Claim No: HC13A00539

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BETWEEN:

CATHAL ANTHONY LYONS

Claimant

-and-

FOX WILLIAMS LLP

Defendant

DEFENCE

1. The Defendant adopts certain of the Claimant's abbreviations as set out in the Particulars of Claim, but no admissions are made in so doing.

2. References below to paragraph numbers are references to paragraphs in the Particulars of Claim signed on 12 March 2014.

The Parties

3. Save that the first part of the third sentence is not admitted, paragraph 1 is admitted. The Defendant understands that the Claimant had other motivations for resigning as a partner in 2009, including an apparently difficult relationship with Karl Johansson (the Managing Partner).

4. Paragraph 2 is admitted.

The Policies

5. Save that the policy number for the Colonial LTD Policy is 003012-00, paragraph 3 is admitted. Further insurance policies relevant to this matter are as follows:

   5.1 Ingosstrakh LMT Limited Liability Insurance Company Policy Number 319009/2006-161, which replaced the AGF AD&D Policy with effect from 1 July 2006 ("the Ingosstrakh Policy").

   5.2 Generali Worldwide Insurance Company Limited Policy Number 802.058, which replaced the AGF LTD Policy and the Colonial LTD Policy with effect from 29 June 2006 ("the Generali Policy").

   5.3 ACE European Group Limited "*businessclass* Injury and Travel Insurance Policy"

Policy Number 55UK455191(C) ("the ACE Policy").

6. In relation to paragraph 4:

6.1 It is denied that the only terms of the AGF AD&D Policy relevant to this claim are (to the extent that they are accurately set out) those set out at paragraph 4 of the Particulars of Claim.

6.2 To the extent that sub-paragraphs 4.1 and 4.2 are consistent with the true terms of the AGF AD&D Policy, they are admitted. To the extent that sub-paragraphs 4.1 and 4.2 are inconsistent with the true terms of the AGF AD&D Policy, they are denied. For the avoidance of doubt, sub-paragraphs 4.1 and 4.2 do appear accurately to summarise relevant terms of the AGF AD&D Policy.

6.3 Save as aforesaid, paragraph 4 is not admitted.

7. In relation to paragraph 5:

7.1 It is denied that the only terms of the Colonial LTD Policy relevant to this claim are (to the extent that they are accurately set out) those set out at paragraph 5 of the Particulars of Claim.

7.2 To the extent that sub-paragraphs 5.1 to 5.6 are consistent with the true terms of the Colonial LTD Policy, they are admitted. To the extent that sub-paragraphs 5.1 to 5.6 are inconsistent with the true terms of the Colonial LTD Policy, they are denied.

7.3 It is admitted and averred that the relevant terms of the Colonial LTD Policy are as set out in Annex 1 to this Defence.

7.4 Save as aforesaid, paragraph 5 is not admitted.

8. In relation to paragraph 6:

8.1 it is denied that the only terms of the AGF LTD Policy relevant to this claim are (to the extent that they are accurately set out) those set out at paragraph 6 of the Particulars of Claim.

8.2 To the extent that sub-paragraphs 6.1 to 6.5 are consistent with the true terms of the AGF LTD Policy, they are admitted. To the extent that sub-paragraphs 6.1 to 6.5 are inconsistent with the true terms of the AGF LTD Policy, they are denied.

8.3 It is admitted and averred that the relevant terms of the AGF LTD Policy are as set out in Annex 1 to this Defence.

8.4 Save as aforesaid, paragraph 6 is not admitted.

The Accident and Subsequent Events

9. In relation to paragraph 7:

9.1 The first sentence is admitted and it is admitted that as a result of the accident the Claimant sustained serious injuries and underwent various medical procedures.

9.2 Save as aforesaid, paragraph 7 is not admitted.

10. As to paragraph 8:

10.1 The first and second sentences are admitted. It is understood that the Claimant returned to work on 4 September 2006.

10.2 The third sentence is not admitted and the Claimant is put to proof.

10.3 The Defendant understands that when the Claimant returned to work he resumed his position as Managing Partner of Operations and Chief Financial Officer of the E&Y CIS Practice. He continued to receive his full remuneration package and to have the same responsibilities as he had before his accident.

10.4 On 15 September 2006, Svetlana Kondakova (Partner Matters Secretary, E&Y) sent to John Misa (of Sherwood Solutions LLC, "Sherwood", E&Y's insurance brokers) the completed version of the "Colonial Medical Disability Claim" claim form. The "Attending Physician's Statement" had been completed by Dr Clavert and this stated (in relevant parts) as follows (answers indicated in italics): "Physical Impairment ... *Medium manual activity 15-30%*", "Is patient now totally disabled? Patient's Job – *Yes.* Any Other Work – Yes. What duties of patients job is he/she incapable of performing? *Unable to drive – to lift.* Do you expect a fundamental or marked change in the future? Yes. If YES, when will patient recover sufficiently to perform duties? *3-6 MTH.* ... Can present job be modified to allow for handling with impairment? Patient's Job – Yes. Any Other Work – *Yes.* When could trial employment commence? *Part-time.* ...". Dr Clavert signed this document on 30 August 2006.

10.5 On 18 December 2006, Kerry Irwin (the Claimant's girlfriend at the time) emailed Melanie Matthews (Underwriting Case Manager, Colonial) and stated (in relevant part) "Cathal is still working for E&Y, though he is only part-time at work as he is unable to do full days and does at least 2 hours of physiotherapy every day."

10.6 On 18 December 2006, Philipp Turowski (Chief Operating Officer, E&Y) wrote to Ms Matthews to provide various information in relation to the Claimant, including "Total partner income for the period beginning 1 July 2005 and ending 30 June 2006 is USD 684,660" and that the Claimant had returned to work on 4 September 2006. Mr Turowski wrote to Ms Matthews again on 20 December 2006 to say that the Claimant had "... not yet returned to full-time work and continues to work on a part-time basis. It is unclear at the moment when Cathal Lyons will resume working full-time".

10.7 On 16 March 2007, Ms Kondakova emailed Ms Matthews and stated (in relevant part) "Cathal continues to hold the position of the CIS CFO. Currently Cathal is attending extensive physiotherapy sessions on a daily basis. His current workload is adjusted on the basis on his physical abilities. Cathal continues to receive his full pay at the moment. It remains to be decided how Cathal's financial arrangements will be handled in the future." This same wording formed part of a letter from Mr Turowski to Ms Matthews dated 15 February 2007.

10.8 On 18 January 2009, the Claimant sent Mr Custance an email asking various questions and setting out a draft email that he intended to send to Mr Turowski and James Mandel (Head of Department, In-House Legal, E&Y), which draft email stated (in relevant part) as follows: "As you probably remember the Insurance Company says it will not pay out on any disabilities I had returned to work. This is a further concern to me due to the continuing deterioration of my shoulder. It is clear that I am having more and more difficulties getting through the day. My shoulder gets more painful and I

seem to have to work longer and harder to deliver the same quality. ... I am already thinking that the deterioration might continue, what happens then?"

10.9 On 20 January 2009, Mr Custance replied to this email and sent an amended version of the draft email back to the Claimant. Mr Custance also answered the questions set out in the Claimant's email, in particular (Mr Custance's response is set out in italics): "Not sure if i should or should not say that i have to work longer and harder to get same amount of work done? *I've think that's fine but I've taken out the bit about having more and more difficulties getting through the day as am not sure we want to imply that you can't actually do the job*". The Defendant understands that the Claimant sent the revised version of the email, incorporating this change.

10.10 On 23 March 2009, the Claimant emailed Mr Custance and reported on a conversation the Claimant had with Mr Turowski that day. Mr Turowski had apparently said that E&Y might "offer money and a position somewhere else". The Claimant's email continued that "He said he knows I have an interest in Miami. I said yes but not too sure how or what i would do there? He mentioned a person in known in China and working with him again but i said NOPE as that is China and i will go there. Climate/Smog too bad and I am way too far for my daughter." The Claimant did not suggest that he would be unable to relocate because he was not capable of working.

10.11 Indeed, in April 2009 the terms of the Claimant's consultancy role (the April 2009 Agreement) were negotiated and agreed, including his hourly rate, minimum annual guarantee of hours of consulting work and a non-compete agreement to prevent the Claimant from working for any other "Big 4" auditing firm for a period of time. These terms do not suggest that the Claimant was not capable of working. Indeed, to the best of the Defendant's knowledge and belief, once the consultancy role commenced, the Claimant (initially at least) performed a significant amount of work for E&Y pursuant to the same. In this period, the Claimant remained as a director of one E&Y entity and retained the title of CFO of the E&Y CIS Practice.

10.12 On 6 April 2011, the Claimant signed a "Disability Claim (LTD) Form (Employee's Notification)". Paragraph 6(a) on this form asked "Date your disability first prevented you from carrying out your own occupation". The Claimant wrote the date *"04 06 10"* and added a note that *"my work has dropped since 2006 and in 2009 dropped so I could not do job. I did part time 2009-10 but not anymore"*. The "Declaration and Consent" section of the form provided in relevant parts: "I declare that I have been continuously unable to work in any capacity due to illness or injury since the date given in 6 a). I declare that the information I have given herein is true and complete and that no information has been withheld that might affect the acceptance of my claim for benefits from Generali Worldwide. Any fraudulent statements may lead to prosecution or legal action by Generali Worldwide and any information obtained in respect of my claim may be disclosed to third parties where fraud is suspected."

10.13 Paragraphs 11, 23 and 24 of the Claimant's witness statement (signed on 16 March 2012) in his High Court claim against E&Y (Claim No. HC11C00546) provided, in relevant parts, as follows:

> "11.1 I was unable to work at all for almost three months and eventually returned in September 2006 on a very much reduced workload, say a few hours per day. ...

...

23. I had a further operation in January 2009 which made the mobility of my shoulder even worse and the pain considerably worse.

...

24. In early 2009 I, (together with my Doctors and Surgeons) concluded that I could not continue to work even part-time with Ernst & Young and that I needed to pursue my claims for the inadequacy of their AD&D insurance."

10.14 Save as aforesaid, paragraph 8 is not admitted.

11. It is admitted and averred that the Claimant was employed in a senior position for which there was no strict requirement as to number of hours worked per week or when those hours were to be worked. The Claimant's key duties in his role were set out in a document titled "Job Description – Chief Financial Officer". To the best of the Defendant's understanding, the Claimant was able to carry out his key duties when he returned to work in 2006, at least on a part-time basis. The Claimant's condition does not appear to have deteriorated until 2009, although no admissions are made as to the degree of the Claimant's disability from 2009 onwards.

12. Paragraph 9 is not admitted.

13. As to paragraph 10:

13.1 The first sentence is denied. The Claimant's pleaded case is inconsistent with the medical and other evidence referred to above and the Claimant's own assessment set out in the "Disability Claim (LTD) Form (Employee's Notification)" dated 6 April 2011. Alternatively, the first sentence is not admitted.

13.2 Save that the reason why the Claimant entered into the April 2009 Agreement is not admitted, the second sentence is admitted.

13.3 It is admitted and averred that the Claimant agreed to resign as a partner and to be employed as a consultant at $300 per hour with a minimum annual guarantee of 300 hours of consulting for the period 1 July 2009 to 30 June 2010. The term of employment was agreed to be indefinite and "... may not be terminated except by agreement with Mr. Lyons ...".

13.4 Save as aforesaid, paragraph 10 is not admitted.

14. Paragraph 11 is admitted. It is, further, admitted and averred that the Claimant's case as set out in paragraphs 15 and 16 of the Particulars of Claim signed by the Claimant on 15 February 2012 in Claim No HC11C00546 was that "15. ... the Second Defendant (acting through Mr Labaude) knowingly and intentionally induced and caused the Practice to breach the Agreement. 16. The Claimant believes that the actions taken by Mr Labaude referred to above result from Mr Labaude's personal animosity against him arising from a discussion in late 2010 between the Claimant and Maz Krupski (Ernst & Young's Director Global Tax and Statutory) regarding alleged corruption by the Practice."

Alleged Benefits under the Insurance Policies

15. Save as set out below, paragraph 12 is denied:

15.1 Paragraph 12.1 is admitted.

15.2 Paragraph 12.2 is denied. Without prejudice to the generality of the foregoing denial, on a true construction of the Colonial LTD Policy and on the basis of the Claimant's own case as pleaded, and in any event on the facts of his case, any claim under the Colonial LTD Policy made by the Claimant was bound to fail.

15.3 Paragraph 12.3 is denied. Without prejudice to the generality of the foregoing denial, on a true construction of the AGF LTD Policy and on the basis of the Claimant's own case as pleaded, and in any event on the facts of his case, any claim under the AGF LTD Policy made by the Claimant was bound to fail.

The Retainer

16. In relation to paragraph 13:

16.1 It is admitted that in or about February 2007 the Claimant retained the Defendant, which at all times acted by partner and solicitor Tom Custance, to act on his behalf in the terms of the retainer letter dated 15 February 2007.

16.2 Save as aforesaid, paragraph 13 is denied. In particular, and without prejudice to the generality of the foregoing denial, it is denied that the Claimant instructed the Defendant in relation to any claim or claims he might have under the Colonial LTD Policy and/or the AGF LTD Policy (together, "the LTD Policies").

17. Paragraph 14 is admitted. For the avoidance of doubt, save for some minor typographical errors, it is admitted that paragraph 14 accurately sets out part of the retainer letter. The last paragraph on the first page of the retainer letter was as follows:

> "Depending on the outcome of my review of this material, the intention would then be to draft a letter to be sent by you to E&Y, in order to put some pressure on them either to extract the fullest cover to which you are entitled under the insurance in place at the time of your accident, and/or to compensate you for the disparity between that cover and the insurance which they represented to you as being in place."

18. It is averred that Mr Custance spoke with the Claimant on 14 February 2007. Mr Custance then emailed Mr Lyons on 14 February 2007, saying (in relevant part) "... I will let you have an engagement letter etc tomorrow". Mr Custance then sent Mr Lyons the 15 February 2007 retainer letter by email at 8.36pm on 15 February 2007, commenting (in relevant part) "Do let me know if anything is unclear". The retainer letter set out in clear terms the scope of the Defendant's retainer, which was clearly limited to the AD&D insurance issue set out more fully in that letter. With the retainer letter, the Defendant included its "terms of business for working with clients". The Defendant refers, in particular, to the following paragraphs in those terms of business:

> "10.6 We rely on you for the accuracy of the information and documentation that you provide to us. We shall not be liable for errors or losses which arise as a result of false, misleading or incomplete information or documentation or which result from any act or omission by you or any third party.

...

11.1 The maximum amount of our liability (whether in contract, tort (including negligence) or otherwise) in respect of any matter undertaken by us shall be limited to the amount specified in our engagement letter or, if no amount is specified, the lower of the following two limits:

11.1.1 £10 million;

11.1.2 the higher of £3 million or an amount equal to 100 times the fee (excluding disbursements, sundry charges and VAT) charged by us for the relevant matter."

19. The Claimant did not respond to the retainer letter by saying that anything was missing from the same (i.e. any reference to the LTD Policies). Instead, on 19 February 2007 the Claimant emailed Mr Custance at 10.57am (amongst other things) thanking him for the engagement letters. In this email, the Claimant also commented as follows (this being a reference, Mr Custance later understood, to the Ingosstrakh Policy):

> "As I mentioned I am hoping for some form of amicable settlement and best case scenario is from Insurance provider but I do not believe this is likely. Although the second operation on my foot was done while the new policy was active. That operation did amputate toes and metatarsal. We also believe that the amputation of shoulder and top of humerus also constitutes compensation. But this is where i do not see any action from my Employer/Partnership. I have informed them (verbally) that they should get a lawyer so they can put pressure on the Insurance company. As EY represented to me that I was covered I have been very clear with them that I expect compensation and if Insurance does not provide then I will."

20. It is averred that the Claimant was forthright in his views and in asserting any rights that he believed that he had. If the Claimant wanted the Defendant to advise or comment on anything, the Claimant would make it absolutely clear that this was his intention. Indeed, the Claimant sent a vast number of emails to Mr Custance throughout the period relevant to this matter. If the Claimant had wanted to instruct the Defendant to advise on the LTD Policies, he would have made this completely clear. If the Claimant had so instructed the Defendant and the Defendant had failed to provide relevant advice, the Claimant would have pointed this out immediately to Mr Custance and would have repeated requests for such advice until it had been received. This was not the case, however, because the Claimant only instructed the Defendant (in relation to insurance issues) in the terms set out in the retainer.

21. Paragraph 15 is denied. It is entirely clear that the scope of the retainer was limited to advising on the accidental death and dismemberment ("AD&D") insurance issues (including the alleged misrepresentation made by E&Y in relation to the same). The Defendant was not instructed to (and did not) provide advice in relation to the LTD Policies. If the Defendant had been instructed to advise on the LTD Policies, the failure to have done so would have been a striking omission, and certainly one that the Claimant would have immediately and repeatedly pointed out.

22. On 19 February 2007 at 9.04am, Ms Irwin emailed Mr Custance to introduce herself as the Claimant's girlfriend and to tell Mr Custance that she had been looking after the paperwork and that she had in the range of about 75 emails that she could forward to Mr Custance. Mr Custance replied at 6.39pm, asking her to send all of the emails and saying that "Yes, do you

mind sending me all of the emails – I suspect only a proportion will in fact be important, but it will be helpful for me to have the entire picture".

23. At 6.46pm on 19 February 2007, Mr Custance emailed the Claimant and stated (in relevant part) "I entirely agree with where you're trying to get to on this, which is basically to make it clear to E&Y that this is their problem (one way or the other)".

24. It is averred that, as instructed, Mr Custance at this time had two issues in mind when acting for the Claimant, corresponding with him and Ms Irwin and reviewing the correspondence that he was sent: (1) the scope of the AD&D cover in place and (2) whether E&Y had made any misrepresentations in relation to the same. Mr Custance was, as instructed, not reviewing the materials he was sent for the purpose of advising on the LTD Policies.

25. Save as follows, paragraph 16 is denied:

25.1 It is admitted that the Claimant sent the Defendant documents relevant to the LTD Policies.

25.2 However, the reason that such documents were provided was simply because the Claimant was providing to Mr Custance "all of the emails", without filtering through those emails to select only the emails and attached documents relevant to the AD&D insurance issues.

25.3 Further documents relevant to the LTD Policies were sent to the Defendant at later stages, as set out in more detail below. However, the reasons for those documents being sent to the Defendant are addressed below and it is denied that they were sent to the Defendant because the Claimant was seeking advice from the Defendant in relation to the LTD Policies.

25.4 It is, further, averred that the Claimant had a tendency to send the Defendant a large number of emails and documents, whether or not they were relevant to the matters in relation to which the Defendant was instructed to advise.

25.5 Further, as can be seen from a review of the emails and documents sent to the Defendant, and as addressed in more detail below, the claims under the LTD Policies were being handled by E&Y and Sherwood. Mr Custance rightly did not regard his role to be that he should "second-guess" what E&Y and Sherwood were doing in this regard.

25.6 Further still, the claims under the LTD Policies were (by the time the Defendant was instructed) historical (in the sense that they had been made some time previously) and were not at that time contentious because they were essentially "on hold" for the relevant waiting periods under the policy terms. In the circumstances, it would have been particularly unlikely that the Claimant would have instructed Mr Custance to advise in relation to the claims under the LTD Policies when these were already being handled by E&Y and Sherwood, were uncontentious at that time and were "on hold", in the above sense.

25.7 Sub-paragraphs 16.1 to 16.19 are addressed below, but for the avoidance of doubt it is denied that the Claimant is entitled to rely on the same in support of the (denied) allegations that the Defendant's retainer extended to the LTD Policies and/or that the Defendant was in any event under a duty to and did in fact advise on the same.

26. On 22 February 2007, Ms Irwin sent Mr Custance a large number of emails with a large number of attachments. The emails from Ms Irwin to Mr Custance forwarded emails between the Claimant, E&Y and Sherwood relating to the Claimant's insurance policy claims and his injuries. Mr Custance reviewed these emails and the attachments for the purpose of addressing the matters in relation to which he was instructed. Mr Custance noted that E&Y and Sherwood were dealing with the LTD Policy claims.

27. For example, at 13.21 on 22 February 2007 Ms Irwin forwarded to Mr Custance an email from Ms Kondakova to the Claimant (sent at 3.10pm on 25 July 2006) and stating (in relevant part) "The underwriters have acknowledged the notice of LTD Claim. Below is the list of documents required by the underwriters (Colonial) to proceed with the claim." Ms Kondakova's email in turn had forwarded to the Claimant an email from Mr Misa to Ms Kondakova (dated 24 July 2006) stating (in relevant part) "... Colonial Underwriters has acknowledged notice of possible LTD claim for Cathal Lyons and have requested the documents listed below. ... As I advised you previously, we are reminded that the LTD policy that was issued to E&Y has a 365 Elimination Period with regard to accidents. In addition; AGF who also provides Disability cover, will be sending their reporting requirements." Mr Misa's email in turn forwarded an email from Marilynn Donley (of Hanleigh) to Mr Misa (dated 24 July 2006) stating (in relevant parts) "... Colonial Underwriters has acknowledged notice of possible LTD claim for CIS Russia, Mr. Cathal Lyons and request following documents: ... Please have the attached claim form completed and forward the accident/police report; hospital report and current salary information. In addition, AGF has not yet sent me their reporting requirements, will forward when I receive them."

28. Mr Custance did not review this documentation in detail at the time (having only been instructed in relation to the AD&D insurance issues). However, it is notable that:

    28.1 The Claimant was in email correspondence in 2006 in relation to his claims under the LTD Policies. In an email sent at 7.30pm on 20 August 2006 from the Claimant to Ms Kondakova, the Claimant referred to "... the maximum compensation covered by insurance is $300k". It appears, therefore, that the Claimant was aware of the limits of indemnity of the AGF LTD Policy and the Colonial LTD Policy and, if he had chosen to do so, was in a position to have instructed the Defendant in relation to the same, but did not do so.

    28.2 Ms Matthews wrote to the Claimant on 9 December 2006 and asked for details of the Claimant's medical status and work status. The Claimant was in correspondence with Ms Kondakova and Mr Misa about this. Various medical records and letters relating to work status were apparently sent to Colonial.

    28.3 It appeared that amongst the Claimant, Ms Irwin, E&Y, Sherwood, Colonial and AGF, the claims under the LTD Policies were being adequately handled. Mr Custance understood that these claims were being handled by others and in any event he was not instructed in relation to the same.

29. In relation to paragraph 16.1:

    29.1 It is admitted that the Claimant forwarded to the Defendant the documents listed, although the "Ernst & Young Employee Booklet" and the Generali Policy were sent to Mr Custance by Ms Irwin on 22 February 2007. On or prior to 22 February 2007, Ms Irwin sent Mr Custance approximately 35 emails.

    29.2 Save as set out above, it is denied that the Claimant instructed the Defendant to

advise on these documents. The circumstances in which, and the purpose for which, these documents were sent to Mr Custance were as set out above and Mr Custance's review of the same was limited to the purpose of complying with his instructions.

29.3 The "Hauteville (AGF) Group Life, Disability and Accidental Death and Dismemberment Insurance Plans Member Information Boooklet" ("the AGF Booklet") was provided to the Claimant under cover of an email from Ms Kondakova dated 2 November 2006. This email stated (in relevant part) "Our policy documents are attached." Mr Custance therefore believed that these documents were reliable and were the correct policy documents to review. Whilst Mr Custance does not recall whether he noted that the AGF Booklet was the actual AGF AD&D Policy or only a summary booklet, Mr Custance would have been very surprised if the terms of the AGF AD&D Policy were so different from the terms of the AGF Booklet that the definition of "Loss" was materially different.

29.4 Mr Custance read the AGF Booklet for the purpose of carrying out his instructions. Mr Custance noted that Section 3.1 ("Definition of Benefit") of the AGF Booklet provided in relevant parts as follows:

> "In the event of an accidental death or dismemberment of an Insured Member the Insurer pays a lump sum benefit equal to the Principal Sum subject to a maximum benefit multiplied by a percentage as shown below.
>
> ...
>
> • loss of one foot or one leg. 50%
>
> ...
>
> 'Loss' shall mean with regard to hands and feet, actual severance through or above the wrist or ankle joint; ..."

29.5 Mr Custance understood from the AGF Booklet that the Claimant's foot injury did not fall within the ambit of the definition of "Loss".

29.6 Save as aforesaid, paragraph 16.1 is not admitted.

30. Save that the dates should probably be 22 and 25 February 2007 (and it is not admitted that the 25 February 2007 email was "a second email"), paragraph 16.2 is admitted. For the avoidance of doubt, it is denied that the Claimant instructed the Defendant to advise on these documents. The circumstances in which, and the purpose for which, these documents were sent to Mr Custance were as set out above and Mr Custance's review of the same was limited to the purpose of complying with his instructions.

31. Paragraph 16.3 is admitted, save that it is not admitted that the 25 February 2007 email was "a third email". For the avoidance of doubt, it is denied that the Claimant instructed the Defendant to advise on this document. The circumstances in which, and the purpose for which, this document was sent to Mr Custance were as set out above and Mr Custance's review of the same was limited to the purpose of complying with his instructions. Mr Custance noted that the Sherwood report stated in relation to "AGF AD&D Cover" that "... it appears that no claim for AD&D would be paid by AGF based upon their definition of dismemberment being either the loss, or the loss of use, of his foot." Mr Custance also relied on the fact that Sherwood had been in correspondence with AGF in relation to the Claimant's AD&D claim.

32. The Sherwood report was also somewhat confused because it referred to "Colonial AD&D Cover", when in fact Colonial provided no such cover. Mr Custance believes that the effect of this incorrect reference was to cause him in some later correspondence to refer to AGF and Colonial when referring to the AD&D cover. Mr Custance also believes that this use of incorrect names was probably compounded by him seeing the 18 December 2006 10.29am email from Ms Kondakova to the Claimant that also referred to Colonial apparently providing AD&D cover.

33. On reviewing the various documents sent to him, Mr Custance noted that the Ingosstrakh Policy replaced the AGF AD&D Policy with effect from 1 July 2006. On 16 March 2007, Mr Custance sent the Claimant an email setting out some advice and also setting out a draft email for the Claimant to send to E&Y. In this email, Mr Custance referred to "the Colonial/AGF policy", but (as explained above) this was a reference to the AD&D insurance only. Mr Custance also stated in this email that it was important to obtain a copy of the Ingosstrakh Policy because he believed that the Claimant's injuries did not fall within the definition of "Loss" as set out above. The draft email that Mr Custance provided to the Claimant only addressed AD&D cover (although, again, mistakenly referred to "the Colonial/AGF policies"). The Claimant did not respond to this email by asking Mr Custance to advise on or take any other action in relation to the LTD Policies.

34. On 18 March 2007, the Claimant sent E&Y an email based on the draft email sent to him by Mr Custance on 16 March 2007. This email was expressly limited to the Claimant's concerns about the AD&D cover, asserting that E&Y had allowed his AD&D claim to "run into the sand", that the AD&D insurance did not provide cover for his injuries, that nothing had been done to investigate whether there might be some AD&D cover available under the Ingosstrakh Policy, that E&Y had made misrepresentations to him about the extent of the AD&D cover and, ultimately, that "... I will be looking to E&Y to make good any shortfall between the cover available under the Ingosstrakh and/or Colonial/AGF policies, and the cover which E&Y (either directly or through their agents, Sherwoods) represented to me as being in place." The rest of the email makes clear that this last passage related only to the AD&D insurance, not the long term disability ("LTD") insurance.

35. On 19 March 2007, Mr Custance emailed the Claimant to report on a conversation that Mr Custance had had with Mr Mandel. Mr Mandel had agreed to make some enquiries about the best way of approaching Ingosstrakh and Mr Custance suggested this could be done through E&Y's brokers.

36. Later on 19 March 2007, the Claimant sent Mr Custance three emails with various attachments, all in relation to the potential claim on the Ingosstrakh Policy. The first email forwarded a 19 March 2007 email from Ms Kondakova stating (in relevant part) that "We have contacted Ingosstrakh with the request to consider applying policies effective 1 July 2006 on the basis that surgeries took place after 1 July 2006. We received the following reply – all consequences of the treatment following the accident are considered to be a consequences resulting from the accident and covered under the plan in place at the date of the accident. Ingostrakh/Generali therefore are not liable to cover those instances." The reference to Generali is understood to be a reference to the fact that Ingosstrakh was fronting for Generali in providing the Ingosstrakh Policy.

37. The third email forwarded to Mr Custance by the Claimant on 19 March 2007 was an email from Mr Turowski to Mr Mandel, stating (in relevant parts) "I discussed with Cathal that he personally should hire an external lawyer ... that represents him and not EY, but that we would cover the cost. The trigger for this is the fact that ... Ingostrakh is an audit client ...". On

20 March 2007, Mr Custance sent the Claimant a long email (copied to Mr Mandel) setting out arguments to be deployed in a meeting that the Claimant and Mr Mandel were going to have the following day with Ingosstrakh. These arguments covered the issues of why the Ingosstrakh Policy should respond to the Claimant's claim and what level of cover should apply.

38. The tactical approach at this stage was for Mr Custance and the Claimant to pressure E&Y to try to assert pressure on Ingosstrakh to meet the Claimant's claim. E&Y had huge market presence and significant economic power in relation to Ingosstrakh, certainly significantly more than the Claimant as an individual. Further, E&Y were present in Russia and were better able to negotiate with Ingosstrakh than Mr Custance, particularly because Russian law applied to the Ingosstrakh Policy. In this regard, Mr Custance emailed Mr Mandel on 23 March 2007 (in relevant part) as follows: "In terms of taking things forward with Colonial/AGF and Ingosstrakh (depending on Colonial/AGF's response), can I assume that EY is taking responsibility for this?" Mr Custance's email was referring only to the AD&D insurance and not the LTD insurance, the mistaken reference to "Colonial" being explained above.

39. There were delays by E&Y in progressing the Ingosstrakh insurance claim and Mr Custance attempted to chase E&Y to progress this claim in April 2007. On 24 April 2007, the Claimant emailed Mr Custance to say (amongst other things) that the Country Managing Partner had been interviewing for the Claimant's position and that he viewed this as "work place violence or an attempt at constructive dismissal".

40. Save that it is denied that by the email dated 25 April 2007 the Claimant sought advice from the Defendant as to his (alleged) entitlement to long term disability benefit (and save that it is denied that the Claimant had any such entitlement), paragraph 16.4 is admitted. The Claimant's 25 April 2007 email made no mention of the LTD Policies. If the Claimant had wanted the Defendant to advise on the LTD Policies he would have made it completely clear. Further, as referred to in the email, the Claimant and Mr Custance spoke on 25 April 2007. The Defendant notes that no allegation is made by the Claimant that during this conversation the LTD Policies were discussed. Further still, Mr Custance did not advise on the LTD Policies after the 25 April 2007 email. The Claimant did not chase Mr Custance to provide such advice, which is consistent with the Claimant not having instructed Mr Custance so to advise. In any event, the LTD Policies claims were still being handled at this time by the Claimant, E&Y and Sherwood and were also "on hold", as set out above.

41. Paragraph 16.5 is admitted. Along with a large number of emails passing between the Claimant, Ms Irwin and Mr Custance at around this time, the Claimant did forward to Mr Custance the 17 May 2007 email from Mr Mandel. For the avoidance of doubt, it is denied that the Claimant instructed the Defendant to advise on this email or that this email amounted to an instruction to advise on the LTD Policies. The Claimant would, as set out above, forward to Mr Custance a large number of emails and documents, whether or not they were relevant to the AD&D insurance issues on which Mr Custance had been instructed to advise.

42. Paragraph 16.6 is admitted. At this time, Mr Mandel was corresponding with Barry Mathews (of AON) in relation to the Claimant's insurance claims. As was the Claimant's standard practice, the Claimant forwarded to Mr Custance an email (with attachments) from Mr Mandel to Mr Mathews dated 18 May 2007. To the extent that this email and the attachments addressed the LTD Policies, it was irrelevant to Mr Custance's instructions. For the avoidance of doubt, it is denied that the Claimant instructed the Defendant to advise on this email or that this email amounted to an instruction to advise on the LTD Policies.

43. On 18 May 2007, Mr Custance sent the Claimant an email setting out the draft text of a letter to be sent to E&Y on the Defendant's notepaper and various points for the Claimant to consider. Mr Custance asked in this email whether the Claimant would like to discuss the draft letter. The Claimant reviewed the email and replied on 20 May 2007. The Claimant did not ask Mr Custance to advise on the LTD Policies. The narrative to the Defendant's invoice dated 29 May 2007 records for 18 May 2007 *"Preparing draft letter to E&Y re AD&D claim and emailing to client with comments"*.

44. Paragraph 16.7 is admitted, although the passage quoted is taken out of context and it is denied that the same indicated that the Defendant had been instructed to advise on the LTD Policies. The 21 May 2007 letter from the Defendant to Mr Turowski was headed "Re Cathal Lyons: AD&D insurance claim". The letter started "We act for Cathal Lyons. We refer to our client's email to yourself and others dated 18 March 2007 relating to his AD&D (Accidental Death & Dismemberment) claim." The letter went on expressly (and only) to deal with AD&D insurance issues and the Claimant's complaint that E&Y had failed to progress such claim. The letter asserted "... our client now requires E&Y to pay him the amount due in respect of his AD&D claim." The letter concluded "For the avoidance of doubt, this letter deals only with our client's AD&D claim. The other insurance claims arising from his accident will need to be addressed separately". This is because the Defendant was only instructed in relation to the AD&D insurance issues, which is entirely consistent with the remainder of the content of the letter. As can be seen from the narrative to the Defendant's invoice dated 29 May 2007 for 21 May 2007, Mr Custance discussed the draft letter with the Claimant before sending it and met with the Claimant on 21 May 2007.

45. Also on 21 May 2007, the Claimant sent Mr Custance by email two spreadsheets setting out "... the calculation from FY07 through to FY14. The file is not as complicated as it initially looks". The Claimant essentially set out in these spreadsheets his total remuneration package from E&Y. The tables were lengthy, complicated and detailed and had clearly been given careful consideration. Under the heading "Final amount to be paid", the Claimant set out another heading "Insurance settlement" and the text "Amputated Toes 700,000 Amputated Shoulder & Upper Humerus 900,000 Total Owed – Amputation 1,600,000". No figures were set out in relation to any LTD Policy claim, consistently with the Defendant not having been instructed in relation to any claims under the LTD Policies.

46. Save to the extent that it is consistent with the following, paragraph 16.8 is denied:

46.1 On 22 May 2007, Ms Irwin sent an email to Mr Custance setting out a message from the Claimant, as follows: "There are special rules for big payments so better for me not to be a partner:..So EY can sign legal letter that they will pay me everything 1 hour after I resign. Needs to be tight so I don't get screwed. Karl can sign a legally binding letter saying that if I resign as partner he will pay 6 million dollars. He pays for me out and to release all signing powers back to firm and buy my silence. When he agrees and signs this with you, then I resign."

46.2 Mr Custance replied that he did receive the Claimant's messages.

46.3 Later on 22 May 2007, Mr Custance replied to the Claimant's 21 May 2007 email that attached the payment calculations (above). Mr Custance stated (in relevant part) "Will be in touch later today – will call if have any questions, but otherwise will get on and prepare the 'head of terms'. ...".

46.4 The reference in Ms Irwin's email to 6 million dollars simply cannot have been a

reference to the total payments to which the Claimant now alleges that he would be entitled under the LTD Policies over 20 years until his 65th birthday. This is pure coincidence. It is inconceivable that the only content of the payment that the Claimant was seeking (and referred to in the 22 May 2007) email was the sums allegedly owed under the LTD Policies. This would be entirely inconsistent with the Claimant's 21 May 2007 email and attached tables. The total figures in those tables (which included no sum in relation to the LTD Policies) were for FY07 USD 3,159,784 and for FY08 to FY11 (the payments the Claimant alleges he would have received if he had remained a partner with E&Y) USD 6,199,040. Whilst the calculations are difficult to follow, it appears that the grand total figure set out in these tables would be approximately USD 9,358,824.

46.5 It is also denied that the sum of 6 million dollars would have been understood by the Defendant to be a reference to the total payments to which the Claimant would be entitled under the LTD Policies. The Defendant had never been instructed to advise on the LTD Policies and had not received the LTD Policies by this date, let alone studied them in sufficient detail to know (without prompting) that the figure of $6 million can only have been a reference to the total limit of both policies combined over 20 years until the Claimant's 65th birthday (if, which is highly unlikely, Mr Custance knew off the top of his head when the Claimant would turn 65).

46.6 Further still, the Waiting Periods under the LTD Policies had not yet expired and so there was no indication at that time that the LTD Policies would not respond in full to the Claimant's claims. It would be extremely peculiar for the Claimant to accept an exit payment from E&Y that apparently was to represent the LTD Policy limits when it was not yet known at that time whether or not those LTD Policies were going to respond in any event.

46.7 Further and in any event, Mr Custance did then draw up a draft agreement between the Claimant and E&Y relating to his resignation as a partner. There was no reference at all in that draft agreement to the sums claimed by the Claimant under the LTD Policies. This would have been a striking omission if it is correct, as alleged, that the Defendant would have known that the only sum claimed ($6 million) was to be made up exclusively of the total limits under the LTD Policies.

46.8 Further, the content of the draft agreement drawn up by Mr Custance was completely contrary to what is alleged at paragraph 16.8. The sums sought by the Claimant (a total of USD 8,853,824), as recorded in the draft agreement (and as set out in the Claimant's 21 May 2007 email), were made up of a number of different heads, including the repayment of loans, sums due under the AD&D insurance claim and net payments for various future years of employment lost. When the Claimant received this draft agreement, he did not complain that it was all wrong and that the total figure claimed should have been USD 6 million, to be made up of the total limits under the LTD Policies.

46.9 For the avoidance of doubt, it is denied that the matters pleaded at paragraph 16.8 amounted to an instruction to the Defendant to advise on the LTD Policies.

47. On 22 May 2007, Mr Custance sent the Claimant a draft agreement. This agreement was "In consideration of Mr Lyons agreeing to resign as a partner of E&Y ... and in full and final settlement of all claims he has or may have against E&Y ...". The draft agreement recorded at clause 2 that part of the USD 8,853,824 sought was "The amounts due in respect of Mr Lyons'

AD&D ... insurance claim(s) totalling USD 1,500,000: Mr Lyons will ... assign to E&Y his rights under the relevant insurance policies to the AD&D benefits ...". Clause 4 related to the Claimant's Cigna medical insurance (to be provided to the Claimant for the rest of his life). Clauses 7 and 8 set out English law and jurisdiction clauses.

48. On 23 May 2007, the Claimant sent an email to Mr Custance setting out in an attached file a "narrative" of events, including recent discussions with Jonathan Tubb (CIS CFO for Deloitte) and Mr Turowski. The Claimant reported that Mr Turowski had apparently stated that the Claimant was on Mr Johansson's "hit list" and that Mr Johansson had tried to persuade the Claimant's former boss to persuade the Claimant to leave Russia and relocate to China.

49. On 24 May 2007, the Claimant sent to Mr Mandel, Mr Custance and Ms Kondakova the Colonial letter dated 13 April 2007 rejecting his claim. The Claimant did not ask Mr Custance to take any action in relation to this letter, nor did Mr Custance even respond to the Claimant's email. If Mr Custance had been instructed to advise in relation to any claims under the LTD Policies, at the very least the Claimant would have asked for his reaction to this Colonial Rejection Letter and at the very least Mr Custance would have responded to the Claimant's email. The Colonial Rejection Letter was an outright rejection of the Claimant's claim and therefore likely to have elicited at least some response from the purportedly instructed solicitor and/or the disappointed client. However, as set out above, the Defendant had only been instructed in relation to the AD&D claim and that is why the above kinds of responses did not occur.

50. Save that the wording "(following the email from the Claimant's girlfriend)" is not understood (but to the extent that it is understood it is denied for the reasons set out below), and save that the full narrative stated *"Reviewing client's calculations of remuneration / other benefits, and policy docs re entitlement to disability benefits"*, the first sentence of paragraph 16.9 is admitted. The second sentence is denied. The inference made is incorrect. Mr Custance was not reviewing the LTD Policies. Instead, this reference to "disability benefits" was an incorrect reference to the Ingosstrakh Policy and/or the AGF AD&D Policy. The inferred link between the narrative set out in the invoice and the 22 May 2007 email from Ms Irwin is denied. The context set out above and, in particular, the Claimant's 21 May 2007 email and attached schedule makes clear that Mr Custance did not review the LTD Policies and that the entry in the invoice was incorrect, and was not a reference to the LTD Policies. Other entries for 22 May 2007 on the 29 May 2007 invoice were *"Phone call with client discussing various queries on items / figures to be included in agreement"*, *"Drafting settlement agreement between client and E&Y"* and *"Email to client attaching draft agreement with comments"*.

51. Save that it is admitted that the Defendant recorded 24 minutes for a telephone call that took place between the Claimant and Mr Custance, paragraph 16.10 is denied. First, Mr Custance was not in a position to have discussed the LTD Policies with the Claimant because Mr Custance had not read those policies. Indeed, the Defendant does not believe that Mr Custance had received those policies by that date. Second, the context and the background set out above makes clear that the LTD Policies were not discussed. The relevant narrative for 22 May 2007 on the 29 May 2007 invoice reads *"Phone call with client discussing various queries on items / figures to be included in agreement"*. Notably, as set out above, there was no reference at all in the draft agreement to the sums claimed by the Claimant under the LTD Policies. Third, if (as alleged) Mr Custance had recently read the LTD Policies, he would immediately have responded to the Claimant with comments on the Colonial Rejection Letter received on 24 May 2007. Further, if (which is denied) the Claimant's case were correct, the Claimant would have known that Mr Custance had recently reviewed the LTD Policies (because this would have been discussed during the 24 minute call) and therefore the

Claimant would have asked Mr Custance for his views on the Colonial Rejection Letter. These events did not occur because Mr Custance had not recently reviewed the LTD Policies because he had not received those policies at that stage and, crucially, he had never been instructed in relation to the LTD Policies claims.

52. In relation to paragraph 16.11:

52.1 It is admitted that the Claimant emailed Mr Custance the Colonial Rejection Letter, as set out above.

52.2 It is denied that this was "two days after Mr Custance reviewed the Claimant's entitlement to long term disability benefits", because Mr Custance did not conduct such a review.

52.3 The second sentence of paragraph 16.11 is denied. All that the Colonial Rejection Letter states is "We determined your date of disability was 6/17/06" and it is denied that it states that Colonial "... accepted that Mr Lyons was Disabled with effect from 17 June 2006, within the meaning of the Colonial LTD Policy".

52.4 The Defendant repeats paragraphs 49 to 51 above.

52.5 The Defendant notes that paragraph 16.9 does not allege that Mr Custance did review the LTD Policies, although paragraph 16.11 is incorrectly premised on that basis.

52.6 Save as aforesaid, paragraph 16.11 is not admitted.

53. The first correspondence between the Claimant and Mr Custance after sending the Colonial Rejection Letter was later on 24 May 2007 by email. No reference was made in these emails (or in any later emails) to the Colonial Rejection Letter, which would have been remarkable if the Claimant had in fact instructed Mr Custance to advise in relation to any claims under the LTD Policies. The Claimant and Mr Custance were then in touch in June 2007 about the AD&D claim and on 7 June 2007 Mr Custance sent E&Y a chasing letter, further to the 21 May 2007 letter. On 15 June 2007, the Claimant and Mr Custance were in email correspondence about putting pressure on E&Y to resolve the AD&D claim. On 25 July 2007, the Claimant informed Mr Custance by email that they could pursue the insurers and E&Y would pay. Mr Custance then spoke to Mr Mandel, who was leaving it to the Claimant and Mr Custance to pursue the insurers. On 1 August 2007, Mr Custance emailed Mr Mandel to ask for his file relating to the AD&D claim because he needed the file to advise on further arguments potentially available.

54. Paragraph 16.12 is admitted. It is denied that this amounted to the Claimant instructing the Defendant to advise in relation to the LTD Policies. These files were sent to Mr Custance in the context set out above, that is E&Y handing over to the Claimant and Mr Custance responsibility for pursuing the AD&D claim. Thus, Mr Custance required Mr Mandel's files in order to pursue the AD&D claim, not to advise in relation to the LTD Policies. In any event, it was easier for the full files to be sent to Mr Custance, rather than solely the AD&D papers. In addition to what is listed in paragraph 16.12, there were also a large number of other documents in Mr Mandel's files not relating to Colonial (including medical records, the Ingosstrakh Policy, the ACE Policy, invoices and emails). For the avoidance of doubt, the Claimant did not instruct Mr Custance to review these files in relation to the LTD Policies.

55. Paragraph 16.13 is admitted. It is denied that this amounted to the Claimant instructing the Defendant to advise in relation to the Colonial Rejection Letter and/or the LTD Policies. It is

not clear why this letter was sent to Mr Custance at this time. As set out above, the Claimant did send large numbers of emails. The focus of the Claimant and Mr Custance at this time was the Ingosstrakh Policy claim (as demonstrated by, for example, the 2 August 2007 and 28 August 2007 correspondence relating to the Ingosstrakh claim form). The Claimant, Mr Custance and Mr Mandel corresponded in September and October 2007 in relation to the Ingosstrakh Policy claim. The Claimant perceived that there were various delays by E&Y in progressing the Ingosstrakh Policy claim. On 10 December 2007, Mr Custance sent the Claimant four invoices and a covering letter. The covering letter referred to the AD&D insurance, the settlement agreement and the Ingosstrakh claim, but not to the LTD Policies.

56. Paragraph 16.14 is admitted. It is denied that this reflects any alleged instructions given by the Claimant to the Defendant to advise in relation to the LTD Policies or that Mr Custance did so advise. The entry in Mr Custance's time record is explained by the simple error referred to above, that is that Mr Custance sometimes mistakenly referred to the AGF AD&D Policy by both the names Colonial and AGF. This entry in the time record was in fact related solely to the AGF AD&D Policy claim.

57. Save that the passage quoted accurately sets out one small part of a long email dated 20 February 2008, paragraph 16.15 is denied. The two main issues concerning the Claimant at this time were the Ingosstrakh Policy claim, and his difficulties with Mr Johansson and the settlement that could be reached for the Claimant leaving E&Y. The content of the full email from which the passage set out at paragraph 16.15 has been selectively quoted makes clear that the Claimant is commenting on a potential deal that he could seek with E&Y. The Claimant was not requesting advice on the LTD Policies. The Claimant was proposing essentially an additional factor that could be agreed with E&Y (that they say that he was physically and mentally not capable of working) so he could claim insurance sums. The Claimant's email did not refer to the LTD Policies, nor did it ask Mr Custance to consider the same.

58. In March, April and May 2008, the Claimant, Mr Custance and Mr Mandel corresponded about the Ingosstrakh Policy claim. On 16 June 2008, Mr Mandel emailed the Claimant and Mr Custance with a letter from Ingosstrakh rejecting the Claimant's claim.

59. As to paragraph 16.16:

59.1 Save that the relevant narrative in the invoice ends with ", *etc*", it is admitted that the narrative on the Defendant's invoice dated 26 June 2008 in relation to an entry for 11 June 2008 is accurately set out. The other entry for 11 June 2008 in this invoice reads *"Briefly reviewing policy docs and email correspondence in preparation for conference call with client and J Mandel"*.

59.2 It is denied that the narrative set out at paragraph 16.16 "shows" that Mr Custance discussed any claim against Colonial. For the avoidance of doubt, Mr Custance did not discuss any claim against Colonial and the narrative is inaccurate.

59.3 The inaccurate narrative in the invoice is explained by the simple error referred to above; that is that Mr Custance sometimes mistakenly referred to the AGF AD&D Policy by the name Colonial. This entry in the time record in fact related to the AGF AD&D Policy and the Ingosstrakh Policy. Mr Custance had been trying for some time to set up a call to put pressure on E&Y to progress the Ingosstrakh claim. That (and the AGF AD&D Policy) is what was discussed on this call, not the LTD Policies.

59.4 It is denied that the inaccurate narrative on the invoice reflects any alleged instructions

given by the Claimant to the Defendant to advise in relation to the LTD Policies or that Mr Custance did so advise.

59.5 Save as aforesaid, paragraph 16.16 is not admitted.

60. Save as follows, paragraph 16.17 is admitted. If the Claimant is using the word "after" to mean "as a result of", this is denied. It is not now clear why the Claimant sent this material to Mr Custance. However, this would be consistent with the Claimant's standard practice of sending Mr Custance large numbers of documents and emails over long periods of time and "dumping" material on Mr Custance in this way. It is denied that this reflects any alleged instructions given by the Claimant to the Defendant to advise in relation to the LTD Policies or that Mr Custance did so advise. In addition to what is listed in paragraph 16.17, there were also a large number of other documents sent to Mr Custance by the Claimant not relating to Colonial (including medical records, the Ingosstrakh Policy claim form, the Ingosstrakh Policy, the AGF AD&D claim form, various ACE Policy claim documents, the ACE Policy, Cigna documents, invoices, correspondence and emails).

61. Between July and November 2008, there was very little correspondence between the Claimant and Mr Custance. The correspondence then started again in November in relation to the Ingosstrakh Policy claim and the Claimant's contingent claim against E&Y for misrepresentation. On 9 February 2009, the Claimant sent Mr Custance a note of a meeting with Mr Turowski regarding suing Ingosstrakh (E&Y agreed to pay the Claimant's legal fees) and a possible settlement for the Claimant to leave E&Y. On 19 March 2009, Mr Custance sent the Claimant a "Heads of Terms" document. This provided for the Claimant to resign as a partner, to become a consultant, to relocate to Miami, to receive $2.5 million and to retain Cigna insurance for life. Mr Custance included an English law and jurisdiction clause. There was no reference to any claims under the LTD Policies in this document.

62. Save that it is admitted that paragraph 16.18 accurately (subject to minor typographical errors) sets out part of one short email out of hundreds passing between the Claimant and Mr Custance over many years, it is denied. It is denied that this short email (which has been taken out of context) reflects any alleged instructions given by the Claimant to the Defendant to advise in relation to the LTD Policies or that Mr Custance did so advise. The reference to "thread carefully" appears to be a reference to Mr Custance's email to the Claimant dated 20 January 2009, in which he stated "*... am not sure we want to imply that you can't actually do the job*". The Claimant's email to Mr Custance was sent in the context of the Claimant attempting to reach an agreement with E&Y. There had been no discussions prior to this email about the LTD Policies, nor had Mr Custance advised in relation to the same. The Claimant may have had in mind the possibility of pursuing claims under the LTD Policies, but this was not something with which Mr Custance had been involved. In any event, Mr Custance did not advise on the LTD Policies following on from this email, nor did the Claimant pursue Mr Custance to provide such advice or complain when such advice was not given. The next correspondence between the Claimant and Mr Custance was on 6 April 2007 and related to the settlement with E&Y. The Claimant did not ask for advice on the LTD Policies at this time either.

63. Paragraph 16.19 is denied and is, in any event, embarrassing for want of particularity.

64. As set out in paragraphs 2.61 to 2.72 of the Defendant's Professional Negligence Pre-Action Protocol Letter of Response, the Defendant will also seek to rely on the correspondence between the Claimant and Mr Custance and other matters in 2011 and 2012 relating to the Generali Policy (including the Claimant's witness statement dated 16 March 2012) as further

evidence that the Defendant was not instructed to advise (or under a duty to advise) on the LTD Policies.

65. As to paragraph 17:

65.1 Paragraph 17.1 is admitted.

65.2 Save to the extent that they are consistent with the Defendant's case set out above, paragraphs 17.2 and 17.3 are denied.

65.3 Save as aforesaid, paragraph 17 is not admitted.

66. As to paragraph 18, the Defendant repeats its response to paragraph 17.

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

67. Paragraph 19 is denied. For the avoidance of doubt, alleged negligence and breach of contract are denied. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraph 19 as follows:

67.1 On the basis of the evidence and documentation provided to Mr Custance by the Claimant, it is denied that the Defendant fell below the standard to be expected of a reasonably competent solicitor in advising as Mr Custance did in relation to the AD&D insurance policy issues, in the circumstances set out above. Mr Custance reasonably relied on the accuracy of the documentation provided to him by the Claimant, E&Y and the Sherwood report.

67.2 Further, the Defendant repeats paragraph 18 of this Defence above and relies on the exclusion set out at paragraph 10.6 of its terms of business.

67.3 Part of the background to the Claimant's attempts to recover under the AGF AD&D Policy and the Ingosstrakh Policy is set out above. The Claimant's claim was (as set out and pursued by the Defendant) that if the AD&D insurers did not meet the Claimant's claim, then E&Y would have to meet the claim. Ultimately, the Claimant agreed the terms of the April 2009 Agreement with E&Y. Clauses B3, C1 and C4 of this Agreement provided (in relevant parts) as follows:

> "B. New Employment
>
> 3. So long as Mr. Lyons is alive, the Practice will take all such steps as are necessary to ensure that Mr Lyons is included as an individual into the CIGNA medical insurance coverage that is now currently available to partners. ...
>
> C. Compensation for Future Medical Payments
>
> 1 Due to injuries suffered by Mr. Lyons while returning to an off-site Practice function, the parties estimate that Mr. Lyons will incur USD 2 million in future medical expenses and related expenses that will not be covered by medical insurance. The Parties estimate that the insurance coverage to be provided to Mr. Lyons pursuant to clause B.3 above is worth USD 200,000.

Thus the estimated future medical costs which the Practice is willing to compensate are USD 1.8 million to be paid as set forth below. ("Medical Expense Payment")

...

4. Should any of the major medical expenses that were included in the USD 2 million estimate of future medical be reimbursed by medical insurance or by his claim under the Accidental Death and Dismember Policy Mr. Lyons' shall be required to return to the Practice 50% of any such recovery up to a maximum of US 750,000."

67.4 The Claimant was, therefore, fully compensated in relation to his AGF AD&D Policy claim and the Defendant advised in relation to the April 2009 Agreement with E&Y that ensured such full compensation.

68. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraphs 19.1 to 19.4 as follows:

ALLEGED PARTICULARS OF ALLEGED BREACH

68.1 In relation to sub-paragraph 19.1, it is admitted that the Defendant sent the email, but it is denied (for the reasons set out above) that this amounted to negligence and/or breach of contract.

68.2 Save that the Claimant's alleged understanding is not admitted, sub-paragraph 19.2 is admitted. For the avoidance of doubt, breach is denied.

68.3 Save that for the reasons set out above it is denied that the advice was "wrong" (in the sense of amounting to negligence and/or a breach of contract), sub-paragraph 19.3 is admitted. For the avoidance of doubt, breach is denied.

68.4 For the reasons and in the circumstances set out above, sub-paragraph 19.4 is denied. Without prejudice to the generality of the foregoing, it is not understood how the Claimant can assert what the Defendant knew.

69. Save that it is admitted that the Claimant's new solicitors commenced proceedings in arbitration against AGF, paragraph 20 is not admitted.

70. Paragraph 21 is not admitted.

71. Paragraph 22 is denied. Without prejudice to the generality of the foregoing denial, the Claimant's claim is denied for the following reasons, amongst others:

71.1 Causation and loss are denied. It is denied that if (which is denied) the Defendant was negligent, that negligence was causative of any loss.

71.2 The Claimant has suffered no loss as a result of the late recovery of the monies under the AGF AD&D Policy. As set out above, the settlement payment under the terms of the April 2009 Agreement was intended to compensate (and did compensate) the Claimant for the alleged shortfall in the AD&D insurance monies received.

71.3 In fact, therefore, the Claimant has apparently been compensated twice in relation to

the AD&D insurance monies, once under the terms of the April 2009 Agreement and once by AGF directly (as alleged at paragraph 21 of the Particulars of Claim). Far from the Defendant's alleged negligence causing the Claimant any loss, therefore, the Defendant's alleged negligence has caused a gain to the Claimant because if a recovery had been made from AGF prior to the April 2009 Agreement, no doubt the sums paid to the Claimant under the April 2009 Agreement would not have included any sum to reflect any shortfall in AD&D insurance monies recovered.

71.4 Further and in any event, as is made clear by Clauses C1 and C4 of the April 2009 Agreement, the settlement payment that was intended to compensate for the alleged shortfall in the AD&D insurance monies was significantly greater than the US$500,000 value of the AD&D cover to which the Claimant was entitled. This surplus was either intended to compensate, or as a matter of fact did compensate, the Claimant for any lost interest on, other loss of use of, and any cost and expense of recovering the shortfall in the AD&D insurance monies. Again, it is denied that the Claimant has suffered any loss.

71.5 Now that the Claimant has made a recovery against AGF, as far as the Defendant is aware, it is incumbent on the Claimant to comply with the terms of Clause C4 of the April 2009 Agreement. In any event, in light of the April 2009 Agreement, the Claimant cannot seek to recover from the Defendant damages for the alleged lost use of the US$500,000.

71.6 Further or in the alternative, if (which is denied) the Claimant is entitled to recover from the Defendant damages for the alleged lost use of the US$500,000, despite the terms of the April 2009 Agreement, such claim for lost use can only span the period between when AGF would (on a reasonable analysis) have paid out under the AGF AD&D Policy up to the date that the Claimant received the monies from E&Y pursuant to the April 2009 Agreement. Realistically, the claim on the AGF AD&D Policy would have taken some time to make and then AGF would have taken some time to pay. Realistically, the AGF monies would not have been received by the Claimant until approximately October 2007 at the earliest (because the Defendant was not instructed until February 2007 and would not have made a claim until after that date).

71.7 Further or in the alternative, if (which is denied) the Claimant is entitled to recover from the Defendant damages for the alleged lost use of the US$500,000, despite the terms of the April 2009 Agreement, the Claimant is / was bound to repay to E&Y 50% of AD&D insurance sums recovered and therefore the Claimant's loss of use claim must be reduced to reflect this obligation to repay E&Y.

71.8 Further and in any event, the Defendant was not instructed until February 2007 and therefore the Defendant cannot be liable for any alleged loss of use prior to this date.

71.9 Further or in the alternative, the Claimant is put to strict proof of what he allegedly would have done with the US$500,000 and that he in fact suffered any loss by not having the use of the monies recovered from AGF.

71.10 Further, the claim for unnecessary cost and expense is denied. The Claimant would have incurred cost and expense in making the claim under the AGF AD&D Policy in any event.

71.11 Further still, the claim for alleged unnecessary cost and expense is wholly unparticularised and the Claimant has failed to plead why the Defendant's alleged

negligence allegedly resulted in such (alleged) unnecessary cost and expense.

Long Term Disability Insurance Policies

72. Paragraph 23 is denied. For the avoidance of doubt, alleged negligence and breach of contract are denied. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraph 23 as follows:

72.1 It is denied that the Defendant was instructed to advise and/or was under a duty to advise the Claimant as to his rights under the Colonial LTD Policy and/or the AGF LTD Policy.

72.2 It is denied that the Defendant did provide such advice.

72.3 It is denied that (on the facts of his case and on a true construction of the LTD Policies) the Claimant would in any event have had sustainable claims under the LTD Policies with prospects of success that were real and substantial.

73. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraphs 23.1 to 23.14 as follows:

ALLEGED PARTICULARS OF ALLEGED BREACH

73.1 Sub-paragraph 23.1 is denied. The Defendant did not "fail" to consider the Claimant's alleged rights because the Defendant was under no duty so to advise.

73.2 Sub-paragraph 23.2 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. In any event, the Claimant had no sustainable claim under the Colonial LTD Policy and Colonial would have recognised this and would have rejected the Claimant's claim for this reason.

73.3 Sub-paragraph 23.3 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. In any event, it would not have been appropriate to have advised the Claimant to seek to review the determination in the Colonial Rejection Letter because the Claimant had no sustainable claim under the Colonial LTD Policy.

73.4 Sub-paragraph 23.4 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. It is in any event denied that the Claimant was Totally Disabled within the meaning of the Colonial LTD Policy. Advice to the contrary would have been wrong. In relation to the allegation that Colonial had accepted that the Claimant was Totally Disabled within the meaning of the Colonial LTD Policy, the Defendant repeats paragraph 52(3) above. If, which is denied, Colonial had accepted that the Claimant was Totally Disabled within the meaning of the Colonial LTD Policy, Colonial would have reached the opposite conclusion prior to the time for making any payment to the Claimant and would not (for the avoidance of doubt) have accepted the Claimant's claim or made any payment to the Claimant.

73.5 Sub-paragraph 23.5 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. It is in any event denied that the Claimant was entitled to a minimum payment of US$50 a month. Advice to the contrary would have been wrong.

73.6 Sub-paragraph 23.6 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. It is in any event denied that the Claimant was likely to have an ongoing claim for Total Disability alternatively Partial Disability payments after expiry of the two year period following the Elimination Period. Advice to the contrary would have been wrong.

73.7 Sub-paragraphs 23.7 to 23.9 are denied. The Defendant did not "fail" to advise or make the alleged recommendations to the Claimant because the Defendant was under no duty so to advise. Whilst in the Letter of Response the Defendant asserted that the Defendant could not have been obliged to advise on the Colonial LTD Policy as it was governed by Bermudian Law, the Defendant now accepts that as Bermudian Law would follow English common law, that of itself would not have been an impediment to giving advice to the Claimant in relation to the Colonial LTD Policy. If (which is denied) the Defendant had advised on the Colonial LTD Policy, the Defendant would have set out a caveat to that advice in relation to the Bermudian Law issue. In any event, it is denied that the Claimant had any claim against Colonial with reasonable prospects of success and therefore it was not appropriate or advisable for the Claimant to bring a claim under the Colonial Policy or to issue a claim against Colonial within three years, or at all.

73.8 Sub-paragraph 23.10 is denied. The Defendant did not "fail" to consider the Claimant's rights because the Defendant was under no duty so to advise.

73.9 Sub-paragraph 23.11 is denied. The Defendant did not "fail" to give such notice because the Defendant was under no duty to give such notice. In any event, the Claimant had not been on sick leave for more than thirty five weeks and/or fifty-two weeks and therefore any notice to the effect asserted in the Particulars of Claim would have been inaccurate, inappropriate and ineffective.

73.10 Sub-paragraph 23.12 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. In any event, the Claimant was not suffering (and was not probably suffering) from Short Term Disability within the meaning of the AGF LTD Policy. Advice to the contrary would have been wrong.

73.11 Sub-paragraph 23.13 is denied. The Defendant did not "fail" to advise the Claimant because the Defendant was under no duty so to advise. In any event, the Claimant was not likely to have an ongoing claim for Long Term Disability within the meaning of the AGF LTD Policy. Advice to the contrary would have been wrong.

73.12 Sub-paragraph 23.14 is denied. The Defendant did not "fail" to take such steps because the Defendant was under no duty to take such steps. In any event, it is denied that the Claimant had any such alleged rights.

74. If, which is denied, the Defendant was under a duty to advise the Claimant in relation to the LTD Policies and did negligently fail to provide such advice, it is denied that any such (alleged) negligence was causative of any loss. As set out above, on the facts of his case and on a true construction of the LTD Policies, the Claimant had no sustainable claims under the LTD Policies with prospects of success that were real and substantial. If claims under the LTD Policies had been made and pursued by the Defendant on behalf of the Claimant, those claims would have rightly been rejected and any formal claim against AGF and/or Colonial in Court or in Arbitration would equally have failed.

75. Further or in the alternative, if (which is denied) the Claimant has or had any sustainable

claims under the LTD Policies with prospects of success that were real and substantial, any such alleged rights were not lost during the period of the Defendant's retainer and the Claimant has for this reason also not suffered any loss as a result of the Defendant's alleged negligence.

76. For the avoidance of doubt, causation and loss are denied.

The April 2009 Agreement

77. Subject to the following, and save that the allegation as to "documentation of [the Claimant's] retirement" is not admitted and is not understood, paragraph 24 is admitted. On a proper analysis of the relevant correspondence it is clear that the instruction was informal in the sense set out below. Further, the Claimant used the Defendant to provide limited input and assistance in relation to (what ultimately became) the April 2009 Agreement. The Defendant did not have conduct of the negotiations with E&Y, nor did the Defendant have carriage of the final version of the April 2009 Agreement, which was negotiated by the Claimant alone.

78. Save that the scope of the Defendant's retainer was subject to the nature and extent of the instructions received from the Claimant, paragraph 25 is admitted. The Claimant instructed the Defendant on an ad hoc basis. If the Claimant did not instruct the Defendant to consider an issue or a document (for example the final version of the April 2009 Agreement), the Defendant was not in some other way instructed to advise on the same. There was no overarching instruction to advise on the Claimant's retirement package and/or to draw up and/or to advise upon the documentation enshrining such terms. The Defendant repeats that the Claimant used the Defendant to provide limited input and assistance in relation to (what ultimately became) the April 2009 Agreement, and the Defendant did not have conduct of the negotiations with E&Y.

79. In relation to paragraph 26, the Defendant repeats the response to paragraph 25.

80. Paragraph 27 is admitted.

81. Paragraph 28 is not admitted. On 6 April 2009, the Claimant emailed Mr Custance to inform him that he had reached agreement with E&Y on the terms of his departure and set out a summary of the key terms.

82. Paragraph 29 is admitted.

83. Save that a version of the Term Sheet was first sent to Mr Custance on 14 April 2009, and save that the version sent by Mr Custance to Mr Mandel at 5.24pm was not a "final" version, paragraph 30 is admitted. The Claimant then sent Mr Custance another email on 14 April 2009 relating to certain details for the agreement. On 15 April 2009, a revised version of the Term Sheet was sent to the Claimant by Mr Mandel and then by the Claimant to Mr Custance. Neither version of the Term Sheet contained an English law and jurisdiction clause. Mr Custance had not been involved in negotiating the terms of the draft agreement and therefore was not aware of what had and had not been agreed.

84. Paragraph 31 is admitted. The Defendant was not instructed to advise on this version of the draft agreement.

85. Paragraph 32 is not admitted. On 17 April 2009, Mr Custance received a call from the Claimant (lasting at most 6 minutes). To the best of Mr Custance's recollection, during this call the Claimant told him that he had concluded a deal with E&Y (the Claimant's evidence in his

claim against E&Y was that he thought the agreement was signed at his meeting with Mr Turowski on 17 April 2009). On the same day, the Claimant sent Mr Custance a copy of the final version of the April 2009 Agreement by email.

86. The final version of the April 2009 Agreement contained a significant number of additional amendments, including amendments to the clause relating to Cigna insurance cover, the payment provisions and the reimbursement provisions in the event of a recovery on the Claimant's AD&D insurance (as set out above). Mr Custance was not asked to advise on these amendments, nor did he have conduct of the document in the run-up to signature. The final version of the April 2009 Agreement was not sent to him for approval before signature. The last version seen by Mr Custance still contained a number of unresolved issues and points in square brackets. Mr Custance was never asked to prepare a long-form version of the April 2009 Agreement.

87. Paragraph 33 is denied. For the avoidance of doubt, alleged negligence and breach of contract are denied. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraph 33 as follows:

87.1 As set out above, the Claimant used the Defendant to provide limited input and assistance in relation to (what ultimately became) the April 2009 Agreement. The Defendant did not have conduct of the negotiations with E&Y, nor did the Defendant have carriage of the final version of the April 2009 Agreement, which was negotiated by the Claimant alone.

87.2 The Defendant was never instructed to prepare a long-form version of the April 2009 Agreement.

87.3 The Defendant was not told whether an English law and jurisdiction clause had been agreed by E&Y or not.

87.4 The Claimant did not send a draft of the final version of the April 2009 Agreement to Mr Custance for his comment or approval.

88. Without prejudice to the generality of the foregoing, the Defendant pleads further to paragraphs 33.1 to 33.4 as follows:

ALLEGED PARTICULARS OF ALLEGED NEGLIGENCE AND BREACH

88.1 Sub-paragraph 33.1 is denied for the reasons and in the circumstances set out above.

88.2 Sub-paragraph 33.2 is denied. It is denied that this alleged breach falls within the scope of the Defendant's retainer and/or the duties owed to the Claimant. Further and in any event, this alleged breach appears to fall outside the scope of the Defendant's retainer as alleged in the Particulars of Claim.

88.3 Sub-paragraph 33.3 is denied. It is denied that this alleged breach falls within the scope of the Defendant's retainer and/or the duties owed to the Claimant. Further and in any event, this alleged breach appears to fall outside the scope of the Defendant's retainer as alleged in the Particulars of Claim.

88.4 Sub-paragraph 33.4 is denied. The Defendant was not instructed to draft a long form agreement.

89. It was the Claimant's case in his claim against E&Y that in late 2010, while performing his ongoing duties in his capacity as CFO of the E&Y CIS Practice, the Claimant's attention was drawn to a suspicious payment that had been paid to a Russian law firm by an E&Y tax partner responsible for tax litigation in which E&Y was involved at the time. The Claimant's case was that he formed the view that this payment appeared to be a bribe to be paid to a Russian Judge to facilitate an outcome in E&Y's favour in the tax litigation. The suspicious payment was apparently investigated by E&Y. However, the investigation stopped with Mr Lebaude, who did not take the investigation further apparently after a conversation with Mr Johansson. The Claimant apparently believed that this was a "whitewash" and stated to E&Y's global Head of Tax that he wanted the matter dealt with under E&Y's provisions for protection for whistleblowers.

90. In January 2011, Mr Turowski contacted the Claimant and asked whether the Claimant was prepared to renegotiate the terms of his Cigna insurance cover (which, as set out above, formed part of the April 2009 Agreement). According to the Claimant's account of events, in February 2011, Mr Lebaude telephoned the Claimant and informed the Claimant that as a result of an internal review it had been decided that the Claimant would no longer be included in the E&Y Cigna insurance programme.

91. Save that there were in fact three documents, paragraph 34 is broadly admitted. It appears that on or about 28 April 2011, the following were sent to the Claimant: a "Notice on Termination of the Insurance Coverage" document dated 26 April 2011, a "Notice on Dismissal due to Reduction of Personnel" document dated 26 April 2011 and a "Notice on Termination of Service Agreement dated July 1, 2009" document dated 27 April 2011.

92. The Defendant repeats here the extracts set out above (at paragraph 14 of this Defence) from the Particulars of Claim signed by the Claimant on 15 February 2012 in Claim No. HC11C00546. The Claimant held very strong views as to what he believed were the true reasons why he was dismissed and the April 2009 Agreement was breached.

93. Paragraph 35 is admitted.

94. Save that it is not admitted that the Claimant suffered irrecoverable costs, the first sentence of paragraph 36 is admitted. The second sentence of paragraph 36 is not admitted.

95. As to paragraph 37:

95.1 Save that it is admitted that the Claimant settled his claim against E&Y on confidential terms, the first sentence is not admitted.

95.2 The second sentence is admitted, save that the terms offered by the Claimant were unacceptable.

95.3 The third sentence is not admitted. In any event, by the Order of Master Bragge sealed on 14 May 2014, the Claimant was given permission to disclose the settlement sum between the Claimant and E&Y the subject of the Tomlin Order dated 27 November 2012 in Claim Number HC11C00546.

95.4 The Defendant notes that there is no allegation made in the Particulars of Claim that the Defendant's alleged negligence caused the alleged loss in terms of the (alleged) difference between the value of ongoing Cigna Medical Insurance and the monies received under the settlement. The Claimant's pleading is therefore defective in this regard and this aspect of the Claimant's case must fail, alternatively stands to be

struck out.

96. If, which is denied, the Defendant acted negligently and/or in breach of contract in relation to the April 2009 Agreement, it is denied that such (alleged) negligence and/or breach of contract was causative of loss. For the avoidance of doubt, causation and loss are denied. Without prejudice to the generality of the foregoing denial:

96.1 Paragraph 43 of the Claimant's Professional Negligence Pre-Action Protocol Letter of Claim ("the Letter of Claim") stated (in relevant part) "For the avoidance of doubt, Mr Lyons contends that, had English jurisdiction been specified, Ernst & Young would not have breached the April 2009 Agreement at all". Contrary to the Claimant's case set out in the Letter of Claim, the Claimant does not allege in the Particulars of Claim that E&Y would not have breached the April 2009 Agreement (and thereby terminated his Cigna Medical Insurance) if an English law and jurisdiction clause had been included in the April 2009 Agreement. Presumably, therefore, this does not form part of the Claimant's case.

96.2 If such an allegation does form part of the Claimant's case, it is denied. Such an allegation would run contrary to the Claimant's own pleaded case in his claim against E&Y. In that litigation, the various explanations for the termination of the Claimant's Cigna group insurance cover were that the Claimant was not working a sufficient number of hours to be included in the programme, the high cost of the insurance and (on the Claimant's case) what the Claimant perceived to be Mr Lebaude's motivations relating to the suspected bribe.

96.3 For the avoidance of doubt, it is clear on the Claimant's own case against E&Y (and it is in any event correct) that E&Y would have breached the April 2009 Agreement and dismissed the Claimant when it did, whether or not an English law and jurisdiction clause was included in the April 2009 Agreement.

96.4 In any event, the absence of the English law and jurisdiction clause made no material difference to the outcome achieved by the Claimant. The Claimant was successful on the jurisdiction issue and he was awarded his costs of the same. The Claimant ought, therefore, to have recovered all of his reasonably incurred costs of dealing with E&Y's jurisdiction application.

96.5 The argument referred to at paragraph 35 of the Particulars of Claim would also have been available to E&Y under English law (which also requires the parties to a contract and the terms of the contract to be identifiable with sufficient certainty). The only material difference between Russian law and English law for these purposes appears to have been Article 181(2) of the Civil Code, that a party loses the right to challenge the validity of any transaction after the expiry of one year from its conclusion. This provided a further ground for the Claimant to challenge E&Y's conduct; a ground that would not have been available under English law.

96.6 E&Y had no justification for breaching the April 2009 Agreement, whether under English law or Russian law. The notion (if this is still the Claimant's case) that the High Court in London would have allowed E&Y to resile from its clearly defined obligations on the basis of the Russian law arguments set out in its Defence is wholly unrealistic.

96.7 Further and in any event, the Claimant's claim under this head of claim is, in reality, a loss of a chance claim. The Claimant must establish that there was a real and substantial chance that E&Y would have agreed to an English law and jurisdiction

clause. If the Claimant had insisted on English law and jurisdiction, it is not clear whether E&Y would have agreed (and the Defendant will rely on, amongst other things, Mr Turowski's witness evidence in Claim No. HC11C00546). If, which is denied, the Defendant was negligent and such negligence was causative of loss, and without prejudice to the burden on the Claimant first to establish the relevant real and substantial chance, a discount should be made to reflect this loss of a chance assessment.

96.8 Further and in any event, the Claimant contributed very substantially to his own loss. The Claimant had primary conduct of the negotiation of the April 2009 Agreement. The Claimant's own evidence in his claim against E&Y was to the effect that the law and jurisdiction clause was agreed by E&Y without hesitation. The draft agreement sent by Mr Custance to the Claimant on 22 May 2007 included English law and jurisdiction clauses and the Claimant used this as a "crib sheet". The Claimant's evidence was also that he and E&Y were fully aware of the importance of such clauses because of the notoriety of Russian Courts and Judges. The Claimant was, therefore, primarily responsible for the fact that the April 2009 Agreement did not include an English law and jurisdiction clause. If (which is denied), the Defendant is liable to the Claimant, any award of damages to the Claimant should be reduced to reflect this very substantial contributory negligence.

Alleged Loss and Damage

97. Paragraph 38 is denied. For the avoidance of doubt, causation and loss are denied. Without prejudice to the generality of the foregoing denial, the Defendant pleads further to paragraph 38 as follows:

97.1 The alleged losses set out in paragraphs 38.1 to 38.5 are denied for the reasons set out above.

97.2 In relation to paragraph 38.4:

97.2.1 On 19 May 2014 SGH Martineau LLP (acting for the Claimant) wrote to DAC Beachcroft LLP (acting for the Defendant), stating that the settlement sum in the claims against E&Y was £1,300,000 and that the amount claimed at paragraph 38.4 of the Particulars of Claim was clarified as being "The value of ongoing CIGNA medical insurance (including discount for lump sum receipt of amounts payable in future) £2,387,341 Less settlement sum £1,300,000 **Total claimed £1,087,341**".

97.2.2 The unparticularised figure of £2,387,341 has not been explained by the Claimant in any pleading. It appears to be based on paragraph 55 of the Claimant's (unsigned and undated) draft Witness Statement produced with the Letter of Claim and, it seems, pages 149A to 154 of the exhibit to that draft Statement. The spreadsheet at pages 152 to 154 was prepared by the Claimant and this demonstrates that the Claimant's calculated "total out of pocket" figure (of £2,523,688) is based on the premiums for the Claimant, his wife and his children. The Claimant's figure alone appears to have been calculated by the Claimant as £1,684,088 (although this may simply include the total premium to replace the Cigna cover, without any deduction being applied).

97.2.3 Whilst no admissions are made as to whether or not it is appropriate for the Claimant to have used these figures at all, the premium rates used by the Claimant when calculating the "total out of pocket" figure appear to be "Area Three" figures (as set out at page 151 of the exhibit to the draft Statement), when in fact the "Area One" figures should (it seems) have been used. The Area Three figures are significantly more than double the Area One figures in terms of size of premium.

97.2.4 Presumably, the figure of £2,387,341 is (allegedly) the figure of £2,523,688 with the above "discount for lump sum receipt of amounts payable in future" applied. If that is the case, then the sum claimed at paragraph 38.4 is inappropriately high.

97.2.5 First, clause B3 of the April 2009 Agreement expressly provided that the Cigna cover was for the Claimant alone and that "at his own expense" he was permitted to include his wife and children. The Claimant's claim must therefore be limited to his own alleged losses, not those in relation to his wife and children also. Second, if (which is denied) the Claimant's figures and method of calculation used in his table at pages 152 to 154 are an appropriate way of calculating the Claimant's alleged losses, the Claimant has incorrectly used the Area Three premium rates rather than the significantly lower Area One premium rates. Third, even if the inflated sum of £1,684,088 is used as the starting point, if this figure is reduced to reflect accelerated receipt, the Net Present Value of this sum is highly likely to be lower than the £1,300,000 settlement reached. In the circumstances, based on the Claimant's own calculations and figures (which are denied), the Claimant has suffered no loss.

97.2.6 In any event, even the sum of £1,684,088 is unreasonably high when compared to the estimated value of the Cigna insurance set out in clause C1 of the April 2009 Agreement (being US$200,000).

97.2.7 Further or in the alternative, the figure of £2,387,341 is not admitted and the Claimant is asked to explain this figure in full and is put to strict proof that he has suffered any (alleged) loss under this head of claim.

97.3 The figure of £100,000 in paragraph 38.5 is not understood and is in any event denied. If this figure is for irrecoverable costs only, it appears unreasonably high. The Claimant was successful on the jurisdiction issue and therefore should recover (or should have recovered) his reasonably incurred costs. The Claimant is put to strict proof of the alleged irrecoverable costs.

97.4 Further and in any event, the Claimant's claim is limited to the higher of £3 million or an amount equal to 100 times the Defendant's fee (excluding disbursements, sundry charges and VAT) for the relevant matter, as set out at paragraph 11.1.2 of the Defendant's terms of business.

98. Paragraph 39 is denied. The Claimant's "loss of a chance" claim in relation to the LTD Policies is denied. For the avoidance of doubt, the Defendant avers that (for the reasons and in the circumstances set out more fully above) such (alleged) lost chance was nil, alternatively was not real or substantial.

99. Paragraph 40 is denied.

100. The Statement of Truth on page 17 is in the incorrect form, contrary to CPR 16PD3.4.

101. Save where specifically denied, not admitted or admitted, each and every allegation made against the Defendant is denied as though the same were individually set out herein and traversed. The Claimant is not entitled to the relief claimed in the Particulars of Claim against the Defendant or to any other relief.

COLIN EDELMAN QC
BEN LYNCH

SERVED this 30th day of May 2014 by DAC Beachcroft LLP, 3 Minster Court, Mincing Lane, London, EC3R 7DD, Solicitors for the Defendant.

Statement of Truth

The Defendant believes that the facts stated in this Defence are true. I am duly authorised by the Defendant to sign this Defence.

Signed: _____ Date: 30 May 2014

Full Name: THOMAS N. L. CUSTANCE

Position or office held: PARTNER
(if signing on behalf of firm or company)

Defendant's solicitors' address to which documents should be sent

DAC Beachcroft LLP
3 Minster Court
Mincing Lane
London
EC3R 7DD
Solicitors for the Defendant

Ref No:	ZLH008-0879942
Tel No:	020 7894 6800
Fax No.	020 7894 6801
DX	753 London