

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN:

CATHAL ANTHONY LYONS

Claimant

-and-

FOX WILLIAMS LLP

Defendant

PARTICULARS OF CLAIM

The Parties

1. The Claimant was until July 2009 a partner of Ernst & Young's CIS practice ("E&Y"). He was Managing Director of Operations and Chief Financial Officer based in Moscow. Because of his injuries sustained as a result of the accident which is particularised below, he resigned as a partner and became a consultant in July 2009. He remained in this position until August 2011 when his consultancy agreement was terminated.
2. The Defendant is a firm of solicitors practising from, amongst other premises, 10 Dominion Street, London EC2M 2EE. At the time material to this claim, the Defendant held itself out as having particular expertise in (amongst other practice areas) insurance law.

The Policies

3. From 2004 until 1 July 2006, E&Y insured its partners, including the Claimant, under the following policies of insurance:

3.1. An Accidental Death & Dismemberment Policy No 011490/000, governed by English law with Hauteville Insurance Company Limited (“AGF”) in Guernsey (the “AGF AD&D Policy”);

3.2. A Long Term Disability Policy No 0031012-00 and application, governed by Bermuda law with Colonial Medical Insurance in Bermuda (the “Colonial LTD Policy”);

3.3. A Long Term Disability Policy No 011490/000, governed by English law with AGF in Guernsey (the “AGF LTD Policy”).

(together, the “Insurance Policies”.)

4. So far as relevant to this claim, the terms of the AGF AD&D Policy were:

4.1. that AGF would pay certain sums in the event of dismemberment of parts of the body;

4.2. in particular, that AGF would pay five times the Claimant’s annual salary up to a maximum of US\$500,000 for the “loss or loss of use” of a foot.

5. So far as relevant to this claim, the terms of the Colonial LTD Policy were:

5.1. by virtue of section IV, the insurer would pay the insured a monthly benefit after the end of the Elimination Period of 360 days provided it received proof that the insured was disabled due to sickness or injury and required the regular attendance of a physician (“the Total Disability payment”);

- 5.2. the Total Disability payment would be payable for a period of two years provided that the insured was unable to perform all the material and substantial duties of his occupation on a full-time basis because of a disability caused by injury or sickness that started whilst insured under the policy;
 - 5.3. the Total Disability payment payable during the period of two years after the Elimination Period would be a maximum sum of US\$15,000 a month (US\$180,000 per annum) with credit being given for salary received but subject to a minimum of US\$50 a month;
 - 5.4. after two years of Total Disability payments, the insured would continue to be entitled to Total Disability benefit of US\$15,000 a month (US\$180,000 per annum) provided he was unable to perform with reasonable continuity all the material and substantial duties of his own or any other occupation for which he was or had become reasonably fitted by training, education, experience, age and physical and mental capacity;
 - 5.5. alternatively, the insured would be entitled to Partial Disability payments if he was able to perform one or more, but not all, of the material and substantial duties of his own or any other occupation on a full or part-time basis or able to perform all the material and substantial duties of his own or any other occupation on a part-time basis provided the earnings at that time were 80% or less than those pre-accident;
 - 5.6. legal action could not be brought against the insurer more than three years after "Proof of Claim" was due to be given (being no later than 90 days after the end of the Elimination Period).
6. So far as relevant to this claim, the terms of the AGF LTD Policy were:
- 6.1. E&Y was obliged to notify AGF of any accident within three months.
 - 6.2. E&Y was obliged to notify AGF of any sick leave which lasted 35 weeks and to make a claim after 52 weeks;

- 6.3. subject to the insured undergoing a medical examination in order to assess the disability, the insurer would pay, after a Waiting Period of 52 weeks, a Short Term Disability annual pension of up to US\$120,000, subject to an offset of US\$180,000 (being the Total Disability payment due under the Colonial policy) and less any salary received;
- 6.4. after two years of Short Term Disability payments, a Long Term Disability pension would be paid of up to US\$120,000, subject to an offset of US\$180,000 and less any salary received;
- 6.5. in the event of any dispute in respect of the policy, the dispute would be referred to an arbitration to be held in Paris.

The Accident and Subsequent Events

7. On 17 June 2006 the Claimant was involved in a road accident whilst travelling on E&Y business. As a result, he sustained serious injuries which required the immediate amputation of his toes and removal of part of his right shoulder. Subsequently, he underwent the partial amputation of his right foot just below the ankle.
8. The Claimant was unable to work for almost three months. He eventually returned to work in September 2006. However, his medical condition was such that he was only able to work a few hours a day a few days a week. He was on very considerable amounts of medication including anticoagulants for the first 12 months after the accident and he was in constant pain despite taking powerful pain killers on a daily basis. He also had to undergo physiotherapy on an almost daily basis for the first two to three years after the accident. This reduced to three times a week in about 2009. Thereafter he attended physiotherapy (a round trip of three to four hours) three times a week until his contract (and thereby his health insurance cover) was terminated in August 2011.

9. In all, the Claimant has had a total of five operations/amputations under general anaesthetic. He is likely to require further amputation/reconstructive surgery to his shoulder and a further amputation to his right foot. He is also in constant pain.
10. By about the end of the summer of 2008 at the latest, it was obvious that the Claimant was never going to be able to return to work in his former capacity on either a full or part-time basis. He accordingly entered into an agreement with E&Y in April 2009 (“the April 2009 Agreement”) whereby he agreed to resign as a partner with effect from June 2009 and thereafter he would remain as a part-time consultant for an indefinite period.
11. The April 2009 Agreement was terminated by E&Y with effect from August 2011.

Benefits under the Insurance Policies

12. It is the Claimant’s case that, in the light of the accident and his ongoing disabilities, he was entitled to the following benefits under the Insurance Policies:
 - 12.1. a payment of US\$500,000 under the AGF AD&D Policy for loss of use of his foot;
 - 12.2. the right to Total Disability payments under the Colonial LTD Policy both during the two year period after the Elimination Period and after the expiry of such two year period or alternatively Partial Disability Payments commencing at the end of the period of Total Disability but giving credit for salary received. In practice, the Claimant should have received the minimum monthly payment of \$50 for a period of two years after the Elimination Period and then payments of US\$180,000 per annum with effect from June 2009 less consultancy payments of US\$85,000, in the year to June 2010 and US\$0 thereafter;
 - 12.3. the right to a Short Term Disability annuity followed by a Long Term Disability pension under the AGF LTD Policy (E&Y having notified AGF of the accident within three months). In practice, the Claimant should have

started to receive payments of US\$120,000 per annum with effect from June 2009.

The Retainer

13. In or about February 2007 the Claimant retained the Defendant, which at all material times acted by partner and solicitor Tom Custance, to act on his behalf in relation to any claim or claims he might have under the Insurance Policies.
14. The terms of the retainer were set out in the Defendant's retainer letter dated 15 February 2007 which provides as follows:

"Scope

You have explained that, following the accident in June 2006, it has become apparent that the insurance cover arranged on your behalf by E&Y does not provide the type or level of accidental death and dismemberment ("ADD") cover which E&Y have previously represented to you was in place ...

I have suggested that the areas to be considered further are as follows: (1) to check the extent of the cover in fact provided by the insurance in place at the time of your accident to ensure that there are no arguments available which E&Y have failed to take up with insurers on your behalf; (2) to compare that cover with the insurance put in place with effect from 1 July 2006; and (3) to obtain further details of the representations made to you by E&Y as to the "ADD" cover supposedly in place at the time of your accident.

In order to advise on these points, I will need to see the following: (a) copies of the relevant insurance policies; (b) all correspondence or emails between you and E&Y or insurance/brokers relating to the extent of the cover available for your accident including in particular any e-mails/correspondence dealing with the meaning/interpretation of that cover; and (c) anything from E&Y which refers to the insurance benefits available to you in the event of death or serious accident."

15. It is the Claimant's case that, contrary to the position adopted by the Defendant in its response to the Claimant's letter before action, the scope of this retainer on its face extended to consideration of all the insurance benefits available to the Claimant as a result of his accident.
16. Pursuant to this retainer, the Claimant sought advice from the Defendant about his

entitlement to long term disability benefits and sent the Defendant relevant documents relating to such entitlement. In particular, the Claimant will rely on the following in support of his averment that the Defendant's retainer extended to the long term disability policies and/or that the Defendant was in any event under a duty to and did in fact advise on the same:

16.1. By an email dated 25 February 2007, the Claimant forwarded to the Defendant the Colonial LTD members' booklet, the AGF AD&D and LTD booklet, the E&Y program summary of benefits and the Generali policy (being the long term disability policy that replaced the Colonial and AGF LTD policies). The E&Y program and the members' booklets contained detailed summaries of the Claimant's benefits under the Insurance Policies.

16.2. By a second email dated 25 February 2007, the Claimant forwarded to the Defendant emails confirming that Colonial had acknowledged receipt of notice of the claim under the Colonial LTD Policy and identifying the documents that Colonial required to proceed with the claim.

16.3. By a third email dated 25 February 2007, the Claimant provided the Defendant with the preliminary findings of Sherwood Solutions, E&Y's insurance advisors in relation to the Insurance Policies, dated October 2006.

16.4. By an email dated 25 April 2007, the Claimant sought advice from the Defendant as to his entitlement to long term disability benefit as follows:

"If I am dumped out of the firm as an invalid, I will have difficulty finding a new job. So I should expect to be compensated through to retirement ... if this is true then they should also be able to give me the \$300,000 per annum under our insurance".

For the avoidance of doubt, of the Insurance Policies, only the Colonial and AGF LTD Policies gave a right to an annual payment.

16.5. On 17 May 2007 the Claimant sent the Defendant a copy of an email from James Mandel, E&Y's CIS General Counsel, which posed the question:

“Have any disability claims been made?”

16.6. The next day, being 18 May 2007, the Claimant forwarded the Defendant an email from Mr Mandel to an insurer from whom he was seeking guidance which stated: *“attached are copies of correspondence relating to Mr Lyons AD&D and disability claims.”*

16.7. The Defendant’s letter to E&Y of 21 May 2007 concludes: *“the other insurance claims arising from his accident will need to be addressed separately”*.

16.8. On 22 May 2007 the Claimant left messages with Mr Custance about obtaining his long term disability payments and Mr Lyons’ girlfriend emailed the Defendant referring to the long term disability payments in the following terms:

“Karl [E&Y CIS’s Managing Partner] can sign a legally binding letter saying that if [Mr Lyons] resigns as partner he will pay 6 million dollars”.

This was clearly a reference to the total payments to which the Claimant would be entitled under the Colonial LTD and AGF LTD Policies, over 20 years until his 65th birthday, and would have been understood to be so by the Defendant.

16.9. The narrative to the Defendant’s invoice dated 29 May 2007 shows that on 22 May 2007 (following the email from the Claimant’s girlfriend) Mr Custance spent 30 minutes *“reviewing ...policy documents re entitlement to disability benefits”*. The Claimant infers that this review followed the email from his girlfriend.

16.10. This review was followed by a 24 minute telephone call between the Claimant and the Defendant during which the Claimant infers that his rights under the long term disability policies were discussed.

- 16.11. On 24 May 2007, two days after Mr Custance reviewed the Claimant's entitlement to long term disability benefits, the Claimant emailed to the Defendant the rejection letter dated 13 April 2007 (the "Colonial Rejection Letter") that he had received from Colonial. The Colonial Rejection Letter accepted that Mr Lyons was Disabled with effect from 17 June 2006, within the meaning of the Colonial LTD Policy.
- 16.12. In August 2007 Mr Mandel sent copies of his files to the Defendant which included a copy of the Colonial LTD Policy, the Colonial LTD members' booklet as well as the Colonial Rejection Letter.
- 16.13. On 6 September 2007 yet another copy of the Colonial Rejection Letter was emailed to the Defendant by the Claimant's secretary.
- 16.14. Mr Custance's time record for 11 January 2008 confirms that he spent 30 minutes "*reviewing files received from Jim Mandel re claim under Colonial/AGF policies*". For the avoidance of doubt, there was no other Colonial policy in the James Mandel files provided to the Defendant, other than the Colonial LTD Policy.
- 16.15. On 20 February 2008 the Claimant again emailed the Defendant requesting advice on the long term disability policies:
- "That as far as I am concerned is what they are saying and then as this is true according to my employer I should be able to claim \$350,000 [sic] per annum from my insurance. Should work? While Philip like[d] the \$350,000 paid by insurance company he was taken aback by my \$10 million claim"*.
- 16.16. The narrative on the Defendant's invoice dated 26 June 2008 shows that on 11 June 2008 Mr Custance spent 36 minutes on a "*conference call with client and J Mandel – discussing potential claims against Ingosstrakh and Colonial*".
- 16.17. In late June 2008 after the call on 11 June 2008, the Claimant sent the Defendant parts of his file of documents relating to his insurance claims, including yet further copies of the Colonial LTD Policy, the Colonial LTD members' booklet and the Colonial Rejection Letter.

16.18. On 27 March 2009, the Claimant again emailed the Defendant requesting advice on the long term disability policies:

“sounds promising thanks. Also, I have had the third doctor now admit that I am unable to work, so I know we need to thread [sic] carefully but maybe we have a good angle to also get that \$300k per annum until I am 65. What do you think? We should talk.”

16.19. In addition, the Claimant recalls that, shortly after one of the occasions on which he sent the Colonial Rejection Letter to the Defendant, he had a conversation with Mr Custance in which Mr Custance informed him that the rejection letter was not very promising.

17. The following were implied terms of the retainer:

17.1. the Defendant would exercise the skill and care of a reasonably competent solicitor having expertise in insurance law when acting on the Claimant’s behalf;

17.2. the Defendant would advise the Claimant as to his rights under the Insurance Policies;

17.3. the Defendant would take or advise the Claimant to take all necessary steps to protect his interest under the Insurance Policies.

18. Further or alternatively, the Defendant owed the Claimant a common law duty of care in the same terms as set out in the preceding paragraph.

Breach of Duty in relation to the AGF AD&D Policy

19. Negligently and/or in breach of the implied terms of the retainer, the Defendant failed to exercise the care and skill of a reasonably competent solicitor when advising the Claimant as to his rights under the AGF AD&D Policy.

Particulars

19.1. By an email dated 16 March 2007, the Defendant sent the Claimant a draft email for the Claimant to send to E&Y, which (amongst other things) stated that:

“The Colonial/AGF policies... do not apparently provide AD&D cover for the shoulder and foot dismemberment which I have suffered.”

19.2. The Claimant understood from this that the Defendant’s advice was that he had no viable claim under the AGF AD&D Policy and the Defendant never said anything to contradict this understanding.

19.3. This advice was wrong in that the Claimant had lost the use of his right foot within the meaning of the AGF AD&D Policy and from 17 June 2006 was entitled to be paid US\$500,000 under that Policy.

19.4. The Defendant knew, from the Sherwood Solutions’ October 2006 advice, that the AGF AD&D Policy covered “loss of the use” of a foot, and should have advised that the Claimant had a valid claim for US \$500,000, and should have recommended that such claim be pursued with all due expedition.

20. In reliance on this advice, the Claimant took no action against AGF until June 2012, when he changed solicitors and issued an arbitration claim against AGF seeking the sum of US\$500,000 together with interest and costs.

21. On 24 August 2012 AGF paid the Claimant US\$500,000, pursuant to a binding settlement. However it refused to pay out any interest or costs because of the Claimant’s delay in pursuing the claim.

22. As a result of the Defendant’s negligence, the Claimant has lost the use of the US\$500,000 for six years from June 2006 to 24 August 2012 and has been put to unnecessary cost and expense.

Long Term Disability Insurance Policies

23. Negligently and/or in breach of the implied terms of the retainer the Defendant failed to exercise the care and skill of a reasonably competent solicitor when advising the Claimant as to his rights under the Colonial LTD Policy and/or the AGF LTD Policy.

Particulars

- 23.1. Failed to consider the Claimant's rights under the Colonial LTD Policy.
- 23.2. Failed to advise the Claimant that, assuming Bermudan law was the same as English law, the basis of Colonial's denial of liability in the Colonial Rejection Letter was not tenable as Partial Disability benefit could only ever be relevant following 24 months of Total Disability, which in turn was only applicable after the Elimination Period.
- 23.3. Failed to advise the Claimant to seek to review the determination in the Colonial Rejection Letter.
- 23.4. Failed to advise the Claimant that, on the same assumption as to the equivalence of Bermudan and English law, he was Totally Disabled within the meaning of the Colonial LTD Policy, and that Colonial had accepted this.
- 23.5. Failed to advise the Claimant that, on the same assumption, he was entitled to a minimum payment of US\$50 a month.
- 23.6. Failed to advise the Claimant that, on the same assumption, he was likely to have an ongoing claim for Total Disability alternatively Partial Disability payments after the expiry of the two year period following the Elimination Period.
- 23.7. Failed to advise the Claimant as to the need to bring any claim under the

Colonial LTD Policy within three years from the date when proof of claim was required.

- 23.8. Failed to recommend that advice should be taken from a Bermudan lawyer.
- 23.9. Failed to recommend that, provided the Bermudan law advice was to the effect that the Claimant had a valid claim alternatively a reasonable chance of success, proceedings should be issued against Colonial.
- 23.10. Failed to consider the Claimant's rights under the AGF LTD Policy.
- 23.11. Failed to ensure that AGF was given notice of the fact that the Claimant had been on sick leave for more than thirty five weeks and/or fifty-two weeks.
- 23.12. Failed to advise the Claimant that he was or probably was suffering from Short Term Disability within the meaning of the AGF LTD Policy.
- 23.13. Failed to advise the Claimant that he was likely to have an ongoing claim for Long Term Disability within the meaning of the AGF LTD Policy.
- 23.14. Failed to take any or any effective steps to protect the Claimant's rights under the Colonial LTD Policy and/or the AGF LTD Policy.

The April 2009 Agreement

24. In or about early 2009 the Claimant separately retained the Defendant to advise him in relation to the negotiation and documentation of his retirement as a partner from E&Y's CIS practice.
25. It was an implied term of the retainer that the Defendant would exercise the care and skill of a reasonably competent solicitor when advising the Claimant on the terms of his retirement package and drawing up and/or advising on the documentation enshrining such terms.

26. Further or alternatively, the Defendant owed the Claimant a common law duty of care in the same terms as set out in the preceding paragraph.
27. Pursuant to that retainer, on 19 March 2009, the Defendant emailed to the Claimant draft Heads of Terms, which specified English law and jurisdiction.
28. Subsequently in about late March or April 2009, E&Y orally agreed terms of the agreement that would be executed. In particular, it was agreed that English law and jurisdiction would apply, that the Claimant had a right to CIGNA Medical Insurance for the rest of his lifetime as well as an ongoing part-time consultancy role and a cash payout.
29. On 10 April 2009, the Claimant emailed the Defendant a summary of terms agreed with E&Y. By a reply email at 19.57, the Defendant responded:

“am happy to review the details once I hear from [Mr Mandel] and hopefully sort it all out with [Mr Mandel]”.

30. On 15 April 2009 a draft “Term Sheet” was emailed by the Claimant to the Defendant for comment. On 16 April 2009 the Defendant made redline comments on the Term Sheet prepared by E&Y which had been sent to it for comments and emailed back a final version at 17:24 that day.
31. At 17:53 on 16 April 2009 Mr Mandel emailed a final agreement to Mr Philipp Turowski, E&Y’s Chief Operating Officer in the CIS, with a copy to the Defendant, as follows:

“Attached...is the Term Sheet that is the result of my discussions with Cathal [Mr Lyons] and with Tom Custance and therefore represents Cathal’s understanding of the Agreement”.

32. The April 2009 Agreement was duly executed on or about 17 or 18 April 2009.
33. Negligently and/or in breach of the implied term of the retainer, the Defendant failed to exercise the care and skill of a reasonably competent solicitor when advising the Claimant on the terms of the April 2009 Agreement and his consultancy agreement

and drawing up and/or advising on the documentation enshrining such terms.

Particulars

- 33.1. Failed to ensure that the April 2009 Agreement contained an English jurisdiction and law clause.
- 33.2. Failed to advise the Claimant of the risks he faced if he entered into an agreement which did not have an English jurisdiction and law clause.
- 33.3. Exposed the Claimant to the risk that, in the event of a failure on the part of E&Y to honour the April 2009 Agreement, E&Y might contend that English law did not apply and/or the English Courts did not have jurisdiction.
- 33.4. Failed to ensure that a long form agreement was executed (to include a choice of English law and jurisdiction clause), despite the fact that the April 2009 Agreement envisages such agreement would be produced.
34. On about 28 April 2011, E&Y gave notice terminating the April 2009 Agreement with effect from 11 August 2011. The notice stated that, by reason of the termination, the Claimant's rights to CIGNA Medical Insurance would also cease at the same time.
35. When the Claimant brought proceedings against E&Y in June 2011 for specific performance in relation to the breach, E&Y was able to challenge jurisdiction and allege that Russian law applied. E&Y also contended that the April 2009 Agreement was unenforceable under Russian law, as it was not sufficiently clear and certain in its terms and the entities were not specified.
36. The Claimant was successful in maintaining that the English Courts had jurisdiction but suffered irrecoverable costs in respect of this issue. The issue of whether or not Russian law applied was left as a question for trial.
37. Subsequently, the Claimant settled his claim against E&Y on confidential terms but has suffered loss in terms of the difference between the value of ongoing CIGNA

Medical Insurance and the monies received under the settlement, as well as irrecoverable costs. The Claimant has offered to reveal the settlement figure to the Defendant, if it undertakes to keep such information confidential, but the Defendant has refused to do so. Accordingly the amount he received can only be disclosed pursuant to an order of the High Court.

Loss and Damage

38. As a result of the Defendant's negligence and/or breach of contract, the Claimant has suffered loss and damage.

Particulars of Loss and Damage

- | | |
|---|------------------------|
| 38.1. Loss of benefits under the Colonial LTD Policy: | \$3,817,553 |
| 38.2. Loss of benefits under the AGF LTD Policy: | \$2,410,435 |
| 38.3. Damages to be assessed for loss of use of the sum of \$500,000 between June 2006 and August 2012 together with legal costs of £15,276.66 | |
| 38.4. Difference between the value of ongoing CIGNA Medical Insurance under the April 2009 Agreement (being £2,387,341) and the monies received under the settlement (to be advised) | |
| 38.5. Irrecoverable costs: | approximately £100,000 |
| (a precise figure will be provided once the costs of the costs assessment have been agreed or determined) | |
| 39. Further or alternatively, the Claimant has been deprived of the opportunity of making a recovery from Colonial and/or AGF in respect of the benefits due under the respective long term disability Policies by way of settlement or litigation/arbitration (as applicable). | |
| 40. The Claimant will pursuant to section 35A of the Senior Courts Act 1981 seek interest | |

on any compensation that the Defendant is ordered to pay at such rate and for such period as the Court considers appropriate.

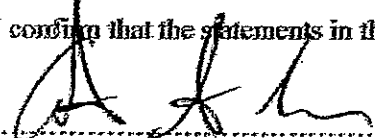
And the Claimant claims:

- (1) Damages.
- (2) Interest, to be assessed.
- (3) Further or other relief.
- (4) Costs.

JOHN WARDELL QC

Statement of Truth

I confirm that the statements in these Particulars of Claim are true.



Cathal Anthony Lyons

Dated 12 March 2014

Case No. HC13A000539

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

B E T W E E N:

CATHAL ANTHONY LYONS

Claimant

-and-

FOX WILLIAMS LLP

Defendant

PARTICULARS OF CLAIM

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Our Ref: KJT/LY03-7