on her case immediately. The CFA was signed and dated 25 January 2016.

49. The terms of the CFA expressly set out that it covered all work that the defendant had done from the date when Mrs Miller first instructed it up until now, and from then onwards. In other words, it expressly contemplated that Mrs Miller might have instructed the defendant before the CFA was signed. Mrs Miller's case is that she did so from the moment that she telephoned their helpline.

Letter of claim: 22 February 2016

50. On 22 February 2016 the defendant wrote a letter of claim to Lowcost on behalf Mrs Miller. The letter contained the passage to which I have already referred requiring them to notify their insurers immediately.

First contact with Lowcost: 3 March 2016

51. On 3 March 2016 Belinda Dunne of Lowcost emailed Wayne James, the claims handler, with a copy to Fawad Mir, sending him the letter of claim, together

with the booking documents and reservation details, and saying that she had started an investigation with the hotel and would forward any evidence of receipt. This was the first contact between the defendant and Lowcost.

52. On 8 March 2016 HCC wrote to the defendant preserving its position in respect of policy coverage pending further information, and asking whether Mrs Miller had reported the incident to their insured at the time, and if so, asking for details/copies of any correspondence.

53. On 11 March 2016 Lesley Edwards wrote on behalf of the defendant to Mr Miller asking whether he or Mrs Miller had had any contact with Lowcost about the accident before the defendant's involvement, saying (ironically enough, as it now appears) that it did not matter whether or not they had.

The claim collapses: April 2016

54. Plexus Law also wrote on 11 March 2016 to say that they had been appointed to represent Lowcost.

55. On 13 April 2016, as I have already mentioned, Mr Miller telephoned to confirm that he and his wife had not contacted Lowcost about the accident. It is submitted on behalf of the claimant, and I accept, that this is good evidence of what the claimant would have said if she had been asked the same question in 2014 or 2015: she would have said they had not contacted Lowcost. They had, however, contacted the hotel, and (as I infer from its emails) LTS.

56. On 13 April 2016 Ms Edwards passed on to Michael Gwilliam of Plexus Law the information that the Millers had not contacted Lowcost about the accident. It was on the basis of that information that Mrs Miller's claim collapsed. On 28

April 2016, Mr James, the claims handler at HCC wrote to Lowcost noting that LTS had been informed of the incident on 15 May 2014, and had informed Lowcost on 15 May 2014, but that HCC had not been informed until 3 March 2016 (nearly 2 years later) following the letter of claim. The letter explained that as a result of a clear breach of General Condition 7, the underwriters were no longer prepared to provide an indemnity to Lowcost in respect of any claims arising from the incident, and Lowcost should consider itself to be uninsured.

57. At that stage, of course, the defendant was unaware of this. On 22 June 2016 it wrote to Mrs Miller to ask her to complete the CFA which evidently had not yet been completed. The following day Lesley Edwards spoke to Mrs Miller to discuss the CFA and the ATE premium, stating that the potential outcome of pursuing the claim and successfully recovering damages would justify the expense involved, and the risks involved in having a potential liability to pay the opponent's costs if unsuccessful. Mrs Miller was satisfied and instructed him to proceed. The CFA was eventually signed that day, 23 June 2016.

58. On 21 July 2016 Michael Gwilliam of Plexus Law wrote to Lesley Edwards to say that the insurers had declined to indemnify Lowcost as a consequence of breach of policy conditions, and that Lowcost had been dealing with the claim themselves as an uninsured entity without his involvement thereafter. As a result of this, he said, it appeared that Mrs Miller's claim was against an uninsured company now in administration. In fact, it appears that it had gone into administration in July 2016. Ms Edwards told Mr Banks, of the defendant. His response was to say "let's proceed as we discussed", but there is no evidence about that discussion apart from what happened next, which was that Ms

Edwards wrote to Mrs Miller following a telephone conversation, to confirm that Lowcost had recently gone into administration and that this was likely to cause a significant issue in terms of the ability to recover any compensation; and that the policy of insurance had been voided due to a failure to notify, which they were checking. (In fact, the policy had not strictly been voided, but had not responded to the claim.). She said that unfortunately a company going into administration was not something that could easily be anticipated. The way in which this letter was drafted suggests that the defendant was concerned to protect itself from the consequences of Mrs Miller's natural disappointment.

59. The defendant instructed counsel who advised, on the basis of what he saw as fairly limited information, that General Condition 7 was a condition precedent, the fact that (as he understood it) some initial enquiries were carried out by Lowcost (which had early notice of the accident) that suggested that there was anticipation of a claim by Mrs Miller at that time, and that Lowcost then delayed for nearly 2 years before notifying the insurer, which was an excessive and unexplained delay, so that it was not surprising that the insurer refused cover; and that a court would not regard General Condition 7 as an unfair provision. He also pointed out that the insurer would be entitled to any defence on which the insurer might rely, including the Condition Precedent (he referred to the Third Parties (Rights against Insurers) Act 2010, but it was common ground before me both that the relevant statute was the Third Parties (Rights against Insurers) Act 1930, and that it made no relevant difference).

60. On 7 March 2017 Mr Edwards relayed the burden of that to Mrs Miller, saying that sadly this meant that there was no viable source of compensation for her

claim and the defendant would be unable to proceed with it. The defendant then closed its file on 28 April 2017.

The claimant's witness evidence

Mrs Miller

61. Mrs Miller confirmed that the advertisement which was played to the court in opening as an example of the defendant's helpline advertisements was in fact the one that she had seen. It was effectively an invitation to telephone the Helpline to see if the defendant could help with a personal injury claim.

62. Mrs Miller confirmed that at no stage did she have any discussions with anybody about the accident and the circumstances surrounding it, save for conversations about the immediate arrangements for her comfort and administration or travel matters, and a conversation with the hotel manager during which no reference was made to the circumstances of the accident. In particular, she had no contact with Lowcost about the accident.

63. I accept this evidence, save that it appears she had forgotten that she or her husband had spoken to LTS on 15 May 2014. That is apparent from the LTS/Mailbox in Resort emails to which I have already referred. The reference there to having spoken to the guest is not readily explicable as a mistake for a conversation with the hotel manager. The reference in the letter from Plexus to Lowcost's having been notified on 15 May 2014 is, in context, a reference to the LTS/Mailbox in Resort emails, rather than to a communication with Lowcost itself.

64. She had been in hospital when she saw the advertisement and called the helpline from her bed. If she had been asked at any time after the accident, she would have said that there had been no contact with Lowcost. I accept that and (save in the sense that there had been communication with LTS) it would have been true for her to say so. When she was asked, much later on, that is exactly what she and her husband said.

65. Her evidence was that if she had been told that contact should be made with Lowcost to tell them about the accident circumstances, then she would have arranged for that to be done. I accept that evidence. Mrs Miller was evidently a witness of truth, as far as she could remember things, and it is in any event plausible that a person in her position would have done so.

66. She confirmed that her son-in-law Darren Holt was trying to help with paperwork. Otherwise, her evidence in chief added little to the paper trail to which I have already referred. That is not surprising if, as she said in cross-examination, the sepsis which she suffered affected her memory.

Mr Miller

67. Peter Miller explained that the holiday had really been a late Christmas present for Mrs Miller. His evidence was that the morning after the accident the manager had come to see them, and Mr Miller had shown him the scene of the accident and told him the steps were unsafe, but apart from that he had spoken to no one about the accident, and in particular not to Lowcost. In his oral evidence he explained that he would bring letters into Mrs Miller if they were addressed to her, but he did not remember her giving him letters from the defendant. Although he had booked the holiday, the actual booking was

undertaken by Darren, because he 'did not do online stuff'. If Mrs Miller had asked her to send documents to the defendant, he would have done it if he could, but he did not know he needed to do so, and he had no dealings with the defendant.

68. Save that, for the reasons I have already given, I find that he or his wife had spoken to LTS, I accept the whole of his evidence, which was given frankly and was inherently plausible.

The defendant's evidence

Mr Lloyd

69. The defendants called Alex Lloyd, whose position with the defendant is and was Head of Contact. He is also a senior associate. He started working for the defendant in April 2016, and is responsible for all client contact departments at the firm, including the legal helplines. In his witness statement, he says that he is able to speak to the purpose of the processes involved in the Legal Helpline in 2014 because they have not changed since it started in 2013. He did not explain how he knew this. He said, however, that in preparing his witness statement he had conferred with Louise Strutt.

70. I had the strong impression that Mr Lloyd was concerned to frame his evidence in such a way as to support the defendant's case, rather than simply to state the facts as he knew them; and that he felt very uncomfortable in doing so in cross examination. Additionally, he did not actually have personal knowledge of the systems in question as they were at the relevant time.

71. Nonetheless, as he described it, the helpline is and was operated by helpline operators, all of whom had a UK undergraduate law degree. They were all trained, had access to knowledge tools, and were overseen by a solicitor, who ensured that the helpline materials and guidance was up-to-date and that there was a qualified person within the team who was responsible for the quality of general legal support provided. The helpline operators were not qualified solicitors, and did not hold themselves out as such. His understanding was (and it seems to be correct) that Mrs Miller called a general legal helpline number. Mr Lloyd accepted in cross examination that the helpline operators might be referred to as 'legal advisors' internally within the defendant (as indeed they were on the Proforma itself), and that Ms Halliwell described herself as having been such in her current LinkedIn profile, but he preferred the word 'operators' which was the title. When they were dealing with business-to-business helplines, they might be referred to as legal advisors, but such a description was not applied to them in their interactions with the general public.

72. This evidence was designed to weaken the suggestion that the defendant's helpline employees undertook the duties of a lawyer/client relationship. I think it more likely that when these employees described themselves or each other to callers, they referred to their own job title and internal description as 'legal advisor'. But the case does not turn on this, in my view.

73. As he described it, the Legal Helpline was effectively a sifting process. The 'operators' captured data from potential clients to determine if they had a claim and should be referred to the relevant legal team for further investigation, as well as relevant information such as key dates and booking references, so the

file can be set up efficiently if the defendant is instructed. I accept this evidence as far as it goes.

74. His evidence was that because Mrs Miller's call related to an accident abroad, it was transferred to the defendant's ITLG helpline. The ITLG helpline helps the defendant's ITLG to note enquiries with either a low prospect of success for an immediately obvious reason, or a low value claim for which it would be disproportionate to take the instruction. At the start of each call, the operator would open a new file on the IT platform using the Proforma to which I have already referred which, he said, sets out a number of questions to ask the caller in order to capture the information required to assess whether the call should be transferred to the ITLG.

75. I find that the Proforma goes considerably further than this, and that many of the questions to which it refers are not and are not intended always to be asked by helpline advisers, but are there to capture information if volunteered and to suggest questions if they seem appropriate to be asked in any particular case. They were not questions which the legal advisor was instructed by the defendant to ask. That is plain from the sheer number of questions or areas for enquiry contained on the Proforma. It would not be practical or sensible in every call to ask all of the questions or explore the areas of enquiry set out on the Proforma which related to the particular circumstances of every potential claim.

76. His evidence was that if required, for the purpose of explaining why relevant information was being captured, the operator might provide general legal advice at a very high level. Any such 'advice' (to which he referred in inverted commas) was generic, preliminary and pre-retainer as part of the sifting process.

The operators did not provide any specific legal advice in relation to the caller's case, and would not opine on whether it was a good case or not. He did accept, under pressure, that if relevant, the operator might offer high level thoughts for consideration if they thought it was for the benefit of the person calling. I accept this: it was consistent with the training materials and the evidence of Louise Strutt, to which I refer later; and with the record of the initial call of Mrs Miller. In cross examination he said that advice should not be given unless to help the person calling; but he recognised that whatever generic legal advice any operator would give would be received by the caller, and understood and applied, in the context of their claim.

77. The tick list at the end of the Proforma makes it clear, if it was not otherwise clear, that the provision of generic preliminary legal advice contemplated was not just to explain why the questions were being asked. It was at least equally a way of engaging with the customer, that is, as I take it, giving the customer for free something which felt as if it was of value. As counsel for the claimant put it in his oral submissions, the defendant was 'reeling them in'.

78. Mr Lloyd's evidence was that while the questions asked by the operators were driven by those set out in the Proforma, they might also ask further questions; but they would not ask for specific information, nor details such as whether the caller had notified the tour operator of the incident or ensured that the tour operator had notified its insurers of the incident, though it would not be unusual for a caller to volunteer that information. I do not accept this evidence. As already noted, but as he appeared to have overlooked, the Proforma itself included a question asking if the caller had notified the tour operator of the

incident. The questions on the Proforma about complaints to the tour representative, a complaints form or accident report form, were, he thought, information obtained once referral had been made to a legal team, that is, not information to be obtained or which might be obtained, by the helpline operator. I reject this evidence. The questions were there on the form to be available for use and filled in if used by the operator. There was no evidence to distinguish these questions and any other on the Proforma, and no basis for inferring that they were questions not to be asked by the helpline operator, whether or not the Proforma might also be used by the legal team. I had the impression that the answer was made up on the spot.

79. His evidence was that the operator would apply the captured information to the sifting criteria using a flowchart. A flowchart was in evidence before me, and Mr Lloyd said in re-examination that this was the flowchart to which he referred (though he was unable to say whether it was the same as would have been in place when Mrs Miller called). I do not accept this: contrary to his description, it was a very simple document, and I doubt it would have helped an operator much in deciding whether to refer the case. I suspect there may have been a flowchart or a 'very full' decision tree such as he described but that it was not in evidence.

80. His evidence was that if the operator had decided to transfer a call, they would complete the transfer document confirming the type of claim and the transfer location. The solicitor investigating the claim within the ITLG would then contact the customer directly to discuss the incident in more detail and obtain documentary evidence where available. Once that had been provided, the ITLG

would then discuss the claim with the client, assess the prospects and discuss whether the defendant could accept the case. I accept this evidence, which is consistent with the documentation.

81. Although Mr Lloyd resisted the idea that the helpline operators were, in effect, weeding potential claims out, plainly they were doing so, as well as identifying to which team to pass on other claims. He preferred the expression, 'a sifting process', on the basis that this was more customer focused.

82. What I took from this evidence was that the defendant was at all material times very alert to the risks of giving legal advice which could be relied upon to members of the public using the Legal Helpline, and wanted to minimise that risk. Hence the (later) language of helpline 'operators', and the encouragement on paper at least to give only limited, generic and high-level advice, and only when asked, or at least only when it looked as if it might help. But there was an inevitable tension between minimising that risk and communicating to the caller that, in the defendant, they were dealing with people who cared, and people who would give them valuable legal information (or advice) of relevance to their situation and case. The conclusion is inevitable that the defendant also wanted to do that because it was part of the marketing strategy, and a way of attracting potential clients. That was why the operators worked on a system that allowed them to give legal advice to a limited extent. The system was supposed to balance that tension, but it was an essential part of that system to give the operators themselves very considerable discretion (as the evidence disclosed) about how far to go in any given case. Partly, no doubt, that was because they were legally qualified, and were the people having the telephone call and were

best placed to make the judgment; and partly, perhaps (although this question was not asked or answered) because a degree of indeterminacy helped in balancing the tension to which I have referred.

83. When asked whether any part of the call involved a disclaimer, he said that there was a recorded part at the beginning of any call, but he did not know what it was at the relevant time. Louise Strutt dealt with this further in her evidence.

Louise Strutt

84. The defendant also called Louise Strutt. She was a client experience coach and associate employed by the defendant. In 2013 her role included setting the defendant's training and operational criteria for the helpline operators. She described the purpose of the helplines, including this one, as being to incept calls from potential clients and applying strict criteria to each call to determine whether a prospective instruction was one that a legal team at the defendant would be likely to accept. She had been involved in the process of identifying the information which would need to be captured for a practice area to accept an instruction.

85. The Legal Helpline provided general preliminary advice (which on that scheme they referred to as case inception advice) only in so far as was necessary to identify the potential claim, potential value, and to ensure that it met the sifting criteria that had been agreed with the practice area, and to explain to the caller why certain questions were being asked. No doubt that was part of the purpose, but I have found that it went further, to the extent I have already indicated.

86. She was also involved in preparing training guides, including the training slides dated September 2013 which formed part of the evidence in this case, and delivering training to the operators.

87. She described the process. When an operator answered the call, they would introduce themselves by name and explain that the scope of the helpline was limited to providing general preliminary legal advice and to ensuring that the caller did not already have a solicitor for the matter they were calling about. This is the disclaimer to which reference has already been made.

88. After that, she said, the operator would work through the Proforma with the caller. But evidently the operator did not work through all of it, even in areas relevant or potentially relevant to this claim, because many areas were left uncompleted.

89. Once all the required information had been captured, the operator would determine whether the sifting criteria had been met and if so would pass it on. The information already gathered would enable the legal team to cut to the chase.

90. In cross-examination, Ms Strutt said that she saw herself as a legal advisor when working on the helpline, rather than a call handler or helpline operator. The legal advisor, that is the person receiving the call from the consumer, was to complete the form. All calls were recorded if, as it should, the system had picked it up, though there were sometimes glitches. The recording of this call had been searched for and she could not locate it. She set up the system of training for the legal advisors, who were all law graduates. She had prepared the training slides

which were in evidence, and Ms Halliwell had that training. She had a law degree.

91. The ITLG training slides for the legal helpline dated August 2013 anticipated the rollout of the helpline in September 2013. Ms Halliwell would have had to have taken this training before she worked on that helpline. The training described the process as using sifting criteria and Proformas. The advisors were expected to ascertain whether a claim was likely to succeed and was proportionate to pursue, by applying the sifting criteria, assessing the jurisdiction of the limitation position, and applying the allocation process to refer, or to close, cases. Advisors taking the initial enquiries were to provide general legal advice and assess the claim in that way. Ms Halliwell must have thought Mrs Miller's case met the criteria and fell within the parameters. Other helpline advisors were trained to ask, additionally, the usual questions that they would normally be expected to ask when handling a personal injury claim. The helpline advisors were expected to know that, and had experience of doing so in the context of insurance helpline claims.

92. The Proforma was used by helpline operators when speaking to callers as a means of helping them to drive the call. Some fields were mandatory, some not; but Ms Strutt was unable to identify from the document in the bundle which were, and which were not. She did not know why the ITLG training document required the operator to take details of the tour operator and travel agent: the ITLG itself had specified that. She would expect advice to be given on limitation, but it would not be definitive. The advisors were not trained to say that they were not giving any advice, nor trained to say that the caller could not

rely on any advice given on the call. They had 'safe legal advice' training before they could give general legal advice. The caller would of course expect it to be relevant to their claim. They were not trained to say that the caller might need to take any urgent steps or seek advice from a different lawyer unless perhaps the operator was closing the case or had been told there were other solicitors. Matters of that kind would be expected to be picked up by the practice area after the matter had been referred.

93. Although she used the term 'operator' in her witness statement, because that was how they were now described, at the time of Mrs Miller's call the title was 'legal advisor'.

94. The advice that someone like Mrs Miller would get would of course be tailored to suit their needs. When an operator answered the call via the helpline, they would introduce themselves by name and explain that the scope of the helpline was limited to providing general preliminary legal advice and ensure the caller did not already have a solicitor. She referred to that as a 'disclaimer', because it amounted to saying that the defendant had not been retained and was not acting for the caller then, that is, they were giving general legal advice only, which was limited and non-specific, albeit tailored to the circumstances of the caller.

95. Questions on the Proforma about the tour representative details and complaints had not been answered in Mrs Miller's case. They must have not been mandatory questions, otherwise the operator could not have made progress on the form. They would have been completed if the information had been volunteered by the caller. The fact that they had not been meant that Mrs Miller had not volunteered that information. That would mean that neither Ms

Halliwell nor, later, the practice area, would know if she had complained. The questions appeared on the Proforma because the practice area had identified them as important for some purpose, otherwise they would not have been put in.

96. She confirmed that if Mrs Miller had been successful in her claim, the defendant would have sought recovery from the other side of all work in progress amounts listed as chargeable, even those before the retainer.

97. Save where inconsistent with the findings I have made in relation to the evidence of Mr Lloyd, I broadly accept this evidence, which was given in a straightforward manner, and mostly consistently with the documentation.

Fawad Mir

98. The defendant also called Fawad Mir. He was the former employee of Lowcost responsible for dealing with complaints and claims at the time of Mrs Miller's accident. He described the claims handling protocols in operation at Lowcost as well as certain other matters. His evidence was that Lowcost was a tour operator/online travel agency which used third party suppliers for hotel accommodation which, in this case, had been booked through LTS, which was an intermediary between the hotel and Lowcost. LTS would have had a local representative. If a customer needed help, they would contact the hotel or LTS in the first instance, and if that did not resolve the issue, would then call the Lowcost in resort assistance telephone number or email. LTS would keep a record and if the incident was serious enough for the tour operator to need involvement, the tour operator might escalate to Mr Mir. This was a value judgment for them to make. It would be relevant whether the incident might

have been the fault of the hotel. If LTS thought the event was sufficiently serious and relevant to the hotel, they would send a report to Lowcost which Mr Mir would see, and consider whether Lowcost needed to report to its insurers.

99. He did not recall receiving a report about Mrs Miller, and if he had he would have notified Lowcost's insurers. He confirmed that he was sure that he would have reported Mrs Miller's injury to HCC as soon as possible, had he been aware of it, whether that was in 2014 or 2015. He would have done so by email. The insurer would have expected a copy of the accommodation vouchers, correspondence with the customer, information from the hotel and the claim form if any. I accept this evidence.

100. In his experience, the insurers would not have raised an issue had the incident been reported within one month of receipt of the claim notification. It was incidents rather than claims which needed to be notified. HCC would expect a report of the number of incidents in the month, and Lowcost would compile such a report at the end of the month. There might be 5 to 10 incidents per month. If he had not been notified of an incident, for example if the hotel had not reported it to him, but it later came in as a claim, HCC would assess it and if they were not prejudiced and there was an explanation for the delay, they would usually accept the claim. The email dated 15 May 2014 to Mailbox in Resort would probably have been the inbox for the LTS 24/7 in-resort team. He would expect the in-resort team to have sought a report from the hotel. If the hotel had reported, Mr Mir would have forwarded it on to HCC. If he had learned of an incident and notified HCC, and explained that the hotel had said they would send a report but had not done so, and that he had just found out,

and there were photographs of the steps in question, he would not have expected HCC to say that the delay had been a problem in July 2014. If that scenario had occurred in December 2014, HCC would have reserved its position and then there would have been a discussion about the reason for the delay. If the explanation had been accepted, there would then have been a discussion about what prejudice HCC had suffered. If the explanation was that the hotelier had been told to report and had said it would, but had not done so, that would not amount to a good explanation. HCC would expect him or his team to have followed it up, as the incident was relatively serious. HCC had taken the point about late notification on other cases, although it was quite rare.

101. This part of his evidence was given without objection, though it seems to me that it is not admissible to the extent that it goes beyond a generalised account of his experience and strays into opinion evidence.

Discussion

i) Whether, and if so the date on which, a contract of retainer between the claimant and the defendant was formed or a like duty assumed

102. The claimant's case is that from 19 May 2014 or shortly afterwards, there was a common law and/or contractual duty to act with due care skill and diligence of which the defendant was in breach by failing to advise Mrs Miller appropriately.

103. The claimant submits, however, that the question when a contract of retainer was first formed, although interesting, is academic, because an equivalent tortious duty of care must have arisen from 19 May 2014 in any event. I do not

agree. If there was a contract of retainer on 19 May 2014, it renders it unnecessary, save for the purposes of completeness, to consider the *Hedley Byrne* principle and its application in this case. If there was not, the converse follows. I therefore consider the question of retainer first, since it is the logically prior question.

Express retainer

104. The basis upon which the claimant alleges that an express retainer was created on 19 May 2014 is that the defendant's television advertisement amounted to an offer to provide legal services which the claimant accepted when she telephoned the defendant and the defendant did not decline to act for her but gave her advice and told her it was passing her case to the ITLG, and started recording time charges. However, the defendant's advertisement did not amount to an offer to provide legal services. It was an invitation to the public to call the helpline to see if the defendant could help by providing legal services. It was, at most, an invitation to treat. The question whether the caller would enter into a retainer with the defendant was one for further consideration on both sides, as each will have readily understood. Merely by telephoning, Mrs Miller cannot be regarded as agreeing to enter into a contract with the defendant. Moreover, the supposed offer in the advertisement contained none of the terms which would have been required to govern a contract of retainer. Whether the defendant did or did not decline to act for her during the call, gave her advice, and told her it was passing her case to ITLG, or recorded time charges, is neither here nor there for these purposes, because part of the way in which the claimant

put this submission is that the contract was complete when the telephone call was made (or, at least, answered).

105. The claimant's case on this included, however, the proposition (presumably as an alternative) that an express retainer was entered into by the end of that telephone call, and on the basis that the defendant did not decline to act for her but gave her advice and told her it was passing her case to ITLG, and started recording time charges. On that footing, the claimant's case must be that a bilateral contract of retainer was concluded orally between the parties during the call on 19 May 2014. But again, at no point during the call did anything the defendant said amount to an offer to enter into a retainer, or an assertion that there was one. The record shows that Mrs Miller provided certain information, was advised as to the scope of the Legal Helpline, the law relating to duty, breach and causation in the context of personal injury, and the applicability of the 3 -year limitation period, and that the matter would be referred to ITLG and that she would hear back, which she did. The defendant did not decline to act for her because her case had passed that stage of the sifting process described by the witnesses, and because there was no question of its acting for her at that stage. Such limited advice as was given to Mrs Miller at that stage was, in my judgment, advice in contemplation of a potential retainer, and not advice referable to one which had come into existence there and then. Passing the case to the ITLG for someone to get back to Mrs Miller was not an indication that a retainer had been agreed, but that it had not. The fact that time charges had started to be recorded is nothing to the point. No agreement had been made with Mrs Miller that she should be responsible for the defendant's fees, and I have no doubt that both sides would have been shocked at the suggestion that they

had implicitly made one at that point. At that stage, the fees would not have been Mrs Miller's responsibility. They might only become her responsibility if a retainer was subsequently entered into on the footing that they would be.

106. Another way in which the claimant put its case in argument was that when a retainer was unarguably entered into, upon the creation of the conditional fee agreement, that agreement was retrospective: that is, the parties did not merely agree that fees incurred before that date would now be chargeable, they agreed that (presumably by some form of mutual estoppel) they should be treated as having entered into an express retainer retrospectively as from 19 May 2014. On that footing, the parties should be treated as if the defendant had always owed Mrs Miller the duties to which that conditional fee agreement gave rise, even if at the time they had not.

107. While of course, parties may enter into contracts with retrospective effect in that sense, it would be a surprising outcome for the defendant, whose actions or omissions would thus fall to be judged by standards and criteria only applied retrospectively. But there is nothing in the conditional fee agreement which either expressly states that it is to have that effect, or from which that consequence must be implied. Even if the conditional fee agreement did involve the parties agreeing that the defendant's actions or omissions should be judged by standards and criteria applied only retrospectively, there would still be nothing in it to require the defendant to have taken steps which it should have taken if there had been a retainer, but which it was under no obligation to take if there was not. It is simply unrealistic to propose that while on or immediately after 19 May 2014 the defendant was under no obligation to advise Mrs Miller

to notify Lowcost or do it themselves (with her authority) but that it later agreed to take on an obligation to have already done something which it had not done. No doubt contracts may be made which have that effect but, in my view, they would require clear words to that effect, which are lacking in the present case.

Implied retainer

108. I turn, therefore, to the claimant's case that if there was not an express retainer on 19 May 2014, one should be implied. The editors of Jackson & Powell on *Professional Liability* (8th ed.) state as follows (at 11-005):

> "In a situation where the parties act as if the relationship of solicitor and client existed, although there is no express agreement to that effect, the court will readily hold that there is an implied retainer to be inferred from the parties' conduct."

And in *Caliendo v Mishcon De Reya* [2016] EWHC 150 (Ch) Arnold J. stated as follows (at para 679):

> "It is well established, that even if there has been no express retainer, the existence of a retainer may be inferred from the acts of the parties. Thus in *Morgan v Blyth [1891] 1 Ch 337* Stirling J stated at 355:
>
> > "It is quite plain that no formal or express retainer was ever given by him to them; but that was not necessary, for although no such express retainer has been given, the relation may subsist, and its existence may be inferred from the acts of the parties. If any authority for that proposition be required, it will be sufficient to refer to the decision of the Court of Appeal in the case of *Bean v Wade* 2 Times LR 157 .""

Further, in *Groom v Crocker* [1939] 1 KB 194 Scott L.J. stated (at 222):

> "A solicitor, as a professional man, is employed by a client just as much as a doctor, an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment… The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the

> client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means."

But the leading case on when a retainer will be implied is the decision of the Court of Appeal in *Dean v Allin & Watts* [2001] PNLR 921, where Lightman J, with whom Robert Walker and Sedley LJJ agreed, stated at [22]:

> "… As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties. In *Searles v Cann and Hallett* [1993] PNLR 494 the question arose whether the solicitors for the borrowers impliedly agreed to act as solicitors for the lenders. Mr Philip Mott QC (sitting as a deputy judge of the Queen's Bench Division) held that there was nothing in the evidence which clearly pointed to that conclusion. He went on:
>
> "No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that [the solicitor himself] ought to have appreciated it."

Moreover, in *Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch) Arnold J concluded at [682]:

> "The test can be summarised as follows: was there conduct by the parties which was consistent only with (the solicitors) being retained as solicitors for the Claimants?" [my emphasis].

109. I reject the proposition that on 19 May 2014 and shortly afterwards, the claimant and the defendant acted in a way which was consistent only with the defendant's being retained as Mrs Miller's solicitors. It is true that the defendant referred to Mrs Miller from this point onwards as its client; but it did so internally, and did not describe her as its client to her. Certainly, it opened a file in respect of her enquiry, but again that was an internal matter, and was not communicated to her, and in my judgment would hardly have suggested to any reasonable person in her position that it was a file which related to her as any more than a potential client of the defendant. For the defendant's own purposes, of course, that is

exactly why it needed the file. The defendant recorded time charges against that file, but not on the footing that she was already liable for fees, merely that she might at some time become so. Again, she was wholly unaware of it at the time. Had she been asked (and she was not) I very much doubt she would have agreed to be responsible for the defendant's fees at that point. The defendant's system was set up and structured so as to attract enquiries which, after a sifting process, might be converted into a retainer, but only after consideration by ITLG and following the provision by the prospective client of the necessary information and documents. None of that had occurred on or shortly after 19 May 2014. Indeed, on 20 May 2014 the defendant wrote and asked for documentation saying explicitly that once it had been reviewed, the writer would contact Mrs Miller to discuss whether the defendant was able to accept her case. There was nothing ambiguous about that, and it made it clear that the question whether the defendant was accepting her case remained an open one. In cross-examination, Mrs Miller said that on the basis of this letter she knew that when Darren sent the defendant the documents which they had asked for, the defendant was taking her case. I accept that she may have thought that, but that is not what the letter said.

110. On or about 8 April 2015, the defendant finally received and then reviewed Mrs Miller's accommodation details and invoice for her holiday, following numerous chasing letters (7 July 2014, 22 July 2014, 15 August 2014, 3 October 2014, 2 January 2015 and 28 January 2015), two of which expressly warned her:

> "You must be aware that no action has been taken by my firm to establish what limitation period would apply to your claim or to protect your right to take any legal action in any jurisdiction".

Those warnings did not explicitly say, "We are not acting for you" or "We have not yet taken on your case". In my judgment, they did not need to do so, because the letter of 20 May 2014 had already made it clear that until the documentation requested had been supplied, the defendant was not even going to consider acting for her or taking on her case. Nor can the mere fact that she was receiving chasing letters have provided her with any such comfort. The conduct of the defendant is consistent (and in my view actually consistent only) with the defendant's seeking information with a view to deciding thereafter whether or not to offer to enter into a retainer with Mrs Miller. On that footing, no implied retainer arose.

111. The defendant accepts that on 25 January 2016, when the defendant informed Mrs Miller that it was ready to proceed with her claim, the next step being the completion of the CFA, an implied retainer arose. I agree that it must have done so then at the latest. In the period since 8 April 2015 the defendant had undertaken a number of activities in relation to Mrs Miller's potential claim. In May and June 2015, it obtained from the internet Lowcost's terms and conditions, reviewed them, and sought and obtained counsel's (free) advice on them. It did not seek Mrs Miller's authority to do so; but as the defendant explained to counsel, it had not yet established funding on the matter, and wanted the advice "so we can decide whether we are able to accept the claim". The purpose of the advice was to determine the basis of any potential claim. That was something in which the defendant had at least as much interest as Mrs Miller, since it was still seeking to determine whether her claim was one which

it was prepared to offer to take on as her solicitor. It did not tell her about that advice until September 2015.

112. In June and July 2015, the defendant had asked for and obtained Mrs Miller's travel insurance documents. As it made clear, that was so as to consider how any claim might be funded. Although Mrs Miller said, in effect, that she had not been concerned with how the claim might be funded, the defendant had communicated to her that it was a matter which needed to be resolved before the defendant took on her claim. The defendant would hardly have done so without being confident of funding.

113. On 21 September 2015 the defendant wrote to Mrs Miller asking if there was any other legal expenses insurance and saying that if not it would be happy to offer her a conditional fee agreement. The letter asked about the steps: whether there was a handrail, and whether she had any photographs taken at a greater distance showing the surroundings. Even at this stage, I do not consider that the claimant and the defendant were acting in a way which was only consistent with the defendant having been retained as Mrs Miller's solicitors. Funding had still not been resolved. There was no agreement about fees or payment terms. Mrs Miller asked if the defendant could also assist with a clinical negligence claim so, from her perspective at least, the ambit of any potential instructions had not yet been established. None of this is consistent only with the parties having entered into a retainer at that stage. That did not happen, as the defendant accepts, until 25 January 2016, when the defendant told her that it was ready to proceed with her claim, the next step being the completion of the CFA.

A tortious duty of care

114. I turn, therefore, to the question whether, in the absence of an express or implied contractual retainer, the defendant owed Mrs Miller an equivalent duty of care in tort at any stage before 25 January 2016.

115. On the basis of, for example, *Crossan v Ward Bracewell & Co* (1989) 4 P.N. 103 the claimant submits that a duty of care is owed by a solicitor to a prospective client to whom the solicitor gives advice, even if that person is not and never becomes a client of the solicitor. The claimant further submits that even more so, a duty of care will be owed by a solicitor to a prospective client to whom the solicitor gives advice who does actually later become a client of the solicitor. I can deal with that second proposition immediately. It does not make any difference to the existence of a tortious duty of care to a prospective client whether that client later becomes a client of that solicitor. The duty to the merely prospective client either exists at the time or it does not. Later events cannot affect that (absent, perhaps, the kind of mutual estoppel to which I have already referred, which is nothing to the point in the present context).

116. I turn therefore to the first proposition. In submissions, counsel for the claimant made it clear that although there might be two tests for establishing a relevant tortious duty of care, namely the incremental approach and the assumption of responsibility principle, this was not a case where established present principles do not provide an answer, so that use of the incremental approach was not required.

117. The assumption of responsibility principle applies where the parties are in a relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. One of the

examples of the types of general relationship giving rise to such a duty given by Lord Devlin in *Hedley Byrne v Heller* [1964] AC 465 was the relationship of solicitor and client. The ratio of that decision was that the reasonable reliance of Hedley Byrne on the reference, combined with Heller & Partners' appreciation of the fact that they would reasonably rely on it, give rise to a direct relationship between them involving a duty of care: *Playboy Club London Ltd v Banco Nazionale del Lavoro SpA* [2018] UKSC 43. The *Playboy* case is authority for the proposition that recovery of a purely economic loss in negligence is available where the relationship between the claimant and the defendant made it appropriate; but where there was reasonable reliance by the claimant on the particular representation combined with appreciation by the defendant of that reliance, a direct relationship arose between them involving a duty of care; but it was the responsibility, voluntarily accepted by the defendant, towards those who acted on the representation, based either on a general relationship, or specifically in relation to a particular transaction, which created such a duty. That approach extends to claims in professional negligence.

118. The reference to a voluntary assumption of responsibility must not, however, be taken to mean that the defendant professional needs to consent to the claimant placing responsibility upon him. Rather it refers to a situation where the doing of that act implies a voluntary undertaking to assume responsibility. Accordingly, in a given case it is the task of the court to consider all the facts and to assess whether they give rise to an implication that the defendant has voluntarily assumed responsibility to the claimant. In *P&P Property Ltd v Owen White & Catlin LLP* [2018] 3 WLR 1244 Patten LJ stated at paragraph 76

> "… The requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, or his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair."

119. The claimant submitted that in the present case, apart from the question of the retainer, the critical question was whether there was the relevant relationship. I agree. The claimant submitted that there was, because Mrs Miller had sought and received advice, and the defendant was treating her as a client by giving a file reference, with a supervising partner, referring to her as a client, giving her advice as a client, obtaining Counsel's advice, updating her as a client and so on, and logging fees as work in progress.

120. I do not accept this. The true nature of the relationship until was that Mrs Miller was only a potential client of the defendant until 25 January 2016 and no duty of care equivalent to that under a retainer was owed to her until then.

121. The facts upon which the claimant particularly relies do not actually support her case. I do not accept that the defendant held itself out (via its TV advertisement) as ready, willing and able to assist persons in the position of the claimant: ready and able in principle, yes; but its willingness depended on a sifting process and the creation of a retainer, and its advertisement did not say otherwise. The limited basis on which the helpline worked was explained to Mrs Miller, as I find. During her conversation with the claimant on 19 May 2014, Ms Halliwell

gave Mrs Miller some limited high-level and generic legal advice about personal injury claims, but it did not purport and cannot have been understood to be complete or comprehensive legal advice about her claim, and it was a preliminary to further consideration. The question of obtaining separate legal advice did not arise for the reasons I have already given. The fact that during her conversation with Ms Halliwell, Mrs Miller was told that her case was being referred to the defendant's ITLG counts against there being a general duty in tort equivalent to the solicitor's duty of care to his client, rather in favour of it. The defendant's having a file and matter number for Mrs Miller's potential claim, recording time charges, and referring to her internally as its client is immaterial for the reasons I have already given. The fact that the defendant did not want or advise Mrs Miller to seek advice is also immaterial. The relationship between them was not akin to a contractual relationship. Mrs Miller was certainly entitled to rely on such advice as she was given, but she was not advised to ensure the insurers were informed, and the facts to which I have referred did not give rise to a duty on the defendant to provide such advice. Her undoubted lack of experience in legal matters does not change that.

122. *Crossan v Ward Bracewell & Co* (1989) 4 P.N. 103 is to be distinguished. It is a case in which positive advice was given before a retainer was entered into or the relationship of solicitor and client was formed, and the solicitor was under a duty to take reasonable care in respect of that advice. It went no further than that.

Conclusion

123. Accordingly, I conclude that no contract of retainer between the claimant and the defendant was formed, and no like duty was assumed, until 25 January 2016.

ii) if such a retainer was formed or a like duty assumed, the terms and scope of the retainer between the claimant and defendant at the point it was formed and, if relevant, the point at which the scope of the retainer changed

124. Since I have held that no retainer had arisen, and that no like duty had been assumed by the defendant, until 25 January 2016, this issue no longer arises, but I should consider it nonetheless.

125. The claimant's case is that, particularly as an inexperienced client, what Mrs Miller required was advice about any steps that it might be prudent for her to take, so as to protect her proposed claim for compensation. The defendant therefore owed her a duty either to give her that advice, or at least to make it clear it was not giving such advice so that she could seek advice elsewhere.

126. I would accept that as part of their general legal knowledge, the defendant would have been fully aware that insurance policies against claims such as that of Mrs Miller would often contain provisions which allow the insurer to decline to indemnify if the underlying incident were not promptly notified. Indeed, it is implicit in the defendant's pleaded position that it was entitled to assume that Lowcost "would have in place proper arrangements to notify its insurers of accidents and potential claims" that it accepts this proposition. Moreover, the Pre-action Protocol for Personal Injury Claims includes the following text for insertion in the letter of claim.

> "Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your

> insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them."

That text reflects the common factual understanding to which I have referred, as indeed does the letter of claim which the defendant eventually sent, which said, "Please note that your insurers will need to see this letter as soon as possible". The Protocol also points out that the claimant or his legal representative may wish to notify the defendant and/or the insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed Letter of Claim.

127. Against that background I consider the law. In *Carradine Properties Ltd V. D. J. Freeman & Co. (A Firm)* [1955-95] P.N.L.R. 219 Donaldson LJ said

> "A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer is undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is nobody's duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions, it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client is made up his mind and is not seeking advice about that. I say only that this *may* be his duty, because the precise scope of that duty will depend *inter alia* upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

But what that included would be heavily dependent upon the facts. In that case, the plaintiff's managing director only remembered two years after the company became involved in litigation that it had had public liability insurance at the time of the initiating incident, and its claim on the policy was rejected for late notification. The plaintiff sued the defendant solicitors for failing to ask it whether it had insurance, but the claim was dismissed, largely on the basis that the managing director was an experienced businessman with knowledge of

insurance matters. *Obiter*, Lord Denning MR said that if the plaintiff had been inexperienced, the duty of skill and care might have included a duty to make such enquiries. But that does not take the matter much further.

128. In *Midland Bank v Hett, Stubbs and Kemp* [1979] 1 Ch. 384, 402, Oliver J. said

> "No doubt the duties owed by a solicitor to his client are high in the sense that he holds himself out as practising a highly skilled and exacting profession. But I think that the court must beware of imposing upon solicitors, or upon professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do, having regard to the standards normally adopted in his profession … The duty is directly related to the confines of the retainer."

He went on at p 417 to say,

> "The case of a layman consulting a solicitor for advice seems to me to be as typical a case as one could find of the sort of relationship in which the duty of care described in the *Hedley Byrne* case [1964] AC 465 exists; and if I am free to do so in the instant case, I would, therefore, hold that the relationship of solicitor and client gave rise to a duty on the defendants under the general law to exercise their care and skill upon which they must have known perfectly well that the client relied. To put it another way, their common law duty was not to injure their client by failing to do that which they had undertaken to do and which, at their invitation, he relied upon them to do."

129. In *Crossan v Ward Bracewell & Co* (1989) 4 P.N. 103 the plaintiff had been involved in an accident as the driver of a car, received a summons for reckless driving. He consulted a solicitor who, having decided that the plaintiff was not entitled to legal aid, advised him that he should either defend himself or instruct the solicitor's firm, in which case he would have to pay £50 on account of costs. The plaintiff defended himself and never instructed the solicitors. The solicitor had, however, failed to tell him that his insurance company would arrange and

pay for his legal representation, and since the plaintiff failed to tell his insurers of the proceedings, they repudiated liability; and he had also to meet a third party claim out of his own pocket. Kennedy J held that the solicitor's firm was negligent in failing to inform him of his position with regards to his insurers.

130. This was a case in which the plaintiff was only ever a prospective client, and never became a client, so there was no claim in contract. The decision was based on the fact that the solicitor in question held himself out in a business setting as a person qualified to assist the plaintiff as to how he could obtain funds to pay legal costs and did so without any qualification or disclaimer; and once he had done so, it became his duty to exercise reasonable skill and care in the performance of the limited task he had undertaken to perform. That is not the case here.

131. An allegation had been made in *Crossan* that the solicitor owed a duty to remind the plaintiff of his duty to notify his insurers of the issue of the summons. This part of the claim was abandoned, however. The solicitor's evidence was that if he had accepted instructions, he would have satisfied himself as to that. That is what happened in the present case. But the court was satisfied that it was not his duty to do so before then, whether or not it might be so after. For present purposes, therefore, while I would accept that absent a retainer or equivalent duty, the defendant was not obliged to advise Mrs Miller to notify Lowcost, this case leaves open the question whether it was under such a duty once there was a retainer or equivalent duty.

132. In *Credit Lyonnais v Russell Jones and Walker* [2002] EWHC 1310 (Ch) at para.[28] Laddie J. said:

> "A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer … The solicitor has only 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 that he learns as a result of and in the course of carrying out his express instructions. … If a dentist is asked to treat a patient's tooth and on looking at 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 that the client may not be aware, the lawyer must warn him."

133. In *John Mowlem Construction plc v Neil F Jones & Co* [2004] EWCA Civ 768, where on the facts a client was perfectly competent to deal with questions of insurance, the solicitors which it instructed were not regarded as having been retained to advise about that. Judge LJ held that while this case supported the principle that there would be occasions when, notwithstanding the absence of a specific retainer to do so, solicitors are professionally obliged to their clients to enquire into and advise them about insurance issues, the question in any given case was fact specific.

134. In *Minkin v Landsberg* [2015] EWCA Civ 1152, Jackson LJ's summary of the general obligations contained within a solicitor's duty to exercise skill and care included that it is implicit that he would give proper advice which was reasonably incidental to the work that he was carrying out, and that in determining what advice was reasonably incidental it was necessary to have regard to all the circumstances of the case, including the character and experience of the client; and that an inexperienced client, for example, would

expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.

135. On behalf of the claimant, it was suggested that *Whelton Sinclair v Hyland* [1992] EGLR 158 was an analogous case to the present one. That was a case in which, when solicitors received instructions to act in relation to a notice pursuant to section 25 Landlord and Tenant Act 1954 to terminate a lease, and they were well aware of the applicable time limit, it was held that they were under a duty either to indicate that they were not going to act, or to take immediate steps to ensure that their tenant client's interests were safeguarded. In the present case, there was no time limit. But *Whelton Sinclair v Hyland* was a case in which the preservation of the tenancy was the central focus of the solicitors' instructions. They were not instructed in relation to potential litigation, and what needed to be done was the service of a counter-notice rather than the commencement of a claim. In the present case, the question is the ambit of instructions to act for a client in a contentious matter.

136. Had there been a retainer or a like duty, I should have been inclined to hold that in a contentious claim it included the obligation, at least with an inexperienced client, to consider, or remind the client to consider, whether the proposed defendant was worth powder and shot; and that this might include an obligation at least when notifying the proposed defendant of the potential claim to remind them to notify their insurer. A judgment which cannot be enforced is not worth the expense of pursuit. Prospective defendants, like any other companies, can and do go into liquidation or administration; or their assets may in any event be insufficient to meet the claim without insurance. There was no particular reason

to suppose that Lowcost was at any greater risk than any other company of its kind, but equally no particular reason to suppose that it was not at any lower risk. Moreover, I think it unlikely that the Pre-action Protocol for Personal Injury Claims in 2021 represents a new best practice, rather than reflection of an existing standard practice. I am reinforced in this by the fact that as soon as the letter of claim was sent in the present case, the enquiry about insurance was made. But I do not consider that the duty to make such an enquiry arose before the point at which it was reasonably possible to send a letter of claim or, at the earliest, a prior letter of notification, though any letter of notification would not have been much earlier in the present case, so that here the time for performance of that duty was not, or not significantly, before the letter of claim was actually sent. Until there was a retainer or like duty, I conclude on the authorities and on the facts of this case that there was no duty to warn in respect of insurance.

iii) If such a retainer was formed or like duty assumed, whether the defendant had an obligation to take steps to notify Lowcost and/or advise the claimant to notify Lowcost of the claimant's accident

a) during the initial call between the claimant and the defendant on 19 May 2014; or

b) on or before 8 April 2015 when the defendant received the claimant's documents, and if so when; or

c) before the letter of claim was served on 22 February 2016; and if so, when.

Conclusion

137. I have answered this question in the discussion on the scope of the duty. If such a retainer had been formed or a like duty assumed, the defendant had an obligation to take steps to notify Lowcost and/or advise the claimant to notify Lowcost of the claimant's accident when the letter of claim was served on 22 February 2016 but not before.

iv) Whether the defendant acted in breach of the duties identified at issues i) and ii);

138. On the basis of my conclusions above, the answer to this question is in the negative.

v) whether Lowcost's insurance policy would have responded to the claimant's claim had it been notified:

a) immediately following the initial call between the claimant and the defendant on 19 May 2014; or

b) between 8 April 2015, when the defendant received the claimant's documents and 22 February 2016, when the letter of claim was served

139. *Philips v Whatley* [2007] UKCP 28 was a case in which the solicitors had negligently allowed a claim for personal injury to become statute barred, but they alleged that no loss had been suffered by the client since, among other things, the defendant had been insolvent by the time judgment would have been obtained, so that recovery could only have been made against insurers, who declined liability on the basis they had not received timeous notification of the claim. The Privy Council held that any award of damages against the solicitors

should be made on the accepted basis of the loss of chance of recovery. In reckoning the chances of obtaining payment from the insurer, the correct criterion was to determine the prospects that a reputable insurer would, in the circumstances of the case, have relied on the breach of policy to repudiate liability. The nature of the breach and its effect on the insurer's ability to handle a claim, were very relevant features. In considering such chances a court should lean, in the event of doubt, in favour of the claimant, since it was the defendant solicitor's fault which caused the claimant have to litigate on the basis of an imponderable. In that case, evidence was given on behalf of the insurer. That is not so in the present case.

140. In that case the accident occurred in August 1994, and the insurer was not notified until May 1995, a period of nine months. The insurer's evidence was that the witness could not recall any case in 32 years' claims experience where the claim had been honoured which was 9 months late in notification, and that he thought that the insurer probably had been prejudiced by the late notification. The question whether the insurer would have rejected a claim for late notification was one of fact. In that case, the clause was a clear and unequivocal condition precedent regarding early notification, which was a matter of obvious importance to liability insurers' ability to investigate and assess any claim. On the other hand,

> "Even where there has been the clearest breach of a policy provision prejudicing insurers, insurers, even though not prepared to waive the breach entirely, may at least prefer to pay without prejudice, using the breach as a lever to control the exposure. Any assessment of prospects must also cover this fact of life."

141. Had Lowcost been notified immediately following the initial call with Mrs Miller on 19 May 2014, I accept Mr Mir's evidence (which was both plausible and supported by the documentation, in particular the documentation relating to the notification of claims and incidents) that on behalf of Lowcost he would promptly have notified HCC. In that event, notification would have been immediate for the purposes of the policy, and the policy would have responded. No point could be taken by HCC about late notification. I assess this prospect at 100%.

142. Had the same occurred on or after 8 April 2015, 11 months after the incident, then HCC could and in my judgment very likely would have taken the point about late notification, and had it done so would have been entitled to decline to indemnify Lowcost. Mr Mir's evidence, based on his experience, was that HCC expected to be notified within one month and if there had been a delay of more than two or three months, there would have to be a conversation. I accept this. He said that if there was a good reason for the delay, there would then have to be a conversation about prejudice; but if there was not a good reason, liability would be repudiated. On this point, however, I prefer the evidence of the defendant's insurance expert, Mr McGregor, as being based on wider experience. His written evidence was that in his experience insurers only consider immediate notice has not been given if the position has been prejudiced by that lack of immediate notice. There is, as I say, no evidence from HCC on prejudice, but after 11 months, it seems highly likely, as a matter of common sense, that the ability of HCC to investigate the incident was substantially prejudiced, quite apart from the question of late notification. Although there might be photographs of the stairs in question at the date of the accident, and

perhaps maintenance records, witnesses might have moved on, and their recollection would be likely in any event to have been compromised. By that stage, the evidence was, the market had in any event hardened. I assess the prospect that the policy would have responded at any time from and after April 2015 at zero.

Conclusion

143. I conclude that there was a 100% chance that the policy would have responded immediately following the initial call between the claimant and the defendant on 19 May 2014 (subject to the excess point with which I deal below); but that there was zero prospect that it would have done so from and after 8 April 2015.

vii) the proper construction and effect of the annual aggregate excess clause within Lowcost's policy with HCC

144. By General Condition 4 of HCC's policy, "Insurers will not make any payment hereunder until such time as the Insured has paid and exhausted the Excess." The parties' respective insurance experts are in agreement. Any claims where the total of damages and costs payable fell below £10,000 fell to be met entirely by Lowcost and did not count towards the aggregate access. Only payments over £10,000 would have become part of the aggregate excess of £560,000, and then only to the extent that the claim exceeded the initial retention of £10,000. Only once that aggregate excess of £560,000 was used would the insurer become liable to indemnify against any claim. The evidence before me shows that only £6765.78 of the aggregate had been eroded for the 2013/2014 policy year: that appears from the letter from Tokio Marine HCC, the successor to HCC. The way in which this figure is calculated has been provided by the

insurers in a spreadsheet. The effect of this is that the excess which remained to be met before the insurers would become liable to indemnify Lowcost was £553,234.22.

145. I consider it highly likely that at any given time HCC would have taken the point, attractive or otherwise, which was available to it; and that Lowcost would not have been in a position to or have chosen to make payment. The question is therefore whether actual payment is required. The claimant argues that General Condition 4 does not provide for a condition precedent to the obligation to indemnify.

146. In *Firma C-Trade SA v Newcastle P & I Association* [1991] 2 AC 1 the House of Lords held that all the ordinary and natural construction of the 'pay to be paid' provisions of the clubs' payment by the members to third parties was a condition precedent to payment by the clubs to the members, and that there was no principle of equity which enabled those express provisions to be disregarded or overridden. I accept of course that this case referred to different provisions, and in a different commercial context but there, as here, the words appeared clear, and there seems to be no room for equity to overcome them. The decision in *The Italia Express* [1992] 2 Lloyd's Rep 281 appears to have been directed to a different point, namely the incorporation of the 'pay to be paid' provision in the relevant part of an insurance contract. No such issue arises in the present case. In *Teal Assurance Co Ltd v W R Berkely Insurance (Europe) Ltd* [2013] UKSC 57 it was held that in the circumstances of that case it was not clear that 'paid' meant 'actually disbursed'; but nor was it clear what actually would have to be disbursed if it did. The present case is rather different. The wording of the

General Condition is unambiguous. Accordingly, it seems that actual payment is required under HCC's policy.

147. But the claimant argues that since the purpose of the 1930 Act was to ensure that upon an insolvency event a third party could enforce an insured's rights to claim an indemnity under a policy against an insurer, even though the insured could not pay the excess, General Condition 4 would frustrate the purpose of the Act, and indirectly alter the rights of Lowcost and HCC in such a way as to be ineffective pursuant to section1(3) of the Act. I am unable to accept that proposition. The point was taken in *Firma C-Trade SA v Newcastle P & I Association* and rejected, on the ground that if the insured could not discharge its liability to a third party and was therefore unable to obtain an indemnity from his P & I club in respect of it, that was not because of any alteration of his rights and his contract of insurance, but because of his inability, by reason of insolvency, to exercise those rights. It seems to me that the same reasoning applies here in relation to the insolvency of Lowcost.

148. It is worth noting, by contrast, that by section 9(5) and (6) of the Third Party (Rights Against Insurers) Act 2010 ("the 2010 Act") Parliament has provided that transferred rights will not be subject to a condition of the insurance contract "requiring the prior discharge by the insured of the insured's liability to the third party", although it preserves the enforceability of such clauses in contracts of marine insurance except in cases involving death or personal injury. The provision is not retrospective and came into force on 1 August 2016.

Conclusion

149. Accordingly, I conclude that for these reasons there would have been no prospect of the policy's responding at any relevant time following the administration of Lowcost.

150. I invite the parties if possible to agree a form of order with a view to avoiding the necessity for a further hearing to deal with consequential matters.