

Professional negligence: Solicitors' duty to warn of risks incidental to their retainer

Richard Whitehouse

The Lyons v. Fox Williams LLP decision

1. In Lyons v. Fox Williams LLP [2018] EWCA Civ 2347 the Court of Appeal considered (again) when a solicitor will need to give a warning to his client about obvious risks that come to his attention when performing his retainer, but which he has not been formally retained to advise on.
2. The Court held that a solicitor is not obliged to do extra work or to operate outside the scope of his retainer. Consequently, the only risks about which a duty to warn can arise, are those that come to his attention whilst performing the tasks the client has instructed him to carry out (see at [39]-[43]). A solicitor instructed to advise on, and pursue a claim under, one insurance policy, did not therefore owe a duty, within the scope of its retainer, to advise on claims under a separate insurance policy that would have required further investigation.

3PB's Analysis

3. **The facts.** The claim arose from an insurance coverage dispute where it was alleged that solicitors had failed to advise about a claim under a long-term disability (“LTD”) policy. Until 2009 Mr Lyons was the Chief Financial Officer and Managing Partner of Operations for Ernst and Young (“EY”) in Moscow. In June 2006 he had a serious motorcycle accident resulting in him suffering permanent disability. Mr Lyons sought to claim under insurance policies taken out by his employer for his benefit.
4. Fox Williams, solicitors, acted for Mr Lyons in relation to the insurance coverage dispute in 2007 and in negotiating his severance agreement with EY in 2009.

5. Mr Lyons' potential claims under LTD policies became time-barred in 2010, without a claim being made under them. The element of the professional negligence claim against Fox Williams that went to the Court of Appeal related to the failure to advise Mr Lyons about the LTD policies, including a failure to protect his claims and prevent them from becoming time-barred.
6. **The retainer.** Fox Williams' engagement letter made no mention of LTD policies or that advice would be provided in relation to them. At first instance the Judge found that, although Fox Williams received copies of the relevant LTD policies and there were discussions between the parties about such policies, the provision of advice as to the LTD policies did not fall within the scope of the retainer.
7. **At first instance** the Judge rejected the submission that the solicitors' retainer had obliged them to warn about the time limits under the LTD policy. The main reasons for this were that the real focus was always on other insurance policies, the solicitors did not need to consider the LTD policies in the course of carrying out their express instructions and there were no obvious or sufficient concerns evident from the face of the LTD policies that would result in the solicitors needing to provide a warning to Mr Lyons.
8. **The Court of Appeal** agreed with the Judge and dismissed the appeal: there was no express or implied duty on Fox Williams to advise about the LTD policies. In doing so the Court considered its earlier guidance (given in Minkin v Landsberg [2015] EWCA Civ 1152) as to the duty “*implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*”
9. Giving the only judgment, Patten L.J. emphasised that any such duty to warn derives from, and does not require the solicitor to



undertake work outside of, his express instructions: *“the solicitor's obligation to bring to the client's attention risks which become apparent to the solicitor when performing his retainer does not involve the solicitor in doing extra work or in operating outside the scope of his retainer.”*

10. Beyond that, the character and experience of the client are important considerations when considering what advice a solicitor would be expected to provide that is reasonably incidental to the express terms of the retainer. It was also important in this case that Mr Lyons had used Fox Williams as a targeted resource, rather than a general legal adviser.

Impact of the Decision

11. This decision is a useful reminder that the Court will primarily focus on the duties set out in the engagement letter in order to ascertain the scope of the retainer. There is no separate and freestanding duty to warn. It is therefore difficult for a claimant to prove that the duties extended beyond the written terms in the absence of contemporaneous documentation which supports such an extension.
12. In addition, it is helpful to note that there is only a duty on a solicitor to warn if, at the time, there was a risk or danger that the solicitor was or should have been aware of. Such hazards usually need to be obvious to the solicitor, but also be something that the client would not appreciate.

13. If the scope of a solicitor's retainer is narrow or expressly limited and a client wants additional advice, they need to make sure that they make a clear and unambiguous written request for advice beyond the scope of what was expressly agreed at that outset.

14. Professional indemnity insurers and solicitors will no doubt be pleased that the Courts continue to take a strict approach to the assessment of the scope of a solicitor's retainer.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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Richard Whitehouse is a Commercial Law barrister whose practice has a particular emphasis on professional negligence, contract, partnership and director disputes. To view his profile [click here](#).

