

Legal review: January to June 2008
Beale and Company, July 2008

Insurance claims

Our review of 2007 included the judgment in *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* on 4 April 2007, in which it was held that Insurers who could have avoided a claim under a liability policy due to late notification had elected to accept it. We commented that the case is a salutary warning to insurers who do not make it clear at the appropriate time, in relation to a claim that they may not be liable to cover, that they reserve their position.

Insurers generally will be relieved to learn that the insurers' appeal in the above case has been allowed. The Court of Appeal's judgment was given on 29 February 2008.

The Court of Appeal held that the breach of the condition precedent on the part of the insured (to give immediate written notice of any injury or damage) automatically discharged the insurers from liability under the policy, which meant that the question of election – whether to affirm the policy or not - did not arise. The insurers could only be held to have waived the breach if their conduct had given rise to an estoppel – i.e. a situation whereby they were estopped at law from relying on the breach. For this to happen it would have to be shown that the insured had relied, to their detriment, on the insurers' representation that they would not rely on the breach and that it would be inequitable to allow the insurers to go back on their representation. No such estoppel could be shown to have arisen here.

The Court of Appeal also held that, whether for the purposes of waiver by election or waiver by estoppel, the insurers had not, in any event, made an unequivocal representation to the insured that they were accepting liability, prior to repudiating liability. This finding was, of course, very much based on the facts of this particular case.

It should be borne in mind that the case was concerned with a breach of a condition precedent, which, as the court held, automatically discharged the insurers from liability. There was no need for them to reserve their rights, unless to prevent an estoppel from arising.

The case was followed in *Lexington Insurance v Multinacional de Seguros* (23 May 2008). By contrast, *Scottish Coal Co v Royal & Sun Alliance* (28 April 2008) was concerned with a non-disclosure which, under the terms of the policy, meant that the policy was voidable at the option of the insurer. This situation did give rise to an election – either to avoid or affirm the policy – once the insurers were aware of their entitlement, and the insurers were held to have elected to affirm the policy.

Our review of 2007 included the judgment in *Tesco Stores Ltd v Constable*, on 14 September 2007. The case involved an insurance dispute, which arose out of the collapse of a section of tunnel at Gerrards Cross, where a Tesco store was being built. The railway had to be closed for a while and Tesco incurred liability to the train operating company for lost revenue, under the terms of a deed between Tesco and the train operating company containing a wide indemnity.

It was held that this liability was not covered by Tesco's public liability policy, even though the policy included an extension for cover assumed by Tesco under a contract.

On 16 April 2008, the Court of Appeal dismissed the appeal. The Court held that the policy was wide enough to cover contractual liability, but only for physical injury or damage to persons or property or for interference with property rights, not for pure economic loss.

Our review of 2007 included the commercial court's judgment on 21 June 2007 in the case of *Seele Austria GMBH & Co v Tokio Marine Europe Insurance Ltd*, which involved a dispute between sub-contractors and insurers over the ambit of a contractors all risks policy. Glazing subcontractors had to have access to windows already installed in order to rectify defects in the windows. The cost of

rectifying the defects was not covered by the policy in the absence of any damage caused by the defects. In rectifying the defects, damage was caused (intentionally) to internal finishes and cladding. The court held that the sub-contractors were not entitled to an indemnity under the policy in respect of this damage.

On 7 May 2008, the Court of Appeal (by a majority only) allowed the subcontractors' appeal, and held that the policy did cover access damage intentionally caused in order to rectify the defects, even though no accidental damage had been caused as a result of the defects.

Other cases affecting liability insurers

In the case of *Harcourt v Griffin & Ors* last year, a party in litigation was ordered to reveal details about its insurance cover, so that the claimant could know whether and to what extent it would be able to satisfy an award of damages and costs. A similar application for insurance disclosure was made this year in the case of *West London Pipeline & Storage v Total UK Ltd*.

However, in a judgment in the Commercial Court on 9 June 2008, the court rejected the application and declined to follow *Harcourt v Griffin*, which the court clearly considered had been wrongly decided.

West London Pipeline & Storage v Total UK Ltd arises out of the explosion at Buncefield. The defendants, Total, are seeking a contribution from another company, TAV Engineering Ltd ("TAV"). Their case against TAV is that they were the designers, manufacturers or suppliers of a switch which failed to operate whereby an overflow of fuel occurred leading to the explosion. The claims amount to over £700 million.

Total argued that TAV's financial statements reveal that it does not trade and has very limited assets. In these circumstances, its ability to contest the proceedings and pay any damages is entirely dependent on its liability insurance. Therefore, disclosure of the insurance position is necessary to know whether continuance of the litigation serves a useful purpose, just as in *Harcourt v Griffin*.

The judge considered what had been said in *Harcourt v Griffin*, but was firmly of the view that the court had no jurisdiction to order the disclosure sought. He referred to two earlier cases that had not been brought to the judge's attention in *Harcourt v Griffin*.

The judge did, however, express some regret that such information should not be available in the modern age of "cards on the table", despite the potential for prejudice to the insured party and its insurers.

Possibly more will be heard on this issue from the Court of Appeal, or maybe there will be moves to change the rules to make it possible to order such disclosure.

Palmer v Palmer Estate and others is a case where liability insurers who directed the defence of a claim against their insured were ordered personally to pay the costs of the other parties when the defence failed. The judgment for damages and costs exceeded the amount of the insurance cover and the excess could not be paid by the insured. The ensuing judgment for costs against the insurers was given on 6 February 2008.

There is jurisdiction to order a non-party to pay the costs of litigation, though it should only be exercised exceptionally. It was, however, said in another case where such an order was made against insurers that exceptional meant exceptional in the context of litigation generally, not necessarily in the narrower context of insurance litigation. It is, after all, hardly unusual for an insurer to play an important role in the defence of a claim against its insured. The question is, whether it plays that role exclusively or very predominantly in its own interest, overriding that of its insured. If it does, an order that it pays the costs may be made. (Obviously, one is contemplating a situation where the judgment exceeds the insurance cover and the costs in question are costs against which the insurers are not obliged to indemnify the insured anyway).

An interesting feature of this case was that the insured itself (through its director who dealt with the matter) was keen on defending the claim and fully supportive of the decision to defend it to judgment. However, the Court of Appeal said that this was a commercially irresponsible attitude, as the insurance cover was limited and it was clear that a judgment against the insured would finish it as a business. Furthermore, the insured was no longer selling the product that was alleged to have caused the accident that had given rise to the claim – so there was no reputation in the product to protect.

The case confirms that insurers should work closely with their insureds in conducting the defence of claims against them and take their interests into account, but also suggests that there may be occasions when they should take an objective view of what is in the best interest of the insured, not merely rely on what the insured is saying.

Solicitors in the firing line

Our review of 2007 included the case of *Whitehead & Anor v Searle & Ors*, in which solicitors were held liable for not prosecuting a claim with sufficient expedition. The solicitors' client was a mother with a claim of alleged negligence against a health authority following the birth of her child with *spina bifida*. The mother committed suicide before her claim came to trial or was settled. Her claim for the future costs of caring for her child died with her. On 9 May 2007, the court held that, if the solicitors had not been negligent in prosecuting the claim, the claim would have been resolved, by trial or settlement, before her death and the award to the mother would then have included future care costs.

However, the Court of Appeal held, on 4 April 2008, that this did not make the solicitors liable for the extra damages (for future care costs) that would have been recovered by the mother before her death, since the mother's estate would otherwise obtain an uncovenanted benefit. The Court said that it should not apply too narrowly the principle of *restitutio ad integrum* (i.e. the principle of compensating a wronged claimant with a view to putting it in the position that it would have been in but for the wrong) and should take into account events that had since taken place (in this case, the death of the mother).

The court also held that the solicitors did not owe a duty to the child's father (in his personal capacity), upholding the judgment below on this issue.

Our review of 2007 included the case of *Mastercigars Direct Ltd v Withers LLP*, on 23 November, in which the court ruled on the question of whether solicitors were entitled to charge more than their cost estimate. The court said that there was no reason why they should not. On assessment of costs, the court could have regard to the estimate and it is a factor in assessing the reasonableness of the solicitors' charges, but not in any sense binding. The case repudiated the practice that had developed in line with earlier cases, of allowing only up to 15% on top of the estimate.

However, the case of *Reynolds v Stone Rowe Brewer*, on 18 March 2008, illustrates how important an initial estimate can be in deciding at the end of the day what is a reasonable amount to charge.

As happened in this case, solicitors may well in practice be bound by their initial estimate, if there is no good reason to explain why the estimate was later exceeded to the extent that it was, especially if the client is likely to have relied on the estimate in deciding what to do at that stage (in which event later revisions to the estimate are unlikely to be of much assistance).

The judgment in *Rind v Theodore Goddard* on 11 March 2008 concerned the difficult question of when and in what circumstances solicitors owe a duty of care to an intended beneficiary of their client's estate planning, including, possibly, the making of the client's will. Can the intended beneficiary make a claim against the solicitors if, due to their negligence in the way they had handled the estate planning during the client's lifetime, the intended beneficiary never receives the intended benefit following the client's death? In *White v Jones*, the leading case on the point, it was held that the intended beneficiary could make a claim, if there would otherwise be a lacuna in the law – e.g. if the

client's estate could not make a claim itself or if any claim it could make would not benefit the intended beneficiary. In some situations, however, it may not be clear whether there is a relevant lacuna or not.

Ring v Theodore Goddard was a judgment only on a summary application by the solicitors to strike out the claim. It did not therefore resolve the claim. The allegation against the solicitors was that their handling of a client's affairs (during the client's lifetime) had failed to achieve the intended saving of inheritance tax on the client's death. The claimant was a beneficiary of the client's estate who should have obtained a benefit as a result of the intended saving in inheritance tax. The solicitors sought to strike out the claim on the basis that any loss was a loss to the estate and could be recovered by the estate: there was therefore no *White v Jones lacuna*. The court however refused to strike out the claim on this ground, on the basis of an earlier case which indicated that, in these circumstances, the estate might not in fact be able to pursue a claim.

Further guidance is awaited on this problematic area of the law.

Watkins v Jones Maidment Wilson on 4 March 2008 also concerned a claim against solicitors and another question that frequently arises in connection with pure economic loss – when was the loss first suffered? This is the date on which the period of limitation commences to run. In particular, where the allegation is that the claimant, on the advice of the solicitors, entered into an agreement which was adverse to the interests of the claimant, was loss suffered as soon as the agreement was entered into, or only later, when the claimant began to suffer the consequences of having entered into the agreement?

The case concerned a building agreement, which the claimants contended contained terms that were disadvantageous to them when problems later arose. The Court of Appeal held, on the basis of earlier authorities, that, if the claimants were correct in what they were saying about the agreement, they suffered an immediate loss when they entered into it, because at that point they had received less than they were entitled to. This meant that their claim was statute-barred, because more than six years had passed since then.

Surveyors' liability

In our review of 2007, we reported on *Earl of Malmesbury & Ors v Strutt & Parker & Ors*, a case of surveyors' negligence, judgment in which was given on 11 May 2007. It was held that surveyors advising landowners leasing out car parking space should have negotiated a turnover rent. What would be the measure of damages that the surveyors should pay?

The court held that the correct basis for damages was diminution of the value of the reversion at the time of the transaction, not the (potentially greater) difference in future earnings that would have been obtained and those likely now to be obtained. We commented in our review of 2007 that it was potentially helpful to surveyors and their professional indemnity insurers that this approach had been taken in this case. Damages on the first basis have since been assessed at £915,139, on the second basis (which was rejected by the court) at £6,972,569. In fact, the sum originally claimed at the trial on liability had been up to £87.8 million.

Costs

On 18 March 2008, the court gave its judgment on costs in the *Earl of Malmesbury* case. The total costs of all parties came to about £5.38 million. The claimants had won on liability but had lost on other issues, which had greatly reduced the amount it recovered from that claimed. Taking all matters into account, the claimants recovered considerably less than the full amount of their costs.

On 24 April 2008, the judge made an order for interest on costs to be paid, in favour of the claimant, from a date when the claimant had made a payment of costs to its solicitors, before the judgment on

liability. The defendant had argued that it was not the normal practice to make such an order, but the judge held that there was no bar against the order being made.

Mediation and costs

One issue on costs that arose in the *Earl of Malmesbury* case concerned the conduct of the parties in relation to mediation. It is well established that a party who unreasonably refuses to mediate may be penalised in costs. In this case, the parties did mediate, more than once, but the judge held that, at the mediation following the trial on liability, the claimants' position was plainly unrealistic and unreasonable. The judge held that this was tantamount to an unreasonable refusal to mediate and this conduct was, therefore, one of the matters reflected in the order for costs.

The argument over whether a party had unreasonably refused to mediate and should be penalised in costs also arose in *Nigel Witham Ltd v Smith* on 4 January 2008. The unsuccessful party argued that the successful party's failure to mediate at an early stage should reduce the costs to be awarded to them. The successful party had not refused to mediate altogether, but had declined to do so at an early stage, arguing that it was premature and that it needed to know more about the other party's case. When the parties did eventually mediate, the costs that had by then been incurred made a settlement much more difficult and the mediation was unsuccessful.

The judge accepted that the stance of the successful party in declining to mediate at an early stage was not to be criticised. He also accepted that the aim with mediation is to time it right – not always easy. A mediation that is too early or too late in the proceedings is less likely to be successful and can just lead to extra expense and a hardening of positions.

Pre-action protocols

Our review of 2007 covered two cases concerning non-compliance with a pre-action protocol prior to commencement of proceedings. It will be recalled that prospective parties to litigation are required to take part in a pre-action protocol, whereby, before proceedings are commenced, the parties exchange information about their respective cases and then attend a meeting. On 23 March 2007, in the case of *Church v Stent Foundations*, a costs order was made against the claimant in a construction case who had commenced proceedings without first complying with the pre-action protocol for construction and engineering disputes. The judge held that this non-compliance was a serious matter. On 19 September 2007, in the case of *Cundall Johnson & Partners v Whipps Cross University Hospital NHS Trust*, engineers brought a claim for fees in the Technology and Construction Court without first complying with the Pre-Action Protocol for Construction and Engineering Disputes, and the court stayed the action to enable the parties to comply with the protocol.

The same issue has arisen in two further cases in the Technology and Construction Court this year, where a stay of proceedings was sought due to alleged failure to comply with the pre-action protocol. However, in both cases a stay was refused. In the first case, *Orange Personal Communications v Hoare Lea*, on 12 February 2008, the judge held that, in the circumstances of the case, a stay would serve no useful purpose. He still made a costs order against the claimant who had not sought to initiate the protocol procedure prior to commencing the proceedings. In the second case, *TJ Brent & Anor v Black & Veatch Consulting Ltd*, on 13 June 2008, the judge held that there had been substantial compliance with the protocol, by way of the communications that had taken place between the parties before the action. The claimant had provided details of its claim to the defendant, who had declined the invitation to attend a meeting.

On the protocol procedure generally, the judge commented: "Anecdotal information about the effectiveness of the Pre-Action Protocol process in the TCC [i.e. the Technology and Construction Court] is mixed. It is recognised as being effective both in settling disputes before they even arrive in Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward."

Pre-action costs

It is possible for certain costs incurred prior to proceedings, including costs in connection with the pre-action protocol, to be recovered later from another party in the proceedings under an order for costs, on the basis that such costs can be regarded as costs incidental to the proceedings. However, in *Lobster Group v Heidelberg Graphic Equipment*, on 6 March 2008, on an application for security for costs, the court did not consider that the costs of an unsuccessful mediation prior to commencement of proceedings could be recoverable as costs incidental to the proceedings, and therefore security was not ordered in respect of those costs.

Part 36 Offers

In our review of 2007, we mentioned that, on 6 April 2007, new civil procedure rules had come into effect, affecting offers to settle under Part 36 of the Civil Procedure Rules.

The effect of these new rules was considered on 22 April 2008 in a judgment of the Court of Appeal in *Carver v BAA*. The Court of Appeal held in this case that the effect of the changes to the wording of Part 36 permits a wide-ranging review of all the circumstances in determining the effect on costs of a Part 36 offer.

The main change to Part 36 was to make it unnecessary to accompany a Part 36 offer with a payment into court of the amount offered. However, the wording was also changed, so that the court now has to consider not whether the claimant has bettered the Part 36 offer but whether the judgment is “more advantageous” to the claimant than accepting the Part 36 offer would have been. Is there a difference? The court has held that there is. “More advantageous” is a more “open-textured” phrase. Money is no longer the sole criterion.

In this case, the claimant beat Part 36 offer by about £50. At one time, that would have been enough – indeed, £1 would have been enough. But the court held that it could not now be said that the this marginally greater sum was, in all the circumstances, more advantageous to the claimant than accepting the offer would have been, considering, for example, the stress and irrecoverable costs that the claimant had incurred in fighting on to judgment. The claimant therefore had to pay the defendant’s costs from the date by when the offer should have been accepted.

The defendants had also made an offer, before the start of proceedings, which was about £500 less than was eventually awarded. The claimant had made no counter-proposal to that offer, so there was no opportunity for a negotiation that could and should have resulted in an early settlement. The claimant had later put forward, and then later still withdrew, an exaggerated claim. Taking this conduct into account, the Court of Appeal held that the judge was justified not awarding the claimant her costs (and making no order for costs) from when this earlier offer was made to when the Part 36 offer was made and should have been accepted.

The case illustrates how flexible the rules on costs have become, as well as laying down an important principle about the new Part 36.

Negotiations

The case of *Framlington Group and anor v Barnetson*, on 24 May 2007, referred to in our review of 2007, was concerned with the question of when negotiations are to be treated as being “without prejudice” and therefore protected from disclosure in legal proceedings. The court held that negotiations may be without prejudice even though there is no litigation or even a threat of litigation, if the parties might reasonably contemplate that there may be litigation if they do not agree.

A similar issue has arisen this year in two cases, *Galliford Try Construction v Mott MacDonald* and *Cowen v Rentokil*. The Galliford Try case, judgment in which was given on 14 March 2008, concerned meetings and correspondence between parties about problems that had arisen on site during a project. The question was whether these communications constituted negotiations and whether they were “without prejudice” (and could not therefore be referred to in witness statements or included in the trial bundles). The claimant contended that these communications merely involved the claimant putting allegations to the defendant engineers and were not negotiations because no claim had then been formulated – in the words of the claimant, “there was nothing to settle”. The judge held that they were negotiations, particularly as the claimant was seeking to rely on admissions allegedly made by the defendant in the course of them. The judge also held that the negotiations were without prejudice, as negotiations normally would be so considered, regardless of whether that expression had actually been used (though here there was evidence that it had been).

The other case, *Cowen v Rentokil*, judgment in which was given on 6 March 2008, was an employment tribunal case, where the employers were seeking to rely on an offer of re-engagement that they had made to a dismissed employee. The court held that the offer must be treated as being “without prejudice” and that the without prejudice privilege could not be waived by the employers, because the “without prejudice” privilege cannot be waived unilaterally. (The same point – whether the privilege had been waived - had arisen in the *Galliford Try* case, albeit in rather different circumstances). The offer could not therefore be referred to, without the consent of the employee.

At one time, parties in negotiations were keen to ensure that the negotiations were “without prejudice”. Now negotiations to settle a dispute are likely to be regarded as being “without prejudice” anyway, even if they take place some time before the dispute is litigated or has even been fully formulated. This is helpful to parties seeking, for example, to settle a dispute during a construction project, without having to be concerned about anything they say coming back to haunt them. It is now normally more important for a party to make it clear if it does not wish any negotiations to be “without prejudice”, or if it wishes the negotiations only to be “without prejudice save as to costs”. The latter may be particularly important in view of the greater flexibility that the courts are showing on questions of costs (as we mention elsewhere in this review). Otherwise, it will not normally be permissible to refer later to the negotiations, or any meetings or documents forming part of them, during proceedings or on any question of costs.

Building contract disputes

Our review of 2007 included the judgment of the Court of Appeal in *Reinwood Ltd v L Brown & Sons Ltd* on 21 June 2007, which concerned a dispute under a JCT contract and a point of construction on a standard JCT form of contract on which there was no previous authority. A notice of intention to deduct liquidated and ascertained damages, following a notice of non-completion, was held not to be invalidated when the notice of non-completion was later cancelled by the grant of an extension of time. The employer was still entitled, therefore, to deduct damages and a notice of default issued by the contractor was invalid.

On 20 February 2008, the House of Lords dismissed the contractor’s appeal. In doing so, they placed emphasis on the Housing Grants Construction and Regeneration Act (to which the Court of Appeal had not referred). The relevant provisions of the JCT contract for withholding liquidated and ascertained damages were intended to put into effect the provisions in the Act for withholding any payments from sums that are due, in particular the requirement to give an effective notice of withholding payment. The House had considered these provisions in another case last year, *Melville Dundas Ltd and Others v George Wimpey UK Ltd & Others*, and had said there that the purpose of these provisions was to provide clarity, so that the parties knew where they stood.

Thus, the House of Lords ruled, in the case now before it, that, as the employer’s notice to withhold liquidated and ascertained damages from the next interim certificate was effective, the employer was entitled to rely on it, notwithstanding the subsequent cancellation of the notice of non-completion by the grant of a new extension of time (the cancellation was not, therefore, retrospective). The contractor

was protected by a provision in the contract for the appropriate amount to be repaid, but it was not entitled to claim that the employer was in default when the final date for payment of the interim certificate passed without the amount withheld being adjusted in the light of the new extension of time.

However, it is worth noting that the new extension of time, although granted before the final date for payment of the interim certificate, was granted after payment had actually been made. The House of Lords did not feel able to express a decided view on what the position would have been had the new extension been granted after the notice of withholding payment but before payment had actually been made.

Our review of 2007 included the judgment of the Technology and Construction Court in *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* on 29 June 2007. The court had to consider the liability of the installers of a sprinkler system for damage that would have been covered by joint insurance if such insurance had been taken out by the employer, as it should have been. The court held that, in those circumstances, the installers were not liable for that damage, even though it was caused by their negligence, and were entitled to be repaid sums that they had been ordered to pay by an adjudicator.

On 2 April 2008 the Court of Appeal overturned that decision.

The 2007 decision highlighted a recent trend in decisions which suggested that a contractual obligation to take joint insurance against specified perils may exclude a contractor's liability to its employer for damage resulting from those perils even if caused by the contractor's negligence. The Court of Appeal's decision is not, therefore, part of that trend. The court emphasised that the issue is one of construction of the particular contract in question.

The Court of Appeal held that, in this case, the provision for joint insurance covering damage to existing structures other than the works installed by Tyco did not, on its proper construction, include Tyco as a co-insured, and was not therefore intended to provide Tyco with separate liability insurance. This was enough to dispose of the case, since the question of whether such insurance would have relieved Tyco of liability to Rolls Royce for negligence did not then arise.

However, the court also doubted whether the provision for joint insurance of Tyco's works, which did include Tyco as a co-insured, would, on its proper construction, have excluded Tyco's liability to Rolls Royce for negligence. (This was not an issue in the case, because Tyco had repaired the damage to its works).

On the general question of the effect of joint insurance, the Court of Appeal expressed the view that, while a provision for joint insurance in a contract might indicate that one co-insured could not sue the other for losses covered by the insurance (and so the insurers could not pursue such a claim by subrogation), this is unlikely to displace any express provisions in the contract to the contrary and ultimately the question is one of construction of the contract.

Formation of construction contracts

Parties that commence building works without executing a formal contract at an early stage run the risk of ending up in court arguing over whether a contract was ever agreed, and if so, what were its terms. Several recent cases illustrate this nightmarish scenario.

FitzPatrick Contractors Ltd v Tyco Fire & Integrated Solutions, in which judgment on preliminary issues was given on 13 June 2008, concerned a sub-contract for mechanical and electrical works. The court held that a basic agreement was reached, which was varied in subsequent discussions. However, the work was completed without the contract ever being signed. The sub-contractors argued that the basic agreement incorporated various earlier agreements reached orally, and that the subsequent discussions should be disregarded because the agreement was never signed. The court rejected these arguments, after an analysis of all the correspondence and evidence relating to

discussions and meetings, by way of which the court determined what had been agreed. One issue involved the meaning and extent of a term limiting liability.

In *Diamond Build Ltd v Clapham Park Homes Ltd*, in which judgment was given on 25 June 2008, contractors commenced work on refurbishment of property pursuant to a letter of intent, which limited the amount that they would be paid in the event that no formal agreement was executed in place of the letter. The work was eventually brought to an end by the developer without a formal contract having been executed. The contractors argued that the letter of intent had nonetheless been superseded by a contract on the JCT form (as envisaged in the letter of intent), so that the developers were not entitled to invoke the limitation on what they had to pay. The judge held that a contract was formed on the terms of the letter of intent and that all the work was done under this contract.

RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH (judgment on 16 May 2008) also concerned work carried out initially on a letter of intent, without a final form of contract ever being executed. Here it was implicit in the agreement based on the letter of intent that it would come to an end after four weeks. The judge held that, in circumstances where the work had been completed, it was unrealistic not to conclude that a contract had been formed. The judge construed what the terms of the agreement were, rejecting the supplier's argument that there was a contract based on its initial quotation.

As the judge said: "This case is another example of the perils of proceeding with work under a letter of intent".

Excluding liability

In *Regus (UK) Ltd v Epcot Solutions Ltd* on 15 April 2008, the Court of Appeal gave a decision holding a standard business term excluding liability to be reasonable under the Unfair Contract Terms Act. The contract in question was for the supply of serviced office accommodation, including air conditioning. The contract term in question excluded liability for all business losses and loss of profits and consequential losses generally.

The judge at first instance had held this term to be unreasonable, because it effectively excluded any liability for the services, such as the air conditioning (which was alleged to be defective in this case). It was conceded, however, on the appeal, that the judge had been wrong on this point, since the term did not exclude liability for the diminution in value of the services, which would normally be the main measure of loss for defective services.

Having established that, the Court of Appeal held that the exclusion of liability for the particular losses mentioned in the term was reasonable.

This finding turned, of course, on the particular circumstances of this contract and the relationship between the parties. One point made is that it is probably easier for the customer to insure against its own business losses caused by defective equipment than for the supplier of the equipment to attempt to insure against those losses through liability insurance.

Claiming contribution

If party wants to make a claim for contribution from another party under the Civil Liability (Contribution) Act, it must prove that both it and the other party are liable in respect of the damage in question. In *BRB (Residuary) Ltd v Connex South Eastern*, the party seeking contribution had settled with the original claimant, and consented to judgment, under a misapprehension that it was liable, when in fact it was not. On 23 May 2008, the court held that it could still make a claim for contribution from the party that was in fact liable, because it (i.e. the party seeking contribution) had now become liable as well as a result of the consent judgment.

The circumstances were a bit unusual, involving inherited liabilities for industrial disease following privatisation of the railways and a genuine mistake on a party's part in thinking that the liability fell on it. However, it is not hard to imagine other circumstances where a party settles a claim and then seeks a contribution and it is then shown that the party was never liable in the first place, not unlike the case of *John F Hunt Demolition Ltd v Asme Engineering Ltd*, referred to in our review of 2007 (27 June 2007), though that involved a contractual claim rather than a claim under the Civil Liability (Contribution) Act.

A controversial judgment

Charlton v Northern Structural Services involved a claim against engineers, for damage caused to a residential property by clay heave. The heave had occurred as a result of the owners removing trees in close vicinity to the house, which they had done on the recommendation of the engineers. The judge held, on 8 February 2008, that the engineers had been negligent in failing to anticipate that this damage would occur if the trees were removed.

It was accepted that, by the time of the trial, the house had stabilised and there was no remedial work that it was worth doing. Damages, therefore, were based on the diminution in value of the property, caused by the stigma that has resulted from the damage.

The trees had been removed in the Autumn of 2000 and the damage occurred soon thereafter. Controversially, the judge awarded the diminution in value of the property as at the date of the trial, in the Autumn of 2007, rather than when the damage occurred. Of course, an award based on the earlier date would have attracted 7 years' interest, but given the increase in house values over this period, the award based on the later date may still have been greater. The question is whether the judge was wrong in principle to have done this. There seems to have been little argument over the point and no authorities referred to in the judgment.

Personal injuries – some landmark decisions

On 30 January 2008, the House of Lords departed from one of its earlier judgments to allow claims for damages for sexual abuse to be brought which would otherwise have been statute-barred (*A v Iorworth Hoare* and other cases). The judgment has been the subject of some misleading comment in the media. The House of Lords did not decide (nor could they) that the courts could generally override the limitation period in exceptional situations. However, the courts have a discretion under the Limitation Act to override the period of limitation in a personal injury case. The question was whether a case of intentional assault, including indecent assault, could be classified as a personal injury case of the kind referred to in the Limitation Act. The House of Lords held that it could, ruling that the earlier judgment on this point had been wrong.

The period of limitation applicable to personal injuries is 3 years, which runs from date of when the claimant had knowledge of various factors relevant to the claim, including the fact that the injury in question was sufficiently serious to justify starting proceedings. If the claim is out of time, the court has a discretion to override the period of limitation altogether. There is no "longstop" for personal injury claims. The House of Lords gave guidance on the degree of knowledge required for the running of the 3 year period and on the considerations to bear in mind for exercising the discretion to override the limitation period. It emphasised that the question of when the claimant first had knowledge that the injury was sufficiently serious had to be considered objectively – i.e. when a person in the position of the claimant ought reasonably to have known, as opposed when the particular claimant in question did know.

An important decision was given by the Court of Appeal on 8 May 2008 in the *Corby Group* litigation. The Corby Group litigation arises out of the treatment of contaminated land by the Corby Borough Council. It is alleged that by a group of litigants that they were born with upper limb deformities as a result of their mothers during pregnancy being exposed to toxic materials emitting from the land. As

well as alleging negligence and breach of statutory duty against the council, the claimants also allege that the council is liable for public nuisance.

The council sought to strike out the claim in public nuisance, arguing that the law no longer allowed a claim for personal injuries as a result of public nuisance (for which liability is strict).

The Court of Appeal, however, has ruled that this is not the case and that public nuisance can still give rise to a claim for personal injuries.

In *Corr v IBC Vehicles Ltd*, on 27 February 2008, the House of Lords held that a widow could pursue a claim against her former husband's employers for financial loss attributable to her husband's suicide, where he had committed suicide while in a depressive state caused by an accident at work. The accident involved a head injury that had caused physical and psychological damage, for which the employers were liable. The suicide occurred six years later. The argument was over whether the financial losses resulting from the suicide were too remote. The House of Lords rejected arguments that the suicide was not reasonably foreseeable, that it broke the chain of causation or constituted a *novus actus* or, as a voluntary act, was subject to the principle of *volenti non fit injuria*. It was not necessary for the defendant to have to foresee the precise form that the damage would take, or for the claimant to prove that the deceased was insane.

A majority of the judges said that a deduction for contributory negligence could be appropriate in a situation such as this.

A compensation culture?

Our review of 2007 included the Court of Appeal's judgment in the case of *James Evans v Kosmar Villa Holidays Plc* on 23 October 2007. (This case concerned the claim underlying the insurance dispute between Kosmar and its liability insurers referred to in this review). The Court of Appeal held that the tour operator was not liable to a holiday maker injured as a result of an obvious risk - diving into a shallow pool. On behalf of the claimant, complaint was made that the "no diving" signs were insufficient, but the court held that this was irrelevant, given that the risk was obvious.

We commented in our review of 2007 that, notwithstanding the belief held by many that we live in a compensation culture and that courts are inclined to be sympathetic to injured claimants, especially if they know that an insurer will pick up the bill, the appellate courts have made it reasonably clear that there should generally be no liability to claimants who suffer injuries through incurring obvious risks. We suggested that the message does not perhaps seem to have been heard everywhere in the courts at first instance and insurers may have to take such cases to appeal, as happened here.

This year, on 7 May 2008, in the case of *Tedstone v Bourne Leisure Ltd*, the Court of Appeal held that a hotel was not liable to a guest who slipped on a pool of water that had only been there for a few minutes.

Again, the case is perhaps only of interest because the judge below had decided otherwise and the hotel owners had had to take the case to the Court of Appeal, who said it was clear that the accident had not occurred for want of care on the hotel's part.

Again, on 12 June 2008, in the case of *Trustees of the Portsmouth Youth Activities Committee v Poppleton*, the Court of Appeal allowed the appeal of the trustee operators of an activity centre, who had been held liable by the judge at first instance for the injuries of the claimant sustained as a result of a fall while using the indoor climbing premises of the centre. The judge found that the claimant should have been warned that the safety matting on the premises may not prevent serious injury in the event of an awkward fall. The Court of Appeal held that this finding was unsustainable, as the risk was obvious and an inherent risk of the activity that the claimant had chosen to undertake. The Court of Appeal also rejected an argument that the centre was under a duty to provide training and supervision.

Corporate manslaughter

We reported in our review of 2007 that the Corporate Manslaughter and Corporate Homicide Act became law on 26 July 2007. It came into force on 6 April 2008.

Legislation on criminal liability of companies for fatalities at work has been promised for a long time. The Act provides for there to be such liability where, in essence, management failure causes the death in question.

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