Court of Appeal

Miller *v* Irwin Mitchell LLP

[2024] EWCA Civ 53

2024 Jan 23;Feb 1 Phillips, Andrews, Falk LJJ

Negligence — Duty of care — Scope of duty — Claimant seeking to claim damages from travel operator for injuries sustained whilst on holiday — Claimant calling solicitors' legal helpline six days after accident — Claimant only entering into retainer with solicitors several months after accident — Travel operator failing to inform insurer of claim within time period specified in insurance policy — Whether solicitors' helpline adviser assuming duty of care to claimant — Whether duty of care arising under implied retainer or common law — Whether scope of duty of care extending beyond preliminary advice — Whether helpline adviser under duty of care to advise claimant to notify travel operator of claim

The claimant sustained injuries in accident on 13 May 2014 whilst on holiday in Turkey. On 19 May 2014, the claimant rang the defendant solicitors' free legal helpline and had a telephone conversation with one of its operatives. On 25 January 2016 the defendant informed the claimant that it was ready to proceed with her claim for damages against the travel operator and sent her a conditional fee agreement to sign. On 22 February 2016, the defendant sent a letter of claim to the travel operator requesting that it notify its insurers immediately. The travel operator sent a copy of that letter to its insurers on 3 March 2016, over 21 months after the accident had occurred. The insurer declined cover for the claim on the ground that the travel operator had notified it of the claim too late, under the terms of the insurance policy. The travel operator subsequently went into administration, so it followed that even if the claimant's proposed claim for damages succeeded, she was unlikely to be paid. The claimant brought a claim in negligence against the defendant firm of solicitors, on the basis that she had entered into an express retainer with them on 19 May 2014 when she had called their legal helpline. She contended that during the conversation on 19 May 2014, the defendant should have advised her to notify the travel operator of the accident immediately. The judge held that (i) no express retainer was entered into before January 2016, at which date an implied retainer arose, and no duty of care had been owed to the claimant until then; and (ii) the defendant had been under no duty to advise the travel operator of the accident, or directly to remind the travel operator to notify its insurer at any time prior to sending the letter of claim. The claimant appealed on the ground that on 19 May 2014 when she rang the legal helpline, the defendant owed her a duty at common law to exercise reasonable care in giving the advice provided, or a contractual duty of care under an implied retainer. Furthermore, since the helpline adviser had chosen to inform the claimant that the limitation period for bringing a claim was three years, she had also been under an obligation to advise the claimant to notify the travel operator of the accident if she had not already done so. Alternatively, the defendant was from that date under an obligation to notify the travel operator themselves about the claimant's accident.

On the appeal—

Held, dismissing the appeal, that the fact that the advice on the defendant's legal helpline was provided gratuitously was not a bar to a finding of a duty of care, since the firm was operating a "legal helpline" staffed by law graduates who had been trained for that purpose, and it was clearly envisaged that the legal advisers who spoke to callers on that helpline would be providing some legal advice to them; that in those circumstances the defendant had assumed a duty to take reasonable care in and about the advice it gave; that, furthermore, the defendant would expect the callers to rely on what they were told, such reliance would be reasonable, and there was no disclaimer apart from an explanation that the scope of the helpline was limited to (i) providing general preliminary legal advice and (ii) ensuring that the caller did not already have a solicitor for the matter they were calling about; that it followed that there was a voluntary assumption of responsibility by the defendant for the limited task undertaken, namely the provision of preliminary legal advice of a limited and general "high level" nature to a prospective client; that since the advice given on the legal helpline was general and preliminary, and it was made clear

by the legal adviser that it was of that nature, the caller would understand that it was not set in stone, and that detailed advice relating to the specific circumstances of the caller's case could only follow after the specialist legal team to which they would then be referred had examined the matter in more detail; that at the time that the claimant made the call to the defendant's helpline, the risk that the insurer might refuse cover because the travel operator failed to notify it of the accident was not something which ought to have been, nor would it have been, a matter of such concern that a reasonable solicitor would have felt compelled to tell the claimant to notify the travel operator immediately, in order that it could notify its insurer; that it was not the case that simply by informing the claimant that a claimant had three years from the accident in which to issue a claim for damages, the defendant's helpline operative had assumed a responsibility to advise her to take a step to safeguard against the risk that the travel operator already knew about the accident but nevertheless would not notify its insurer timeously, even if (which was not accepted) that risk would have been within the reasonable contemplation of a legal adviser in her position and at the very first point of contact with the prospective client; that furthermore, what the helpline operative said about the limitation period could not be characterised as providing some kind of reassurance to the claimant that there were no other steps she needed to take to protect her position; and that, accordingly, there had been no assumption of responsibility as contended for by the claimant (post, paras 40–44, 72–76, 94, 95, 96).

Spire Property Development LLP v Withers LLP [2023] 4 WLR 56, CA applied.

Decision of Judge Cadwallader sitting as a judge of the Chancery Division [2022] EWHC 2252 (Ch) affirmed.

APPEAL from Judge Cadwallader sitting as a High Court judge

On 13 May 2014 the claimant, Carol Miller, sustained an injury in an accident whilst on holiday in Turkey. On 19 May 2014, the claimant rang the free legal helpline of the defendant firm of solicitors, Irwin Mitchell LLP, and had a telephone conversation with one of its operatives. On 25 January 2016 the defendant informed the claimant that it was ready to proceed with her claim for damages against the travel operator and sent her a conditional fee agreement to sign. On 22 February 2016, the defendant sent a letter of claim to the travel operator requesting that it notify its insurers immediately. On 3 March 2016, the travel operator sent a copy of that letter to its insurers, over 21 months after the accident had occurred. On 28 April 2016, the insurer wrote to the travel operator declining cover for the claim on the basis that the travel operator had failed to comply with the notification provisions in the policy of insurance because it had notified the insurer too late. In July 2016 the travel operator went into administration. It followed that even if the claimant's proposed claim for damages succeeded, she was unlikely to be paid. By a claim form dated 13 November 2020 the claimant brought a claim in negligence against the defendant, on the basis that she had entered into an express retainer with them on 19 May 2014 when she called the legal helpline. She contended that during the conversation on 19 May 2014, the defendant should have advised her to notify the travel operator of the accident immediately. By a decision dated 27 July 2022 ([2022] EWHC 2252 (Ch)), Judge Cadwallader sitting as a deputy High Court judge held that (i) no express retainer was entered into before January 2016, at which date an implied retainer arose, and no duty of care was owed to the claimant until then; and (ii) the defendant had been under no duty to advise the travel operator of the accident, or directly to remind the travel operator to notify its insurer at any time prior to sending the letter of claim.

By an appellant's notice filed on 1 August 2022 and with permission granted by the judge the claimant appealed contending, inter alia, that on 19 May 2014 when she rang the helpline, the defendant owed her a duty at common law to exercise reasonable care in giving the advice provided, or a contractual duty of care under an implied retainer. Since the helpline adviser had chosen to inform the claimant that the limitation period for bringing a claim was three years, she had also been under an obligation to advise the claimant to notify the travel operator of the accident if she had not already done so. Alternatively, the defendant was from that date under an obligation to notify the travel operator themselves about the claimant's accident.

The facts are stated in the judgment of Andrews LJ, post, paras 15–32.

Robert Weir KC, *William Thorpe* and *Thomas Westwell* (instructed by *Bond Turner, Liverpool*) for the claimant.

Andrew Warnock KC and *Andrew Spencer* (instructed by *Kennedys*) for the defendant.

The court took time for consideration.

1 February 2024. The following judgments were handed down.

ANDREWS LJ

Introduction

1 This is an appeal, brought with the permission of the judge, against the order of Judge Cadwallader dated 27 July 2022, dismissing the appellant's claim for damages for professional negligence against her former solicitors. The order was made following a trial of preliminary issues in the Business List at Liverpool. The appellant, Mrs Miller, contends that the judge erred in his determination of some of those issues, and consequently was wrong to dismiss her claim. The respondent, Irwin Mitchell, contends that the judge was right for the reasons that he gave. It has also served a respondent's notice seeking to uphold the judge's order on different or additional grounds.

2 This is a sad case. On 13 May 2014 whilst on holiday with her husband in Turkey, Mrs Miller slipped and fell as she was going down some stairs in their hotel. She broke her leg badly, suffering an open fracture. She underwent emergency surgery in Turkey in the early hours of the morning, but following her return to England an infection developed. After many further medical interventions, this ultimately led to her undergoing an amputation of her lower leg in November 2015.

3 Mrs Miller retained Irwin Mitchell to advise and represent her in connection with a claim against the travel operator, Lowcostholidays Spain SLU ("Lowcost"). The date of the inception of the retainer was disputed. The judge held that an implied retainer arose on or around 25 January 2016 when Irwin Mitchell informed Mrs Miller that it was ready to proceed with her claim, and sent her a conditional fee agreement to sign (though she did not sign that document until July 2016). He found that by that date, Mrs Miller had communicated her decision to instruct Irwin Mitchell, and Irwin Mitchell had communicated its willingness to accept those instructions, subject to funding.

4 Irwin Mitchell sent a letter of claim to Lowcost on 22 February 2016 requesting that it notify its insurers immediately. Lowcost sent a copy of that letter to its insurers, HCC International Insurance Company plc ("HCC") on 3 March 2016, a little more than 21 months after the accident occurred. On 8 March, HCC responded to Irwin Mitchell, reserving its position. On 11 March, solicitors named Plexus Law wrote to Irwin Mitchell to confirm that they were instructed to act on behalf of Lowcost in respect of the claim.

5 On 28 April 2016, HCC wrote to Lowcost declining cover for the claim on the basis that Lowcost had failed to comply with the notification provisions in the policy of insurance. Lowcost went into administration in July 2016. Plexus Law informed Irwin Mitchell of these developments by e-mail on 21 July 2016, and provided further details in a letter dated 23 August 2016. Irwin Mitchell sought advice from counsel, following which they concluded there was no prospect of recovery from HCC under the Third Party (Rights Against Insurers) Act 1930. That was the statute governing the circumstances in which a claim could be brought against the insurers of an insolvent defendant at the relevant time (all the relevant events occurred before the Third Party (Rights Against Insurers) Act 2010 came into force on 1 August 2016). No complaint is (or could be) made about that conclusion.

6 Faced with the deeply unpalatable consequence that, even if her claim for damages for personal injury succeeded, she had no prospect of receiving payment, Mrs Miller brought proceedings against Irwin Mitchell. Her primary case in the court below was that she had entered into an express retainer with Irwin Mitchell on 19 May 2014, when she had a telephone conversation with one of the operatives of its "Legal Helpline". Alternatively, a retainer should be implied from the conduct of the parties. Further or in the further alternative, Irwin Mitchell had assumed a common law responsibility to Mrs Miller in tort.

7 Mrs Miller claimed that during the conversation on 19 May 2014, Irwin Mitchell should have advised her to notify Lowcost of the accident immediately. Alternatively, they should have given her that advice on 8 April 2015 when they received documents relating to her claim (which they had been pressing her for months to provide). Alternatively, Irwin Mitchell should have taken steps to notify Lowcost themselves. She contended that if she had been given such advice, she would have followed it, and if she had done so, or if Irwin Mitchell had notified Lowcost of the accident sooner than they did, Lowcost's insurance policy would have responded to the claim. (Before us, she put the case on the basis that there was a real, rather than a speculative or fanciful chance, that she would have recovered something from HCC. That was the subject of a supplementary skeleton argument.)

8 The judge held that:

(1) No express or implied retainer was created when Mrs Miller contended, and that the true nature of the relationship was that Mrs Miller was only a potential client of Irwin Mitchell until 25 January 2016.

(2) No duty of care equivalent to that arising under a contractual retainer was owed to her until then.

(3) There was no duty on Irwin Mitchell to advise Mrs Miller to notify Lowcost of the accident, or to directly remind Lowcost to notify its insurer, at any time prior to sending the letter of claim on 22 February 2016.

(4) If Mrs Miller had been advised to notify Lowcost of the claim on 19 May 2014 she would have done so. Lowcost would then have notified HCC timeously in compliance with its obligations under the insurance policy and there would have been a 100% chance that the policy would have responded to the claim.

(5) However, if the notification of the claim had happened on or after 8 April 2015, HCC would still have declined cover on the basis of late notification. He assessed the prospects that the policy would have responded at any time from and after 8 April 2015 at zero.

9 The judge's finding that there was a 100% chance that Lowcost's insurance policy would have responded if HCC had been notified of the claim by either party immediately after the call between Mrs Miller and Irwin Mitchell on 19 May 2014, was expressly qualified by his finding on preliminary issue 7, which was an issue about the proper construction and effect of the annual aggregate excess clause in that policy. He found that Lowcost had not "paid and exhausted the Excess" as expressly required by General Condition 4 of the General Terms and Conditions. Moreover, it was not financially in a position to do so. Irrespective of the notice issue, therefore, HCC was not liable to indemnify Lowcost. The judge held at para 145 that it was:

> "highly likely that at any given time HCC would have taken the point, attractive or otherwise, which was available to it; and that Lowcost would not have been in a position to or chosen to make payment."

10 Mrs Miller raised four grounds of appeal, namely:

(1) The judge ought to have found that Irwin Mitchell owed her a common law duty of care, or a contractual duty of care under an implied retainer, from 19 May 2014 onwards.

(2) The judge ought to have found that Irwin Mitchell owed and breached an obligation from 19 May 2014 onwards to advise Mrs Miller to notify Lowcost, or alternatively to notify Lowcost themselves about her accident.

(3) The judge erred in law in finding that the proper construction and effect of the excess clause within Lowcost's policy with HCC meant that there was no prospect of the policy responding at any relevant time after Lowcost's administration.

(4) The judge erred in finding there was a 0% chance that Lowcost's policy would have responded had notice been given of Mrs Miller's accident to HCC from and after 8 April 2015.

11 In oral argument, on the primary issue of liability encompassed by grounds 1 and 2, Mr Weir KC (who was not trial counsel) focused on a much narrower submission that on 19 May 2014 when Mrs Miller rang their "Legal Helpline", Irwin Mitchell owed her a duty at common law to exercise reasonable care in and about the advice provided on that occasion. He contended that because their adviser, Ms Victoria Halliwell, chose to inform Mrs Miller that the limitation period for bringing a claim was three years, she was also under an obligation to advise Mrs Miller to notify the tour operator of the accident if she (Mrs Miller) had not already done so.

12 Mr Weir also made oral submissions on ground 3, though in doing so, he spent little time in addressing the correct construction of the excess clause. He focused instead on the judge's finding that it was "highly likely" that HCC would have refused to indemnify Lowcost, relying on that clause, even if it had been notified of the accident in or around May/June 2014. The main thrust of Mr Weir's submissions on this point turned on the case raised in the appellant's supplementary skeleton argument that, even if that finding were correct, there was nevertheless a real and substantial chance that HCC would have paid something under the insurance policy.

13 Like the judge, I have considerable sympathy with Mrs Miller, who suffered a grievous, life-changing injury for which she appears to have had a viable claim for a substantial sum of money, and then found herself in the unhappy situation of being unable to recover any damages against either the tour operator or its insurer even if she were able to establish that the steps on which she fell were unsafe. However, as I shall explain, that situation was not something for which Irwin Mitchell could be held legally responsible. The judge was right to find that they

were under no obligation to advise her on 19 May 2014 to inform Lowcost of the accident, or to do so themselves at any time prior to the inception of the retainer.

14 That being so, if my Lord and my Lady agree with that conclusion, as I understand they do, it is unnecessary for the purposes of this appeal to consider what the position might have been if Irwin Mitchell had owed Mrs Miller such a duty and failed to give her the requisite advice.

Background

15 The background, which is more fully set out in the judgment, can be summarised as follows. In April 2014 Mr Miller booked a two-week "all inclusive" holiday in Turkey as a late Christmas present for his wife. On the night of 13 May 2014, the couple had a meal in the hotel restaurant and then walked down the staircase leading to their room. As she reached the last few steps, Mrs Miller lost her footing and fell, in the process sustaining a 20cm open fracture to her left leg. She underwent emergency surgery at a local hospital in the early hours of the morning. On their return from the hospital later on the morning of 14 May, the couple reported the accident to the hotel manager. Mr Miller showed him the steps where the accident occurred and told him that they were unsafe and that the handrail looked inadequate. Mr Miller also took photographs of the location. Their travel insurer arranged for the couple to be flown back home on 15 May (coincidentally, the day they had been due to return to the UK).

16 The holiday had been booked by Mr Miller with Lowcost, which was an online travel operator. Although Lowcost was registered in Spain, the contract was expressly governed by English law and contained an English jurisdiction clause. Its terms also expressly accepted that the holiday was a "package" falling within the Package Travel, Package Holidays and Package Tours Regulations 1992, though it did not have all the normal features of a package holiday. Lowcost did not own or operate the hotel itself. It had booked it through an intermediary known as LTS. By the terms of the holiday contract, Lowcost was obliged to take reasonable skill and care to arrange for the provision of facilities. It would be liable for any personal injury sustained as a result of negligence by its suppliers.

17 At the time of the accident, Lowcost was insured by HCC under a Vantage Tour Operators and Travel Agents Combined Liability Insurance Policy ("the Policy"). The Policy incepted on 13 September 2013. It was originally due to expire on 27 September 2014, but by a policy endorsement on 28 September 2014 the period of cover was extended to 31 January 2015, in consideration of the payment of an additional premium.

18 The public/product liability insurance cover under the Policy indemnified Lowcost, among other matters, against all sums they were legally liable to pay as damages, including claimants' costs and expenses, in respect of accidental bodily injury that occurred during the period of insurance in connection with its business and happening anywhere within the territorial limits (which included Turkey). It was therefore written on a "claims occurring" rather than a "claims made" basis. The Policy also contained the usual additional indemnity against costs and expenses incurred, with the insurers' prior consent, in connection with the defence of such claims for damages.

19 The general exclusions from liability provided that HCC would not be liable for the excess(es) stated in the Schedule. The excess stipulated in the Policy Schedule was a "non-ranking excess" of £10,000 per person (inclusive of costs) with an annual aggregate excess of £400,000, which was increased to £560,000 when the period of cover was extended in September 2014. The increased figure of £560,000 applied to all claims under the Policy, including claims in respect of incidents that had occurred before the extension of cover.

20 The General Conditions of the Policy included the following:

> "4. Insurers will not make any payment hereunder until such time as the insured has paid and exhausted the Excess."
>
> "7. It is a condition precedent to insurers' liability under this insurance that the insured shall immediately: (a) give written notice to insurers of the occurrence of any Bodily Injury or Damage to Property or of any circumstances that might give rise to a claim against the insured, and for which there may be liability under this insurance; (b) give written notice to insurers when a claim is actually made against the insured (whether written or oral) and for which there may be liability under this insurance …"

It was common ground that a provision similar to General Condition 7(a) is standard in such policies.

21 The judge found that as part of its general legal knowledge, Irwin Mitchell would have been fully aware that insurance policies against claims such as that of Mrs Miller would often

contain provisions which allow the insurer to decline to indemnify if the underlying incident were not promptly notified.

22 The accommodation voucher issued by Lowcost to Mr and Mrs Miller set out the "in resort" contact details. It directed holidaymakers that if they experienced any issues they should speak to the hotel in the first instance, or, if it could not help, to "a member of the Lowcost team". The Millers took no steps to contact Lowcost directly whilst they were still in Turkey. However, LTS found out about the accident. Following communications between the hotel manager and a local representative from LTS, another person to whom that representative reported the accident by e-mail as a matter of urgency spoke to the Millers, who described something of the circumstances of the accident. Unsurprisingly, by the time of the trial neither of the Millers had any recollection of having had that conversation. However, there was a contemporaneous record—an e-mail which was sent by that person from an address described as "Mailbox in Resort" at 12:44 on 15 May 2014 to the LTS local representative who had e-mailed that mailbox address earlier to report the accident.

23 The judge stated at para 15 that "[the Mailbox in Resort address] was agreed to be the e-mail address of the local representative of LTS", but that appears to be an obvious mistake. Whilst it was conceivable that the e-mail communications on 15 May were between two different representatives of LTS, one of whom was liaising with the hotel, and the other was monitoring the mailbox, that was not the case presented to the judge at trial. The person sending the e-mails *to* and receiving e-mails *from* that mailbox address was obviously a local representative of LTS, but it was Mrs Miller's unchallenged case that the mailbox address was the "in resort" e-mail address of *Lowcost*.

24 It was pleaded in paras 30 and 31 of the particulars of claim that:

> "30. On the morning of 15 May 2014 [Mrs Miller's] said accident was reported to Lowcost's local handling agent ('LTS') and LTS e-mailed the *Lowcost* 'In Resort Mailbox' the same afternoon, resulting in one of the resort's staff speaking to [Mrs Miller] the same day.
>
> "31. However, the said report of the said accident may not have been a notification nor was it treated by *Lowcost* as notification under the said policy. *Nor did it communicate the report to its insurer* ".

Likewise, in para 30 of the claimant's opening submission for trial it was stated that: "the evidence is that LTS was informed of the incident on 15 May, and LTS informed *Lowcost* the same day by sending an e-mail to the *Lowcost* 'In Resort Mailbox'." [All emphasis supplied.]

25 Unsurprisingly, this account was not disputed by Irwin Mitchell. It was consistent with what HCC had said in its letter to Lowcost of 28 April 2016 declining cover. There was no evidence of any response from Lowcost to that letter denying that it was told about the accident in May 2014, or alleging that the Mailbox in Resort e-mails were internal communications within LTS, containing information which LTS chose not to pass on to Lowcost. Moreover, in their letter to Irwin Mitchell dated 23 August 2016, after HCC had refused cover and Plexus Law had discovered they were now acting for an uninsured client, Plexus Law said that: "Lowcost Holidays were formally notified of the incident *centrally by e-mail* on 15 May 2014 and we understand that some initial enquiries into the accident were made *by their staff*". [Emphasis supplied.] The judge found at para 63 that in context, this was a reference to the Mailbox in Resort e-mails.

26 The matter was never communicated to the person within Lowcost who was responsible for dealing with its insurers (a Mr Mir), possibly because LTS never made a formal written report. Nevertheless, by reason of the e-mail communications received through the mailbox and the subsequent conversation with the Millers, Lowcost itself was sufficiently aware of the accident to have notified it to HCC. However, Lowcost did not tell HCC about Mrs Miller's accident until it forwarded Irwin Mitchell's letter of claim to them on 3 March 2016. That is no doubt why, when Irwin Mitchell consulted counsel about HCC's stance that Lowcost was in breach of the notification requirements of the Policy, they concluded that there was no realistic prospect of challenging it (see the judgment at paras 59 and 60).

27 Immediately on her return to the UK, Mrs Miller went to her local hospital for assessment. She was booked in for an x-ray the following Monday, 19 May, but by the time she kept that appointment her condition had deteriorated. The leg appeared to be infected, and she was kept in hospital overnight for observation and further treatment. An appointment was made for her to see an orthopaedic consultant on 20 May.

28 Irwin Mitchell is a well-known firm of solicitors whose areas of specialism include personal injury claims. Whilst she was in hospital on 19 May 2014, Mrs Miller saw on TV an advertisement for their services which invited members of the public who had suffered an accident to call them on their Legal Helpline "to see how we can help". Mrs Miller called the number and left a message. Ms Halliwell, a Legal Helpline adviser, called her back. Ms Halliwell took a contemporaneous note of their discussion. She also partly completed, in typescript, an internal proforma which was used by those operating the helpline "as a means of helping them to drive the call" (para 92). She noted the facts recounted by Mrs Miller, which included the date and nature of the accident, that she had been on a package holiday booked with Lowcost in Turkey, and the nature of her injury.

29 The judge found at para 121 that during that conversation Ms Halliwell gave Mrs Miller "some limited high level and generic legal advice about personal injury claims, but it did not purport and cannot have been understood to be complete or comprehensive legal advice about her claim, and it was a preliminary to further conversation". Ms Halliwell recorded that she advised Mrs Miller as to the scope of the Legal Helpline, gave her some account of personal injury law in terms of duty, breach and causation, and told her that there was a three-year limitation period. She did not ask Mrs Miller whether she had complained to a tour representative, whether she had filled in a complaints or accident report form, or whether she had sent any letter to or received any letter from the tour operator. Those questions were on the proforma, but the judge found they were not mandatory, and the relevant part of the proforma would have been completed if the caller had volunteered that information (para 95). The call ended with Ms Halliwell telling Mrs Miller that she would refer the matter to Irwin Mitchell's International Travel Litigation Group ("ITLG"), which she did.

30 It is unnecessary to go into any detail about what occurred thereafter, because Mr Weir concentrated his submissions on the alleged duty of care on the events of 19 May. Suffice it to say that a Ms Pegg of the ITLG tried to contact Mrs Miller on 20 May by telephone, without success. Ms Pegg then sent Mrs Miller a letter on the same day seeking further information and documents from her, and enclosing a prepaid envelope for her response. Her request included "any complaint forms you may have completed following the accident" and "any complaint letters you may have sent to the Tour Operator, and their responses". The judge found at para 29 that this was a means of gathering the most contemporaneous evidence of the way in which the accident was described.

31 Unfortunately, despite several chasing letters, and contact between Irwin Mitchell and Mrs Miller's son-in-law, who was assisting her, none of the requested documents were supplied to Irwin Mitchell until 8 April 2015, when some documents were supplied and internal conflicts clearance was obtained. That was the earliest date that Irwin Mitchell's ITLG were in a position to consider Mrs Miller's case in any more depth, with a view to deciding whether they might agree to act for her, if she so wished.

32 The significance of that date is, of course, that the judge held that even if they had been notified of the accident on 8 April 2015, HCC would have declined cover under the Policy in reliance on General Condition 7(a). Mrs Miller's challenge to that finding was not formally abandoned, but Mr Weir said nothing about it, and rightly so. It was a finding of fact that the judge was entitled to make on the evidence before him, for the reasons that he gave. In this case, unlike the case of *Phillips & Co v Whatley* [2007] UKPC 28; [2007] PNLR 27, HCC had in fact declined cover on grounds of late notification, albeit around a year later. The judge accepted expert evidence to the effect that insurers would refuse cover if they were prejudiced by the late notification. He found for clear and cogent reasons that, despite the photographs of the stairs which were taken by Mr Miller, after a period of 11 months, HCC's ability to investigate the accident had been substantially prejudiced by the lack of immediate notice.

Implied retainer

33 On appeal, Mrs Miller did not seek to challenge the judge's finding that there was no express contract of retainer. She did not formally abandon her contention that the judge was wrong to find that there was no implied retainer, but that argument occupies only three of the 122 paragraphs of the appellant's replacement skeleton argument for this appeal, and Mr Weir made no oral submissions to supplement what is set out in those paragraphs. It is possible to deal with this matter very shortly.

34 The judge expressly rejected the proposition that on 19 May 2014 and shortly afterwards, Mrs Miller and Irwin Mitchell acted in a way which was consistent only with Irwin Mitchell being retained as Mrs Miller's solicitors. He was plainly right to do so. Until late January 2016,

on an objective view of the evidence, Mrs Miller was treated only as a prospective client of Irwin Mitchell.

35 The specific contention that there was an implied retainer on 19 May 2014 was fatally undermined by an abundance of evidence pointing to the opposite conclusion. As the judge found, the Legal Helpline was a means of attracting prospective clients, but there would be a sifting process, and the question of a possible retainer would only arise after the relevant legal team (here the ITLG) had considered the information and documents they had requested Mrs Miller to provide. It was clear from Mrs Miller's own evidence that she understood that to be the position at the time of her conversation with Ms Halliwell. The matter was put beyond doubt by Ms Pegg's letter to Mrs Miller of 20 May 2014, which expressly stated that after the requested documentation had been reviewed, Ms Pegg would contact Mrs Miller "to discuss whether Irwin Mitchell was able to accept her case".

36 By the time any of the requested documentation was provided, it was already too late to prevent HCC declining cover on grounds of late notification, but in any event, Irwin Mitchell then began to make further pertinent inquiries. They would only have entered into a retainer with Mrs Miller if, in consequence of the results of those additional inquiries, they were willing to take on her case and she was willing to instruct them. The judge was entitled to find on the evidence that the parties only started behaving as if they were in a solicitor-client relationship in late January 2016, shortly before Irwin Mitchell sent the letter of claim.

37 Having dealt with the grounds of appeal which were not vigorously pursued, I shall now turn to consider the ones which were.

The alleged duty to advise

38 It is clear from the judgment, and in particular from the way in which it was framed at paras 114 and again at 121, that the case as presented to the judge was that in the absence of an express or implied contractual retainer, Irwin Mitchell owed Mrs Miller "an equivalent duty of care in tort" prior to 25 January 2016. In other words, Mrs Miller's case at trial was that the scope of Irwin Mitchell's duties was exactly the same as it would have been if the parties had entered into a retainer.

39 Before us, however, Mr Weir refined that argument considerably, by concentrating solely on the conversation between Mrs Miller and Ms Halliwell on 19 May 2014. The linchpin of his argument was the fact that Ms Halliwell told Mrs Miller that the limitation period for making a claim for damages for personal injury was three years. He contended that by doing so, she assumed a duty to advise Mrs Miller to take reasonable steps that were open to her to protect her position. The purpose of advising her to notify the tour operator immediately would be to alert the tour operator so that it could tell its insurers, against a background where, as the judge accepted, Irwin Mitchell would have understood that a failure to do so can result in an absence of insurance cover. Mr Weir rightly did not press the point that, in the absence of a retainer, Irwin Mitchell should have notified Lowcost themselves. If Mrs Miller had asked them to do so on her behalf, without being paid, they could quite properly have refused.

40 In a case in which (like the present) there is no retainer, the principles to be applied when ascertaining whether there has been an assumption of responsibility by the solicitor and if so, what is the scope of any duty of care, were helpfully summarised by Carr LJ (as she then was) in *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970; [2023] 4 WLR 56, paras 58–61, ("*Spire*"). I gratefully adopt that summary without repeating it. As Carr LJ confirmed at para 59, the fact that the advice is provided gratuitously is not a bar to a finding of a duty of care.

41 Mr Weir's first proposition was that, given that they were operating a "Legal Helpline" staffed by law graduates who had been trained for that purpose, and it was clearly envisaged that the legal advisers who spoke to callers on that helpline would be providing *some* legal advice to them, Irwin Mitchell had assumed a duty to take reasonable care in and about the advice they gave.

42 I have no difficulty in accepting that submission, given that Irwin Mitchell would expect the callers to rely on what they were told, it would be reasonable for them to rely on it, and there was no disclaimer apart from an explanation that the scope of the helpline was limited to (i) providing general preliminary legal advice and (ii) ensuring that the caller did not already have a solicitor for the matter they were calling about. The legal advisers were not trained to say that they were not giving any legal advice, nor to say the caller could not rely on any advice given during the call. Unsurprisingly, therefore, Ms Halliwell said neither of those things. Indeed, the proforma has a section for recording the "legal advice" given on the helpline.

43 The judge found at para 121 that Mrs Miller was "certainly entitled to rely on such advice as she was given". I agree. To that extent, I accept that there was a voluntary assumption of

responsibility by Irwin Mitchell for the limited task undertaken, ie of providing preliminary legal advice of a limited and general "high level" nature to a prospective client. I do not read the judgment as suggesting otherwise.

44 Given that the advice given on the Legal Helpline was general and preliminary, and it was made clear by the legal adviser that it was of that nature, the caller would understand that it was not set in stone, and that detailed advice relating to the specific circumstances of the caller's case could only follow after the specialist legal team to which they would then be referred had examined the matter in more detail. As the judge found at para 121, the advice given "did not purport and cannot have been understood to be complete or comprehensive legal advice about [Mrs Miller's] claim, and it was a preliminary to further consideration".

45 The fact that the relationship gave rise to a duty of care begs the question as to the ambit of that duty. As Carr LJ stated in *Spire* at para 60, that is to be judged objectively in context and without the benefit of hindsight, and a fact-sensitive enquiry is necessarily required. I also respectfully agree with her observation at para 61 that, because of the importance of the factual detail, the drawing of analogies is not instructive.

46 Mr Weir submitted that in the present case the judge's description of the advice as "general" and "high level" did not assist Irwin Mitchell, because Ms Halliwell chose to raise the specific issue of limitation and give advice about that. He emphasised the importance of the fact that Mrs Miller was known to be an inexperienced litigant (why else would she ring a Legal Helpline?). He relied on the observations of Donaldson LJ in *Carradine Properties Ltd v DJ Freeman & Co* [1955–1995] PNLR 221, at para 12-13, that:

> "An inexperienced client will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

However, those observations were specifically addressed to the situation where there is a retainer. Outside that situation, if a solicitor takes it upon himself to give legal advice to someone who is not a client, the inexperience of that other person in legal matters will be a factor in determining whether the advice is couched in appropriate terms, and whether it was reasonable to rely on it. Beyond that it will be of limited assistance in determining the ambit of the solicitor's responsibility, which will depend on the facts.

47 Mr Weir contended that the scope of the duty in this case extended beyond taking reasonable care that any express representations made to the caller by the legal adviser were accurate and truthful. An express representation could be both those things and yet be misleading because the information given to the caller was incomplete. He gave as an example a situation in which there was a legal obligation on the prospective claimant to inform the police of the incident which caused the injury, and their failure to do so would operate as a bar to the claim. In those circumstances, he submitted that telling them that they had up to three years in which to issue proceedings, without also telling them that they must notify the police straight away if they had not already done so, would paint a misleading picture. But that is not a similar situation at all; it is one in which the person seeking/receiving the advice has an express legal obligation to do something to preserve their claim, over and above issuing their claim form within the limitation period.

48 I accept that, in theory, circumstances could arise in which (irrespective of anything said about the limitation period) a solicitor might come under a duty to advise a prospective client to take an obligatory legal step to keep their claim alive, of which the solicitor is aware and the person seeking their advice may not be. Indeed, a situation could arise in which it would be at least strongly arguable that a solicitor became obliged to give advice about the limitation period to someone who rang a legal helpline of this type, even if the solicitor would not otherwise generally be required to give such advice. I have in mind the converse situation to this case, where the call is made shortly before the limitation period is due to expire, and that becomes apparent during the call. However, it is unnecessary to express any view about whether the legal advisers on the Irwin Mitchell helpline were obliged to tell callers what the limitation period was, since in this case advice *was* given to Mrs Miller about the usual limitation period for personal injury claims, irrespective of whether there would have been a duty to give it.

49 Unlike the scenario posited in Mr Weir's example, Mrs Miller had no legal obligation to tell the tour operator about the accident. Further, such notification had no bearing on the question whether Mrs Miller had a legal basis for bringing a claim against anyone for the personal injuries she sustained in the accident, which was quintessentially what she was ringing the helpline to

ascertain. There were no other steps Mrs Miller needed to take in order to preserve her right of action against the tour operator (or anyone else).

50 Moreover, as is illustrated by *Crossan v Ward Bracewell & Co* [1984] PN 103, (*"Crossan"*) even if the solicitor is aware that there is a legal obligation on a putative client to take certain steps to protect their personal position, such as giving notice to that person's own insurers, he may be under no obligation to advise them to take those steps.

51 The claimant in that case, Mr Crossan, was facing criminal charges of reckless driving in the magistrates' court following a road traffic accident. He went to see a solicitor who specialised in that type of work. He indicated his willingness to instruct the solicitor, but matters never got to the stage where his instructions were accepted because Mr Crossan could not pay the £50 on account that the solicitor required. Kennedy J found that irrespective of whether he might have been under a duty to do so once there was a retainer (a matter which it was unnecessary for him to address) the solicitor was under no duty at that preliminary stage to remind Mr Crossan of his obligation under his motor insurance policy to notify his insurers of the issue of the summons. That was the position even though failure to do so could result in his being uninsured.

52 The contention in the present case is one stage further removed from that situation; it is not that a putative client should have been given advice relating to their own insurance position, but advice to take steps which may (or may not) have had a bearing on someone else's.

53 Mr Weir submitted that it would have been obvious to Irwin Mitchell that it would be important that Lowcost's liability insurance responded to Mrs Miller's claim (particularly as Lowcost was a Spanish company of unknown means). The fact that questions about whether the accident had been reported to the tour operator, or whether a complaint form had been completed, or whether there had been any correspondence between the injured person and the tour operator, appeared on the proforma indicated that Irwin Mitchell thought these were important matters to ask about, even at the earliest stage when someone rang the helpline.

54 That is a fair point to make so far as it goes; but the judge accepted on the evidence he heard that it was a matter of discretion for the legal advisor whether to ask those questions, they were not mandatory and in fact Ms Halliwell chose not to ask them. She did nothing which brought about a duty on her to ask them, unless, as Mr Weir submitted, she did so by bringing up the subject of limitation. In the event, they were asked by Ms Pegg in the letter she sent the very next day, and Mrs Miller did not answer them straight away. However, what happened on 20 May and thereafter does not assist in determining whether a duty of care had already been assumed and breached on 19 May.

55 Mr Weir also submitted that the importance of notifying the prospective defendant to notify their insurer was illustrated by the fact that the Pre-action Protocol for Personal Injury Claims states in terms that the claimant or their legal representative may wish to notify the defendant and/or the insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed letter of claim. The standard form letter of claim annexed to the Pre-action Protocol, quoted by the judge at para 126, contains language which specifically alerts the defendant to the potential consequences for his insurance cover if he does not immediately notify his insurers of the claim.

56 All this is true, but the Protocol is dealing with a situation further down the line, when there is a retainer (express or implied) and what the solicitor is keen to bring about is a timely notification to the insurer of the *claim* (not the accident). Even then, the possibility of giving such notification prior to sending the detailed letter of claim is couched in voluntary terms. Whilst it may be best practice to take those steps, as the judge accepted, it does not follow that failure to warn the defendant to notify his insurers in advance of sending the letter of claim would expose the solicitor to liability in negligence.

57 Mr Weir complained that Irwin Mitchell had chosen not to call Ms Halliwell, nor indeed anyone in the ITLG who became involved in handling Mrs Miller's case, as witnesses at trial, thereby depriving her trial counsel of the opportunity to cross-examine them, and that the judge had been wrong to refuse to draw adverse inferences from the fact they were not called. However, the grounds of appeal contain no challenge to the judge's refusal to draw such inferences. The complaint is made in the appellant's replacement skeleton argument, but skeleton arguments are not the proper vehicle for introducing challenges of this nature on appeal.

58 Even if it had been open to Mrs Miller to take this point, I would have rejected it. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 WLR 3863, when considering an appeal on the ground of failure to draw adverse inferences, Lord Leggatt JSC (with whom the rest of their Lordships all agreed) said at para 42:

> "To succeed in an appeal on this ground the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy."

59 Mrs Miller's trial counsel invited the judge to infer that if the witnesses had been called they would have accepted in cross-examination that they ought to have asked Mrs Miller whether she had notified Lowcost, and that if she had said no, they would have advised her to do so or offered to do so themselves. Given the way that this appeal has been argued, focusing exclusively on the events of 19 May 2014, the only relevant witness is Ms Halliwell. As Mr Warnock KC pointed out when responding to these submissions on behalf of Irwin Mitchell, there was very little factual dispute about what happened (certainly none about the events of 19 May 2014), and the existence and ambit of any duty of care was a question of law for the court, not a matter for any witness.

60 It seems unlikely that Ms Halliwell would have been able to provide any reliable factual evidence about a conversation that took place on the telephone in May 2014, over and above what appears in the contemporaneous records. It is far from clear that the judge could properly have drawn the inference that she would have given any such advice to Mrs Miller (as opposed to noting down that Mrs Miller had not notified Lowcost, and passing that information on to the members of the ITLG). In any event, any speculation by Ms Halliwell about what might have happened had she asked a question which she did not ask, would not have assisted the judge in deciding the ambit of the duty of care. In those circumstances, his refusal to draw those inferences was entirely rational.

61 Mr Weir also prayed in aid the principle that a solicitor is obliged to advise on matters which are "reasonably incidental" to matters within the scope of his retainer—see the authorities referred to in *Spire* at paras 56–57. He submitted that this applied equally, in the absence of a retainer, to matters which are "reasonably incidental" to the specific matters on which the solicitor has assumed responsibility to advise.

62 That was a matter which was the subject of some, though not full, legal argument, in *Spire*. Carr LJ summarised the rival submissions in her judgment at paras 65–67, but at para 68 she said that she preferred to express no concluded view on the matter because it was unnecessary to do so for the resolution of that case. It is equally unnecessary to do so in this case, as I do not consider that by any stretch of the imagination, advice about notifying the tour operator of the accident could be said to be "reasonably incidental" to advice about the limitation period for bringing a claim for damages for personal injury in this jurisdiction.

63 However, Mr Weir contended that it was unnecessary for him to rely on the argument that the obligation to advise Mrs Miller to notify the tour operator was "reasonably incidental" to the obligation undertaken to give the limited advice that was given on the helpline, because by taking it upon herself to specifically advise Mrs Miller about the limitation period for bringing a claim against the tour operator, Ms Halliwell had voluntarily assumed responsibility for advising on the general topic of what Mrs Miller needed to do to protect her position (to the extent it was within Mrs Miller's power to do so). Mr Weir further submitted that telling Mrs Miller that the limitation period was three years "implied that there was nothing Mrs Miller needed to do to protect her position" or created the misleading impression that there was "no rush" and that "she could relax because she had three years in which to take any steps against the tour operator".

64 Mr Weir sought to derive support from the decision of Kennedy J in *Crossan* (above). In that case it was found that the solicitor expressly held himself out as someone who was able to offer some advice to Mr Crossan about how he could obtain funding for his defence. He explored the possibility of obtaining legal aid, but Mr Crossan was not eligible. The solicitor did not go on to consider the possibility that Mr Crossan's motor insurers might pay for his legal representation. He told him, wrongly, that he only had two options: to represent himself, or pay the solicitor £50 on account.

65 It was held that despite the absence of a retainer, the solicitor owed a duty of care to Mr Crossan because, although there was no need for him to do so, he took it upon himself to assist him as to how he could obtain funds to pay his legal costs. The solicitor was in breach of that duty because, having ascertained that Mr Crossan was ineligible for legal aid, he failed to advise him of another source of funds of which, as a competent solicitor undertaking road traffic cases in the magistrates' court, he ought to have been aware and was in fact aware—namely, Mr Crossan's own insurers. It is perhaps of some significance that the solicitor had expressly

accepted in evidence that it would be usual for him to point out to someone in Mr Crossan's position that if a plea of not guilty were entered, his motor insurers would pay the costs.

66 *Crossan* was a case which turned on its own very unusual facts. The solicitor's behaviour in that case went beyond simply telling the prospective client that, since legal aid was unavailable, he would not be able to represent him unless he could find £50 to make a payment on account. The crucial finding was that the solicitor told Mr Crossan that he only had two options, namely, fund the litigation himself or represent himself, when in reality he had a third option, the solicitor knew that, and accepted that he would usually have mentioned it. It was therefore, in truth, a classic example of a *Hedley Byrne v Heller* type of express misrepresentation, made about the very matter on which the solicitor had offered his expert assistance.

67 In the present case, Ms Halliwell took it upon herself to offer high-level preliminary advice about the ingredients of a claim in negligence, and specific advice about the period within which a claimant for damages for personal injury must issue any legal proceedings in this jurisdiction. The advice she gave on those topics was accurate. She did not thereby take it upon herself to give wider-ranging advice to Mrs Miller about any steps she might reasonably take to "protect her position" before she issued proceedings; nor would it have been reasonable for Mrs Miller to have relied on her to give such advice or to have thought she was doing so.

68 On 19 May 2014, Irwin Mitchell did not know whether the tour operator knew about the accident. If the tour operator did not know about the accident, it could not have notified it to its insurers (if any). If it *did* know about the accident, it would be reasonable to assume that it would notify its insurers timeously. The risk against which it is contended that Ms Halliwell should have sought to protect Mrs Miller was the risk that the tour operator *already knew* about the accident and despite this, contrary to its own interests, had failed to notify its insurers, or that it would fail to do so within a reasonable time (the helpline conversation was less than a week after the accident) with the consequence that they might refuse cover—a matter that would assume particular significance were the tour operator to become insolvent.

69 The questions on the proforma about communications with the travel operator about the accident were not designed to elicit information with the aim of advising the caller then and there to do something to protect him or herself against the risk that the defendant might lose their insurance cover. They were designed to obtain relevant information to pass on to the people who would be considering whether Irwin Mitchell should take on the case (here, the ITLG).

70 In general, a solicitor is not obliged to advise even a client with whom there is a formal contractual relationship to take steps to safeguard against the risk of unenforceability of a judgment due to the insolvency or impecuniosity of the other party to actual or prospective litigation, unless he is specifically put on notice that they are in financial difficulties: see eg *Pearson v Sanders Witherspoon* [2000] PNLR 110. The judge found at para 136 that there was no particular reason to suppose that Lowcost was at any greater risk than any other tour operator of becoming insolvent.

71 Whilst a duty of care, once assumed by the solicitor, is the same irrespective of whether the quantum of the potential claim is small or large, I consider that there is also some force in the point made by Mr Warnock that in considering whether a duty of care arose on 19 May 2014 to advise Mrs Miller to take steps to safeguard against the risk that Lowcost's insurers would not cover liability to pay her claim, it is relevant to consider how that claim would have appeared to a solicitor at that time. On the face of it, it was a claim in respect of a broken leg which appeared to have become slightly infected after emergency surgery. There was no indication of how things would develop over the next 18 months. Mrs Miller was a middle-aged woman who did not work, so there was no claim for loss of earnings. The damages were likely to have been modest. Unsurprisingly it was initially treated by Irwin Mitchell as a potential fast-track claim. It was only after the amputation took place that there was a potential for recovering sums in excess of £500,000 (and possibly in excess of £1m, according to Mr Weir).

72 So on 19 May 2014, although the level of excesses would vary under different policies of insurance, a solicitor in the position of Irwin Mitchell had no particular reason to expect the quantum to be much more than whatever the tour operator was likely to have to pay from its own resources under its insurance policy. Smaller claims are also likely to be easier to settle. In that context, the risk that the insurer might refuse cover because the tour operator failed to notify it of the accident is not something which ought to have been, nor would it have been, a matter of such concern that a reasonable solicitor would have felt compelled to tell Mrs Miller to notify the travel operator immediately, in order that it could notify its insurer.

73 Despite the ingenuity of Mr Weir's argument, I cannot see how one can possibly reach the position that just by informing Mrs Miller that a claimant has three years from the accident

in which to issue a claim for damages, Ms Halliwell assumed a responsibility to advise her to take a step to safeguard against the risk that the tour operator already knew about the accident but nevertheless would not notify its insurer timeously, even if (which I do not accept) that risk would have been within the reasonable contemplation of a legal adviser in her position and at the very first point of contact with the prospective client.

74 I also reject the characterisation of what Ms Halliwell said about the limitation period as providing some kind of reassurance to Mrs Miller that there were no other steps she needed to take to protect her position. This was preliminary general advice. One of the matters the ITLG went on to consider was whether Mrs Miller's claim might have been subject to a shorter limitation period because the accident occurred in Turkey. In any event, limitation has nothing to do with the question whether the claim is likely to result in any recovery from the defendant or its insurers, save in the broadest sense that once a claim is time-barred and the point is taken, the claimant will recover nothing. Nor is limitation concerned with the prospective defendant's insurance position or its solvency. It is solely concerned with the time for formally initiating proceedings against the prospective defendant.

75 Even if the advice about the limitation period could be characterised as providing reassurance that there was nothing to be done at that stage to preserve Mrs Miller's prospective claim, that was true: there were no other steps she needed to take on 19 May 2014 to preserve her right to make a claim against Lowcost.

76 For those reasons, although the case he was considering was put on a far broader basis, and the arguments he heard were different, the judge was right to reach the conclusion that he did at para 121 that the facts, as he found them, did not give rise to a duty on Irwin Mitchell to advise Mrs Miller to take steps to ensure that Lowcost's insurers were informed of the accident. Advising Mrs Miller to make contact with Lowcost was not part and parcel of what Ms Halliwell chose to advise her on when she advised on the limitation period. That conclusion means that this appeal must fail.

The excess clause

77 If I am right that the duty of care did not encompass a duty to advise Mrs Miller to notify Lowcost of the accident, and therefore there was no breach of duty, the third ground of appeal does not arise. However, in deference to the oral arguments advanced by both leading counsel, I will make some observations about it.

78 The underwriting experts instructed by the parties agreed how a non-ranking excess clause operates, and that agreed position is reflected in the judgment at para 144. Each claim falling below the £10,000 excess would be borne by the insured in full, but none of those claims would count towards the annual aggregate figure so as to reduce or erode it. As regards larger claims, only the amounts in excess of £10,000 (eg £2,000 of a £12,000 claim) would reduce the annual aggregate. The judge found, on the basis of evidence obtained via Tokio Marine (HCC's successors in title), that only £6,765.78 of the aggregate excess of £560,000 had been eroded for the 2013/14 policy year before Lowcost went into administration in July 2016.

79 In determining the point of construction that he was asked to determine, the judge interpreted General Condition 4 as a "pay to be paid" clause, which meant that Lowcost was contractually obliged to disburse claims totalling £553,234.22 out of its own pocket (excluding all claims of less than £10,000 and the first £10,000 of any larger claims) before HCC had any liability to indemnify it for any claims under the Policy in excess of £10,000. Lowcost had not done so and in the light of its impecuniosity was never going to do so. This was the position that HCC had taken, as reported to Irwin Mitchell by Plexus Law on 23 August 2016, when relying on General Condition 4 as an additional ground for refusing cover.

80 The judge was asked to answer the question whether Lowcost's insurance policy would have responded to Mrs Miller's claim had Lowcost been notified of the incident on 19 May 2014 and to deal with the construction of clause 4 of the General Conditions of the Policy as discrete preliminary issues. He was not asked to assess whether Mrs Miller had lost a chance of recovery under the Policy.

81 It seems to me that the two preliminary issues that the judge was asked to deal with are integrally bound up with each other, and that he was given the impossible task of trying to deal with them discretely. As a result, he ended up making findings about whether HCC would have relied on General Condition 4 to refuse cover in the course of his consideration of the proper construction of that clause. He did so by treating that question as binary (either HCC would have relied on the excess of loss clause, or it would not) and as determinative of the claim (if the clause meant that HCC was not liable, and HCC would have relied on it, Mrs Miller would have

recovered nothing). In the light of the way in which the matter was pleaded and the preliminary issues were formulated, that approach was hardly surprising.

82 Mrs Miller's pleaded case on loss was that, had the claim been notified to Lowcost in May 2014 (and notified by Lowcost to HCC), she would have issued proceedings against Lowcost in 2016 and obtained judgment for substantial damages, and that Tokio Marine "would have indemnified Lowcost for the damages payable to [her]" (para 40 of the particulars of claim). In para 41, she accepted that her claim is a lost opportunity claim, but nevertheless alleged that there should be no discount on the damages she would have been awarded in any judgment against Lowcost (ie that there was a 100% chance of recovery from Lowcost's insurers.)

83 In response, Irwin Mitchell pleaded in para 41 of its defence that "given the terms of the insurance policy relating to payment of the excess and annual aggregate deductible, it is denied that the claimant had a realistic chance of receiving payment from Tokio Marine". They also denied Mrs Miller's case that there should be no discount on the damages. The reply to that paragraph of the defence consisted of a bare denial. So the case at trial, as pleaded on both sides, was "all or nothing".

84 Mr Weir submitted to us that the judge's interpretation was incorrect, and the correct interpretation of General Condition 4 was that Lowcost was under a *liability* to meet the first £560,000 of all claims to the extent they exceeded £10,000. Despite the phrase "has paid and exhausted", the discharge of that liability by making actual disbursement of an equivalent sum was not a condition precedent to HCC's liability to pay under the Policy. Thus, unlike clause 7(a), clause 4 of the General Conditions would not have afforded HCC a cast-iron basis for refusing to pay Mrs Miller's claim (which Mr Weir asserted, by the time proceedings were issued, could potentially have exceeded the aggregate excess balance of £553,234.22 by a considerable margin).

85 However, Mr Weir also contended that it was unnecessary for the judge to decide the question of construction (and logically, therefore, that he should not have been asked to) and nor should we. On the counterfactual assumption that HCC had been notified of the accident in Lowcost's first regular schedule of claims reported to it by Mr Mir after 19 May 2014, and it had not been open to it to refuse cover for late notification, then in line with the approach taken by the Privy Council in *Phillips v Whatley* (above), instead of answering the questions he was asked (whether the Policy would have responded to the claim, and what General Condition 4 on its true interpretation required) the judge should have assessed the *chance* that a reputable insurer would have repudiated liability on the basis of General Condition 4. In so doing, he should have taken into consideration the fact that (on this hypothesis) the solicitors' negligence had caused the situation in which the actual prospects of recovery from the insurer could not be known. That would mean that in case of doubt, when assessing the chance, the court should lean in favour of the disadvantaged claimant.

86 In the real world, Mr Weir submitted, this case would have settled. The true interpretation of General Condition 4 did not really matter. It was enough for his purposes to establish that there is a respectable argument that it is *not* a "pay to be paid" clause. There was a real, rather than a fanciful chance that HCC would have used the General Condition 4 point as a lever for settlement negotiations, instead of simply refusing to pay and forcing Mrs Miller to go to trial against them on that issue as well as proving her claim against Lowcost and obtaining judgment. In what Mr Weir characterised as the unlikely event that the issue of construction of General Condition 4 went all the way to a trial, there was a real, rather than a fanciful chance that HCC would have lost the legal argument.

87 The problem is that, attractively as it was presented to us, that was not the case that the judge was asked to address. He approached the matter on the basis that General Condition 4 had not been satisfied and could not be satisfied after Lowcost became insolvent. HCC would have taken that point, and therefore the Policy would not have responded to the claim in 2016 even if HCC had been notified of the accident timeously. The implication was that in such circumstances, Mrs Miller would recover nothing.

88 The judge did not put a percentage on the "highly unlikely" chance that HCC would *not* take the point, because he was not assessing the loss of a chance but finding on the balance of probabilities what, in fact, HCC would have done in response to notification of a claim in 2016, if it had been aware of the accident in May 2014. Given that that is precisely what HCC did do in 2016, and given the expert evidence, he was entitled to make those findings. The judge had used the phrase "highly likely" earlier in his judgment to mean "100% likely" when addressing the question whether HCC would have relied on the lack of timely notice to refuse cover in or after April 2015. If that was the wrong approach, as is now contended, the fact that through no

fault of his own the judge's analysis stopped short, or he addressed the wrong issue, would pose quite a conundrum for this court, if we had to decide this ground of appeal.

89 The point of construction is far less straightforward than the judge appears to have thought. There is some force in Mr Weir's argument that the commercial rationale behind the conclusion in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 AC 1 does not apply outside the specific context of that type of insurance arrangement, where all the other members of the P&I Club would have a good reason to insist that the individual member against whom a claim is made pays out the money to his insured before being reimbursed, to stop him making a profit at their expense. There is no similar rationale (and indeed no easily discernible rationale) for insisting that an insured under public liability insurance should actually pay out sums for which he is *never* going to be reimbursed by the insurer, before the insurer indemnifies him in respect of the amount of any claims above the excess.

90 However, the arguments on the construction issue (which there is no need for me to set out here) are not all one way, and the complexities are such that it would not be sensible to attempt to form a view about it on the basis of the limited arguments that were addressed to us on this appeal. That is so particularly when we do not need to decide it and, despite the grounds of appeal, the appellant's own counsel is not inviting us to. Suffice it to say that I have not formed any final view about whether the judge's conclusion at para 146 is right or wrong, and I would not wish anything that I have said on this topic to be regarded as endorsing it.

91 So far as the loss of a chance is concerned, Mr Warnock made the point that there is no need to speculate about what HCC would have done because it is known that it took the General Condition 4 point as well as the lack of notice point, via Plexus Law's letter to Irwin Mitchell in August 2016. This was in a commercial context of a market which had hardened, where insurers were experiencing large quantities of claims by operators in the travel industry with poor claims records, and were taking every point that was available to them. The judge accepted expert evidence on that point. As will be apparent from what I have already said, I accept that there was ample evidence to justify the judge's finding that it was "highly likely" that HCC would have taken this point and refused cover in 2016 even if they had been notified of the accident in May 2014.

92 Mr Warnock further submitted that Mrs Miller could not just rely on "giving the claimant the benefit of the doubt" to prove that there was loss of a real chance. The burden of proof still rests on the claimant in a loss of a chance case, and it would have been possible for Mrs Miller's legal team, had they wished, to adduce evidence from HCC/Tokio Marine as to what it would have done if it had been notified of the accident in May 2014 and the claim was brought against Lowcost (and/or HCC) in 2016. It had proved possible to obtain some evidence from Tokio Marine about the level of claims that Lowcost had already met.

93 Again, because we do not need to decide this point, I do not propose to do any more than indicate that I consider that the key to how HCC would have responded to the claim on the counterfactual basis that is now articulated by Mr Weir could well have depended on how large the claim for damages was, a matter about which we have no evidence because of the way in which the matter came before the judge. The judge has found, and was entitled to find as a fact, that HCC would have relied on General Condition 4 to refuse cover. What would have happened after that is a matter of pure speculation, and on the parties' pleaded cases that was irrelevant. Had it mattered, and had it been open to Mrs Miller to redefine her case in this manner on appeal, I do not consider it would have been possible for the Court of Appeal to decide that question on the evidence before us, and we may have had to hear further argument about how to proceed.

Conclusion

94 For the reasons I have explained, I would dismiss this appeal.

FALK LJ

95 I agree.

PHILLIPS LJ

96 I also agree.

Appeal dismissed.

ISABELLA MARSHALL, Barrister