Neutral Citation Number: [2019] EWCA Civ 808

Case No: A4/2018/0306

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MRS JUSTICE MOULDER
[2018] EWHC 46 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2019

Before :

LORD JUSTICE HAMBLEN
LORD JUSTICE MALES
and
DAME ELIZABETH GLOSTER DBE

- -

Between :

EURO POOLS PLC (In Administration)	**Claimant/ Respondent**
- and -	
ROYAL & SUN ALLIANCE INSURANCE PLC	**Defendant/ Appellant**

Ben Elkington QC and Josh Folkard (instructed by **Edwin Coe LLP**) for the **Claimant/Respondent**
Jonathan Hough QC and George Spalton (instructed by **Kennedys Law LLP**) for the **Defendant/Appellant**

Hearing dates : 23/24 January 2019

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Approved Judgment

Dame Elizabeth Gloster DBE :

Introduction

1. This is an appeal from an order ("the order") of Moulder J ("the judge"), sealed on 25 January 2018 following her judgment delivered on 19 January 2018 ("the judgment"). The judge gave judgment in favour of the claimant, Euro Pools PLC (in administration) ("Euro Pools"), against the defendant, Royal & Sun Alliance Insurance PLC ("RSA"), in the sum of £2,417,890 plus interest.

2. Euro Pools claimed to be entitled to indemnities under two policies of professional indemnity insurance, in operation for the years 2006-07 and 2007-08 respectively, in respect of costs incurred by Euro Pools in remedying various faults that had occurred in swimming pools it had installed for third parties. The issue that arises in the present appeal is whether expenses incurred in installing a new hydraulic system to power moveable 'booms' at several pools were incurred to mitigate potential claims arising from circumstances notified by Euro Pools under the first (2006-07) policy of insurance, such that the indemnity payable by RSA would be subject to that policy's limit of indemnity of £5 million; or whether the potential claims, in respect of which those expenses were incurred, arose from circumstances notified under the second policy of insurance (2007-08), such that the indemnity payable would be subject to the separate limit under that policy. The judge held, and Euro Pools submits, that the expenses attach to the second policy; RSA, as appellant, submits that they attach to the first policy.

3. Mr Jonathan Hough QC and Mr George Spalton appeared on behalf of RSA, the appellant, as they had below. Likewise, Mr Ben Elkington QC and Mr Josh Folkard appeared on behalf of Euro Pools, the respondent, as they had below.

Factual and procedural background

The parties

4. Euro Pools is a company, now in administration, that specialised in the installation and fitting out of swimming pools. For the purposes of this judgment, the relevant individual connected with Euro Pools was Mr David Wyllie, the founder, managing director and sole shareholder.

5. RSA is an insurance company. For the purposes of this judgment, the relevant individuals employed by RSA were Ms Rebecca Goddard, a claims manager and Ms Linda Moir, a Senior Claims Technician.

6. AON was engaged as Euro Pools' insurance broker in relation to the relevant insurance policies. For the purposes of this judgment, the relevant individual employed by AON was Ms Jill Gough.

The insurance policies

7. So far as is relevant to the present appeal, Euro Pools and RSA agreed two materially identical policies ("the Policies") for professional indemnity insurance. In particular:

i) a policy which covered the period from 30 June 2006 to 29 June 2007 (the "First Policy"); and

ii) a policy which covered the period from 30 June 2007 to 29 June 2008 (the "Second Policy").

8. The limit of indemnity set out in the Schedule to each policy was £5 million. Each Policy was written on a "claims made basis" and each provided cover both for liabilities to third parties and for the costs of remedial works intended to mitigate the risks of claims by third parties.

9. The key terms of each policy were as follows:

i) Insurance Clause 1 provided cover in respect of third party claims against Euro Pools as follows:

> "[RSA] will indemnify [Euro Pools] against liability at law for damages and claimant's costs and expenses in respect of Claims arising out of the conduct and execution of the Professional Activities and Duties first made against [Euro Pools] and notified to [RSA] during the Period of Insurance for – (A) Negligence… occurring or committed in good faith by [Euro Pools]" ;

ii) Insurance Clause 5 provided cover in respect of sums expended by Euro Pools with a view to mitigating such third party Claims, as follows:

> "[RSA] will indemnify [Euro Pools] against costs and expenses necessarily incurred in respect of any action taken to mitigate a loss or potential loss that otherwise would be the subject of a claim under this Insurance. The onus of proving a loss or potential loss under this Insurance shall be upon [Euro Pools] who will be obliged to give prior written notice to [RSA] during the Period of Insurance of the intention to take action that will incur such costs and expenses";

it would appear that "the subject of a claim under this Insurance" with a lower case "c" in this clause is a reference to a claim by the Insured against RSA under the policy as opposed to a "Claim" by a third party against the Insured;

iii) Condition 2 imposed an obligation on Euro Pools to notify RSA of any circumstances that might give rise to a Claim, as follows –

> "[Euro Pools] shall as a condition precedent to their right to be indemnified under the insurance give written notice to [RSA]… as soon as possible after becoming aware of circumstances… which might reasonably be expected to produce a Claim… for which there may be liability under this Insurance. Any Claim arising from such circumstances shall be deemed to have been made in the Period of Insurance in which such notice has been given";

iv) Exclusion Clause 18 excluded RSA from liability in respect of –

> "A) the consequence of any circumstance 1) notified under any insurance which was in force prior to the inception of this Insurance [or] 2) known to [Euro Pools] or which should have been known to [Euro Pools] at the inception of this Insurance which might reasonably be expected to produce a Claim".

The relevant projects

10. The claim brought by Euro Pools is (primarily) for the payment by RSA of an indemnity in respect of expenses incurred by Euro Pools in carrying out mitigation works on swimming pools that it (or its predecessor) had installed for third parties.

11. Those mitigation works related to two different features installed by Euro Pools:

    i) a system of movable 'booms' installed in several swimming pools; booms are vertical walls used to divide a pool into different swimming zones; Euro Pools' booms are designed to rise and sink in order that a pool can be used in different configurations; and

    ii) a system of movable floors installed in several swimming pools; the floors installed by Euro Pools are platforms designed to rise or sink to vary the usable pool depth.

12. The present appeal relates only to mitigation works carried out in relation to the system of booms. Euro Pools has at different times employed three different mechanisms for raising and lowering the booms. These were:

    i) an air drive system whereby air was pumped into and removed from stainless steel tanks installed within the booms in order to raise or lower the booms;

    ii) an air drive system whereby air was pumped into and removed from inflatable bags inserted into the structure of the booms (the steel tanks having been abandoned); and

    iii) a hydraulic system whereby hydraulic rams were connected to the bottom of the booms in order to lift up or pull down the booms.

February 2007: Problems encountered with Tank (Air Drive) System

13. By February 2007, Euro Pools had been informed of problems with the steel tank system installed at two sites. In particular, air was leaking out and water in, preventing the booms from rising properly.

14. On 23 February 2007, a meeting was held between Mr Wyllie (Euro Pools), Ms Moir (RSA) and representatives of AON. A record of the meeting was made by Ms Moir and Mr Garry Hill of AON. The judge found that, at that meeting:

    i) Mr Wyllie mentioned the problems encountered with the steel tanks. This was mentioned as a notification of circumstances pursuant to Condition 2 of the First Policy, rather than as a mere 'snagging' item;

ii) the specific problem identified by Mr Wyllie was "a failure of original bracing" in steel tanks at some but not all of the sites at which they had been installed. Mr Wyllie considered that the installation of inflatable bags might present a potential solution.

However, at page 13 of Ms Moir's notes, there was a subheading "Booms" after which was stated that at West Tallaght and at Crawley: "the bottom of the ballast tanks in the booms has failed" and that Euro Pools' plan was to cut a hole in the bottom and brace it:

> "looks like failure is of original bracing. Other option is to install what looks like a balloon/bag into tanks"

the note continued:

> "discussed [policy] response. Sep N/C [separate new claim]" but that the insured did not expect it to exceed the self-insured amount.

15. Minutes prepared by Mr Garry Hill of the same meeting contained a section at the end stating that Mr Hill phoned Mr Wyllie for his views on the remainder of the meeting as Mr Hill had left the meeting early. Mr Hill noted

> "DW confirmed that a further circumstance was notified to LM/CD [Linda Moir/Chris Dunn] concerning a weakness in booms inherited on the Thermelek projects. LM has noted her file and will open a separate claim file. GH will notify JG of this matter...."

16. On 9 June 2007, Euro Pools, by Mr Wyllie, completed a proposal form to renew Euro Pools' insurance with RSA. Mr Wyllie responded to the question whether he was "aware of any circumstance which may give rise to a claim" by stating "tanks on booms but we are fixing these with inflatable bags". On 15 June 2007, Ms Gough (AON) forwarded the form to Ms Goddard (RSA), stating that the total cost of remedial works would fall within the applicable policy excess, but that "the insured wish to ensure the matter is logged on a precautionary basis should there be any future problems".

17. Ms Moir (RSA) emailed Ms Goddard (RSA) on 19 June 2007, in relation to the proposal form stating that:

> "[tanks on the booms] was advised to Chris and me when we first called at Europools back in February. The issue was a simple one, in that the floating cuboids used as booms were letting air out and so water in, and were not therefore floating. The insured were installing inflatable bags as liners and no claims were anticipated. This should properly have been registered as a circumstance at the time, but with no reserve as there was (and is) no suggestion of any claim by a third party, or any cost to the insured beyond the SIA."

18. On some date on or before 22 June 2007, Ms Moir (RSA) opened a claim file in respect of the potential booms claim and gave it a reference VF89RV.

19. On 22 June 2007 Ms Moir (RSA) emailed Ms Gough (AON) referring to the email of 15th June 2007 to Ms Goddard:

> "I confirm that David Wyllie… had advised me of this matter in February.…
>
> My understanding is that a simple and inexpensive solution to the booms problem has been identified, there are no claims against the Insured and no risk of any claim exceeding the £30,000 self-insured amount. On that basis, I have marked the matter as a circumstance, with a nominal £1 reserve.…"

2008: Problems encountered with Bags (Air Drive) System

20. From February 2007, Euro Pools began inserting inflatable bags into the steel structures within the booms. However, Euro Pools soon became aware of problems with this system.

21. On 12 March 2008, Mr Wyllie emailed Ms Gough (AON) to inform her of problems encountered with the inflatable bags. On 7 April 2008, Mr Wyllie again emailed Ms Gough, stating that "the bags are now failing" and that he was "thinking of going hydraulic".

22. On 2 May 2008:

    i) Mr Wyllie emailed Ms Gough (AON) to inform her that "the bags for the booms at Cardiff are beginning to fail" and expressing an intention to "change to hydraulics". Mr Wyllie asked to know whether Euro Pools could proceed with that change directly, or whether Euro Pools should first obtain approval from RSA;

    ii) Ms Gough forwarded that email to Ms Goddard (RSA), and informed her that "the original remedial works have now failed";

    iii) Ms Goddard responded that she was instructing Mr Douglas Murphy, a loss adjuster, to liaise with Mr Wyllie "in relation to this potentially new matter".

23. On 15 May 2008, Mr Wyllie met with Mr Murphy and reiterated his belief that the bags were not fit for purpose.

24. By mid-2008, Euro Pools had attempted a sequence of measures to modify its boom drive systems and make them work including (i) using bags of various kinds; (ii) "strangling" the bags; (iii) tying the bags; (iv) modifying air vents; (v) installing a fibreglass tank in one site in place of bags; and (vi) adding low friction slides at the side of the booms. Each change was made because previous changes had not resolved the problems. On 15 August 2008, Mr Murphy wrote to Mr Goddard noting that Euro Pools had concluded that the only realistic option was to install a hydraulic system, and seeking Ms Goddard's approval to confirm to Euro Pools that this was in order. Mr Goddard responded (i) confirming that RSA would cover Euro Pools for the costs of

remedial work to install hydraulic systems and (ii) stating that the claim had been notified under the First Policy.

25. The next change on which Euro Pools decided was to install hydraulic cylinders to push up the booms. On 1 October 2008, Mr Murphy and Mr Wyllie met to review various claims. In relation to the booms claim, Mr Murphy noted "Booms accepted and agreed. Hydraulics Principle accepted".

2008 onwards: Hydraulic System installed

26. Accordingly, from late 2008, Euro Pools began to install Hydraulic Systems for booms at various swimming pool sites. This involved installing hydraulic cylinders to push up the booms, both in relation to booms which had only ever incorporated tanks and those which had been converted to bags. RSA made regular interim payments in respect of these remedial works.

The present claim

27. On 2 May 2013, a meeting was held between Mr Wyllie (Euro Pools), Mr Dunn (RSA) and Mr Murphy. At that meeting:

    i) Mr Wyllie (Euro Pools) expressed the view that Euro Pools' claims for indemnities for mitigation works in relation to the booms attached to the Second Policy;

    ii) Mr Dunn expressed the view that those claims attached to the First Policy, which also covered Euro Pools' claims in relation to faulty pool floors. The limit of indemnity was £5m, and RSA had already paid out sums totalling £4.3m, such that the remaining sums might not be sufficient to cover all the remedial work intended by Euro Pools.

28. On 28 January 2016, Euro Pools issued a Claim Form against RSA. So far as relevant to the present appeal, Euro Pools claimed to be entitled to an indemnity in the sum of £1,597,410 pursuant to Insurance Clause 5 of the Second Policy. That figure comprised the difference between the costs Euro Pools had incurred in installing hydraulic systems in existing booms, and the sums RSA had already paid Euro Pools in respect of those costs.

29. By an Amended Defence dated 1 December 2016, RSA contended that the indemnity sought related to circumstances notified under the First Policy, and that RSA had already paid out the sum of £5m in respect of matters notified under the First Policy; Euro Pools thus had no entitlement to any further indemnity.

The decision under appeal

30. As I have already stated, the judge gave judgment in favour of Euro Pools. She ordered RSA to pay Euro Pools the sum of £2,417,890 plus interest, of which £1,304,760.84 related to the booms claim.

31. So far as relates to the issue under appeal, the judge identified three key questions:

    i) Was there a valid notification in May 2008 under the Second Policy?

ii) What was the scope and effect of the notification in February 2007?

iii) Did the mitigation costs fall for cover under the First Policy or the Second Policy?

32. The judge held that the principles to be applied in determining whether there has been a notification of circumstances for the purposes of an insurance policy were those set out in *Kajima UK Engineering Limited v The Underwriter Insurance Company Limited* [2008] EWHC 83 (TCC), per Akenhead J at [99]. She considered that the following principles referred to by Akenhead J were of particular relevance:

> "(c) It is possible for the insured to give notice of a 'hornets' nest' or 'can of worms' type of circumstance.
>
> (d) The insured must be aware of the circumstances which it is notifying to the Underwriters……
>
> (f) If there has been a proper notification of circumstances, any claim arising from those notified circumstances, of which the Insured was aware, will be considered to have been made within the requisite Period of Insurance. Any claim which arose consequently from the notified circumstances would arise from those circumstances. There must be some causal, as opposed to some coincidental, link between the notified circumstances and the later claim."

33. In relation to the issues which she had identified, the judge concluded as follows:

i) *Was there a valid notification in May 2008 under the Second Policy?*

The judge concluded that there had been a valid notification in May 2008 under the Second Policy. This was because she considered the email sent by Mr Wyllie to Mr Murphy on 2 May 2008, communicated to Ms Goddard (RSA) by Mr Murphy, was initially treated by Ms Goddard as a valid notification of circumstances under the Second Policy.

ii) *What was the scope and effect of the notification in February 2007?*

The judge summarised the competing positions of RSA and Euro Pools in relation to notification as follows:

a) RSA submitted that the issues in respect of which an indemnity was claimed arose from circumstances notified in February and/or June 2007, and that the claim thus attached to the First Policy;

b) Euro Pools submitted that any notification in February and/or June 2007 related only to the use of steel tanks, whereas the indemnity claimed related to the replacement of both bags and tanks in favour of a hydraulic system.

The judge found that Mr Wyllie made a notification of circumstances which might give rise to a claim at the meeting on 23 February 2007. However, the

scope of the notification was limited to a problem affecting some but not all of the steel tanks installed in Euro Pools' booms. It was not a valid notification of circumstances in relation to the mitigation costs incurred in installing a hydraulic system. In particular:

i) She held that, per *Kajima* (at [99](f)]), there must be some causal link between the notified circumstances and the later claim. The judge preferred the expert evidence of Euro Pools' expert, Dr Kirby, to that of RSA's expert, Mr Cotterill. She accepted Dr Kirby's evidence that the problem in February 2007 resulted from poor weld preparation, rather than Mr Cotterill's evidence that the problem resulted from cyclic pressurisation and depressurisation of the tanks. She concluded that this diagnosis led to the conclusion, presented by Dr Kirby, that "had the problem with the welds been identified, the air drive system would have worked". It followed in her judgment that there was no fundamental problem with the air drive system, so it could not be said that there was "any causal link between the failures in the tanks and the decision to abandon an air drive system and move to hydraulics";

ii) Even if Mr Cotterill's technical analysis were accepted, and a causal link had been established between the tank failures and the subsequent move to a hydraulic system, she held that the February 2007 notification still would not extend to Euro Pools' decision to abandon the air drive system and adopt a hydraulic system. Purportedly relying on *Kajima* (at [99](d), (h) and (i)), she concluded that Mr Wyllie was only capable of notifying circumstances of which he was aware. In February 2007, Mr Wyllie had identified the problem as a failure of original bracing affecting some, but not all tanks, and he considered the use of inflatable bags to be a potential solution. He was not aware of any fundamental flaw in the air drive system itself. Mr Wyllie thus cannot have notified RSA of the circumstances which led to Euro Pools' decision to adopt a hydraulic system.

iii) *Did the mitigation costs fall for cover under the First Policy or the Second Policy?*

The judge thus found that there was no notification under the First Policy of the circumstances which gave rise to the mitigation costs incurred in adopting a hydraulic system. As such, those costs did not fall for cover under the First Policy.

The judge further found that there was a notification of the relevant circumstances in May 2008, under the Second Policy. It followed that, in her view, the mitigation costs fell for cover under the Second Policy.

Grounds of appeal

34. By an Appellant's Notice filed on 9 February 2018 RSA sought permission to appeal the decision of Moulder J insofar as she decided that the booms claim was covered under the Second Policy rather than the First Policy.

35. RSA submitted that the judge ought to have held that the booms claim was covered under the First Policy, and that communications about remedial works during the period of the Second Policy were not fresh notifications of circumstances but rather communications about an existing claim attached to the First Policy.

36. It relied on the following grounds of appeal:

    i) the judge erred in finding that there was no causal link between the remedial works which were the subject of the booms claim, and the circumstances notified under the First Policy; the circumstances notified under the first policy were "persistent failures of booms which were causing [Euro Pools] to make design changes"; those circumstances led to a sequence of design changes, and the remedial works in issue were part of that sequence ("Appeal Ground 1");

    ii) the judge erred in concluding that RSA's position was undermined by the evidence of Dr Kirby ("Appeal Ground 2");

    iii) the judge erred in failing to acknowledge a "central logical flaw" in Euro Pools' argument ("Appeal Ground 3");

    iv) the judge erred in accepting Dr Kirby's technical account of the reasons for the boom failures in early 2007, and in rejecting the alternative account of Mr Cotterill ("Appeal Ground 4"); and

    v) the judge erred in holding that Euro Pools was entitled to succeed even if Mr Cotterill's technical analysis were accepted; the judge wrongly reasoned that Euro Pools' claim was covered by the Second Policy because, when Euro Pools made notifications to the First Policy, it was unaware of the sequence of defects which would necessitate the remedial works from mid-2008; applying the proper test, it was not necessary for Euro Pools to foresee the sequence of events; it was only necessary for the remedial works to have some causal connection to the originally notified circumstances ("Appeal Ground 5").

37. Permission to appeal was initially refused by Moulder J. On 30 May 2018, I granted permission to appeal on all grounds.

Respondent's Notice

38. By a Respondent's Notice filed on 6 July 2018, Euro Pools stated that it relied on additional grounds for upholding the Order. The additional grounds put forward by Euro Pools were as follows:

    i) In addition to the notification of circumstances made in May 2008, a further notification was made on 30 June 2008, which RSA subsequently confirmed it would treat as a valid notification under the Second Policy ("Respondent's Ground 1");

    ii) RSA's case proceeded on the premise that, if the booms claim arose from circumstances notified to the First Policy, Euro Pools could not be entitled to an indemnity for the booms claim under the Second Policy; that premise was false because "it was open to [Euro Pools] to make a notification of circumstances to

the Second Policy, even if those circumstances were the same or similar to circumstances notified to the First Policy" ("Respondent's Ground 2"); and

iii) Euro Pools was not entitled to an indemnity under the First Policy in respect of the booms claim ("Respondent's Ground 3").

Key principles from the authorities

39. The legal principles applicable to the determination of the question whether there has been a notification of circumstances for the purposes of an insurance policy were not substantially in dispute between the parties. The following is a summary of the relevant principles applicable to the present case:

i) A deeming provision such as the provision in this case (at the end of Condition 2 viz: "Any Claim arising from such circumstances shall be deemed to have been made in the Period of Insurance in which such notice has been given") is to be construed and applied with a view to its commercial purpose. That purpose is to provide an extension of cover for all claims in the future which flow from the notified circumstances, as I summarised in *HLB Kidsons (A Firm) v Lloyds Underwriters Subscribing to Lloyds Policy No 621/PKID00101 & Ors*, [2007] EWHC 1951 (Comm), [2008] Lloyd's Rep IR 237, at [21]:

> "It is integral to the structure of claims made policies being successively renewed from year to year, **that provision is made for claims arising after the expiry of any one policy period out of circumstances of which the assured has first become aware during that period. Unless provision is made to treat such claims as having been made during that policy period, the concept of claims made policies applying in successive policy years would create an unexpected and inappropriate gap in coverage[1].** This is because of the obligation upon an assured to make disclosure to renewing insurers on the succeeding year and the possibility that, upon disclosure to renewing insurers of such circumstances of which the assured was aware at the end of the earlier policy year, renewing insurers might exclude any claims arising out of them, or only be prepared to accept liability at a premium that was commercially unacceptable to the assured. This would leave the assured with no cover in respect of such claims either under the earlier policy year during which he first became aware of the relevant circumstances or under the later year during which the claim might ultimately be made arising out of those circumstances. This analysis finds confirmation, for example, in the reasoning of Rix J in *J Rothschild Assurance Plc v Collyear* [1999] 1 Lloyds Rep IR 6 at paragraph 22, and

[1] In all cases bold emphasis is supplied by me.

> of Moore-Bick J in *Friends Provident* at paragraph 13 and paragraphs 38-39."

ii) Consistently with that purpose, a provision which refers to circumstances that "may" give rise to claims sets a deliberately undemanding test. As Rix J (as he then was) commented in *J Rothschild Assurance Plc supra,* "the test of materiality is a low one". In particular, he said (at page 22):

> "While it is true that GC2 gives to an assured a significant extension of cover, a "claims made" policy could hardly work on any other basis. Otherwise, by the time that a claim came to be made, it is quite likely that it would have become impossible to obtain cover for it, either at all or on any but prohibitive terms. Therefore as or more significant than the extension of cover itself are the factors first, that the test of materiality for notice is a weak one - "which *may* give rise to a claim", not "which *is likely to* give rise to a claim; and secondly, that the price of the extension of cover is notification of such circumstances, which is a condition precedent to a right to be indemnified. That latter factor is important, for, together with the additional requirement that the assured shall give underwriters "as soon as possible full details in writing of the circumstances which may give rise to a claim", it enables underwriters to adopt or require such immediate steps as they think appropriate to minimise or avert any potential loss. **I do not think, therefore, that there is any justification for demanding too much of the test that the notified circumstance "may" give rise to a claim. There need only be a possibility of claims in future."**

In the present case, the relevant obligation is to:

> "give written notice to [RSA]… as soon as possible after becoming aware of circumstances… which might reasonably be expected to produce a Claim… for which there may be liability under this Insurance."

The addition of the word "reasonably" does not, in my view, affect the low materiality threshold of the test.

iii) A notification need not be limited to particular events. It may extend to something as general as a regulatory warning about a class of business or a concern about work done by a former employee or prior entity. The insured may give a "can of worms" or "hornet's nest" notification; i.e. a notification of a problem, the exact scale and consequences of which are not known. As I said in *Kidsons* (at first instance) at [76] (in a passage which was not departed from or disapproved in the Court of Appeal's decision in *Kidsons* at [2009] 1 Lloyd's Rep 8);

> "At the end of day, it is in my view largely a question of interpretation and analysis of the document setting out the notification, in the context of the facts known to the assured, as to what precise circumstance or set of circumstances has in fact been notified to insurers. I am not therefore convinced that semantic cavilling over the precise formulation of the test assists the ultimate resolution of the problem. **There may well be uncertainty at the time of notification as to what the precise problems or potential problems are; there well may be, whether known, or unknown, to the assured a "hornets' nest" which may give rise to numerous types of claims of presently unknown quantum and character at the date of the notification. Whilst in principle there is no reason why such a state of affairs should not be notified as a circumstance if the assured is aware of it, in each case the extent and ambit of the notification and the claims that are covered by such notification will depend on the particular facts and terms of the notification.**"

See also per Akenhead J in *Kajima supra* at para. 99(c); and per Ms Vivien Rose QC (as she then was) in *McManus v European Risk Insurance Co* [2013] Lloyd's Rep IR 533, at [43].

iv) Thus although the insured necessarily has, on the express wording of the relevant Condition 2, "**to be aware of circumstances** which might reasonably be expected to produce a Claim, … for which there may be liability under this Insurance", that does not predicate that the insured needs to know or appreciate the cause, or all the causes, of the problems which have arisen, or the consequences, or the details of the consequences, which may flow from them. Such a limitation would seriously reduce the value of claims made insurance. I accept the submissions of Mr Hough QC that an insured can notify a problem in general terms without fully appreciating its cause or its potential consequences (e.g. because the insured is not a technical specialist). If it does so, then the insurance will cover claims which have some causal connection to the problem notified. That proposition is implicit in the *J Rothschild Assurance Plc, Kidsons* and *McManus* decisions to which I have previously referred. Ms Vivien Rose QC, after having usefully summarised the facts of *J Rothschild Assurance Plc* and *Kidsons* at [39] - [42], usefully summarised the position in *McManus* at [43] as follows:

> "39. The leading case on blanket notifications is *J Rothschild Assurance plc & Ors v Collyear & Ors* [1998] C.L.C 1697 *('Rothschilds').* In that case the claimant ('JRA') sought to notify its insurer of possible future claims for pensions mis-selling. The letter of notification referred to bulletins issued by the relevant regulatory authority describing wrong advice given to

investors to transfer out of occupational pension schemes and into personal pension plans. The letter also referred to a report by KPMG produced for the Securities and Investment Board recording that a large percentage of the 735 client files that KMPG reviewed from a representative sample of firms undertaking pensions transfer business did not comply with conduct of business rules. None of those files had been JRA files. JRA's notification letter had attached a schedule of 2,500 pension transfer policies so far effected by JRA and stated that 'the circumstances may, in respect of each policy identified or to be identified, give rise to a claim by each client against any of the Assured'. The letter also purported to notify claims relating to clients who had been advised to opt out of entering into an occupational pension (rather than to transfer out of an existing occupational pension), although it had not been possible for JRA even to identify each transaction where the firm had given opt out advice to its clients.

40. The insurer in *Rothschilds* objected to the notification on the grounds that it purported to make a blanket notification. They argued that no cause for concern specific to any transfer or opt out case had been mentioned in the letter. There was no reference in the regulator's bulletin or the KPMG Report to any criticism or complaints directed against JRA itself. The insurer said that the KPMG findings were no basis for a fear of claims against JRA. In response to the notification letter, the insurer had written to JRA inviting it to carry out a review of its files, saying that "when and if they identify particular client cases which give rise to concern and in respect of which a claim may be made against them" they should notify the case to the insurer at that point.

41. Claims were subsequently made against JRA by former clients alleging that they had been mis-sold pensions. The question arose whether these claims were covered by the notification. Rix J held that the prevalence of mis-selling by other providers as evidenced by the KPMG report meant that it was at least possible that equivalent non- compliance would give rise to claims against JRA themselves. He held that the letter was a valid notification not only as regards advice relating to transfers out but also as regards advice about opting out.

42. The case of *HLB Kidsons (a firm) v Lloyd's Underwriters* [2008] EWCA Civ 1206 *('Kidsons')*

concerned a notification made by a firm of chartered accountants of concerns about the efficacy of various tax avoidance products that they had provided to clients. Concerns about the products had been expressed in trenchant terms by a tax manager in the Edinburgh office of the firm and were supported by an opinion from Scottish tax counsel. The notification letter was described by the court as having been written in 'limited and anaemic terms'. Nonetheless it was held by the Court of Appeal to be a valid notification. At first instance, Gloster J had found that the letter did not amount to a notification because it was vague and nebulous; it contained no identification of any error, act or omission or possibility of any claim and did not identify the products or procedures that gave rise to concern. The Court of Appeal rejected this test as too stringent and held that the letter had been a notification of circumstances that may give rise to a claim, those circumstances being the Edinburgh tax manager's view that implementation of certain products might be criticised and might give rise to possible claims or losses.

43. In my judgment, the key point arising from these authorities is that in both cases the notifications were held to be valid in relation to later claims that arose from the circumstances notified, **even though the notification had not even referred to the transaction from which the later claim arose, let alone identified a defect in relation to the handling of that particular client as likely to give rise to a claim by that client.** In *Rothschilds* the Court clearly rejected the view expressed by the underwriter's initial response to JRA that the notification was premature and that JRA must instead notify only once it had identified a possible defect in a specific case. On the contrary, the Court, having found that there was a sufficient factual basis to amount to a 'circumstance', held that the notification covered not only transfers out of pensions but also opt out advice, despite the fact that JRA had not even been able to list the clients to whom opt out advice had been given. Similarly in *Kidsons* there was no suggestion either in the judgment of Gloster J or in the judgment of the Court of Appeal that the notification was ineffective because it failed to identify particular clients to whom the tax avoidance products had been sold or to examine whether that particular client might have a claim. The assumption was that provided circumstances exist which may give rise to a claim, and provided those circumstances are notified, then any future claim arising

> out of those circumstances must be paid out by the insurer at risk at the time of notification whether or not the particular transaction or possible claimant has been identified at the time of notification."

I agree with her analysis.

v) If there has been a proper notification of circumstances, any claim arising from those notified circumstances, will be considered to have been made within the requisite period of insurance. Any claim which arose consequently from the notified circumstances would arise from those circumstances but there must be some causal, as opposed to merely some coincidental, link between the notified circumstances and the later claim; see *Kajima* supra at para. 99(f).

vi) When construing a communication to determine whether it is, or its scope as, a notification, one applies conventional principles of interpretation; see *Kidsons* (first instance) at [76].

vii) The general approach to an analysis of a notification clause is usefully set out by Toulson LJ (as he then was) in *Kidsons* at [134] – [142] as follows:

> "134. **There are two parts to that phrase: the awareness of a circumstance, which is a pure matter of fact, and the characterisation of the circumstance as one which may give rise to a claim against the insured**. The question of construction which has been argued in this case is whether the insured needs to be "aware" that the circumstance may give rise to a claim against him and, if so, what degree of appreciation of risk is required. Is the test subjective or objective, and, if subjective, what is the subjective requirement?
>
> 135. It is a curious feature that in this case the second presentation purported to be a notification on behalf of the insured of circumstances which might give rise to a claim, but the insurers deny that it was effective because the insured lacked the necessary awareness to give such a notification. It is more common for such an argument to arise where the insured has *not* given a notification of circumstances, which the insurer says ought to have been given because the risk of a claim was objectively plain, whether or not the insured subjectively appreciated it. However this reversal of the customary roles (for which there is understandable tactical reason) is irrelevant to the question of construction.
>
> 136. Looking at the practical context in which a notification of circumstances clause comes to be relevant, **I do not believe that the correct answer to the question is to say simply that the test is subjective or that it is objective**.

137. **The question whether a circumstance may give rise to a claim is not a matter of simple knowledge, a question of fact of which a person may or may not be "aware"; rather, it involves a degree of crystal ball gazing, an estimation of the likelihood of a claim**.

138. At one end of the spectrum, there may be cases in which an insured seeks to notify a circumstance which is too vague or remote to be reasonably capable of being regarded in itself as a matter which might give rise to a claim. This is not as unlikely as it might sound, because an insured at the end of a policy period may have an incentive to give a notification in the widest possible terms for which there may be no real justification. The insurer would be entitled to refuse to accept such a purported notification.

139. In the middle of the spectrum, there may not uncommonly be cases in which different people, possessed of the same knowledge, might reasonably form different views about whether a claim was a real possibility as distinct from a remote risk. In such cases an insurer could not reject a notification of the circumstance, but nor could an insurer complain if the insured did not give such a notification.

140. At the other end of the spectrum are cases in which any reasonable person in the insured's position would recognise a real risk of a claim. If so, the insured would be duty bound to give notice of it to a prospective insurer. He would also in my view be bound to give notice of it to the current insurer if the terms of the policy required him to give notice of any circumstance of which he became aware and which might give rise to a claim.

141. In short, in my judgment the right general approach to a policy clause which entitles an insured to give notification of a circumstance which may give rise to a claim, and thereby cause the risk to attach to that policy, is to treat the right as subject to an implicit requirement that the circumstance may reasonably be regarded in itself as a matter which may give rise to a claim. The right general approach to a policy clause which goes further and imposes a duty on the insured to give such a notification is to treat it as implicitly limited, not only by the requirement that the circumstance may reasonably be regarded as a matter which may give rise to a claim, but to a circumstance which either the insured notifies or which any reasonable person in his position would recognise as a matter which may give

> rise to a claim and therefore requiring notification to the insurer."

Although Rix LJ did not expressly agree with this articulation, there is in my view very little difference in his approach at [72] from that of Toulson LJ as set out above. Rix LJ said:

> "In my judgment, any difficulty in this point rests in the ambiguity of identifying the relevant "circumstances". Normally such circumstances arise outside the insured itself, for instance in the intimation of a possible complaint. In such a case which I would regard as typical, the two questions will be: (i) Have such circumstances come to the attention of the insured (during the policy period) so that he can be said to be aware of them? (ii) Are such circumstances such that they "may give rise to a loss or claim against them"? The latter question is an objective one; the insured may have his own views about the complaint, but the question has to be looked at objectively. In the present case, however, the problem which arose was internal, generated by the views of Mr Torrance. Normally the subjective personal views of an insured about the nature of a risk which he presents to underwriters for cover are irrelevant: provided, of course, that all material information is fairly presented, it is for the insurer to rate the risk, not for the assured. Mr Torrance, moreover, was only an employee: he was not a member of the firm. What then in such a case are the "circumstances" for the purposes of GC4?"

Sir Richard Buxton agreed with Rix LJ except in relation to one specific point not relevant for present purposes.

Appeal Ground 1: causal connection

40. The following issues arise for determination on the appeal in relation to Ground 1:

i) What was the scope of the circumstance(s) notified in 2007?

ii) What were the potential third-party "Claims" in respect of which EP undertook the mitigatory works for which it now claims an indemnity?

iii) Did those potential third party Claims arise from the circumstance(s) notified in 2007, in the sense of there being some causal link between the circumstance(s) and the claims?

What was the scope of the circumstance(s) notified in 2007?

41. Mr Jonathan Hough QC and Mr George Spalton, on behalf of RSA, submitted in summary that the circumstances notified in February 2007 were that multiple failures

had taken place in relation to the boom drive system installed by Euro Pools and, although Euro Pools suspected a bracing issue, it was not sure what was causing the failures. The circumstances notified in June 2007 were that, in the face of continuing boom failures, Euro Pools had developed a potential solution involving the use of inflatable bags, but that it nevertheless wished to make a notification in case of "any future problems" giving rise to possible third party Claims.

42. Mr Ben Elkington QC and Mr Josh Folkard, on behalf of Euro Pools, submitted in summary that the circumstance notified in 2007 under the first policy was a failure of some of the steel tanks attached to booms at three swimming pools. They contended that Euro Pools cannot have made any broader notification as to: (i) a defect in the inflatable bags nor (ii) a fundamental flaw in the air drive system, because it was not in 2007 aware of any such defect or fundamental flaw. They contended that it was only under the second policy, that EP notified RSA that (i) the bags it had installed at a larger number of pools did not work, and (ii) an air drive system of any kind would not work.

43. In my judgment RSA's submissions are to be preferred in relation to this issue. It is one that can be determined on the primary facts as found by the judge, notwithstanding that I do not agree with her conclusion as a matter of law that there was no adequate causal connection between the circumstances notified in the First Policy period and the relevant loss.

44. The judge held that there was a notification of circumstances at the meeting with RSA in February 2007 and transcribed in Ms Moir's notes. She rejected Mr Wyllie's evidence that the problems notified at the meeting were a snagging issue or a maintenance issue, and accepted RSA's case that EP was notifying a possible claim relating to design problems: see paras. 65, 66 and 68 of the judgment. On that occasion, Euro Pools notified RSA that booms were failing – i.e. not rising and lowering properly. It identified four further facts, viz: (i) it had inherited a design for booms in which air was fed into tanks; (ii) that tanks had started to fail at some pools; (iii) that it appeared that internal bracing was failing; (iv) and that EP was going to try to resolve it by adding bracing but might also use bags to take the air.

45. The notification in June 2007, given in the context of renewal, was likewise important. On behalf of Euro Pools, AON notified RSA that booms were still failing – i.e. not rising and lowering properly. It identified four further facts: (i) that three pools had now experienced boom failures; (ii) that Euro Pools now thought that these failures were due to water and air not draining out properly (a feature of, or defect in, the air feed design); (iii) that Euro Pools had devised a solution involving the use of an inflatable bag in place of tanks, which had been used in one location (West Tallaght) without problems and which would not cost more than the deductible; and (iv) that nevertheless Euro Pools wanted to make a notification "on a precautionary basis, should there be any future problems." In other words, Euro Pools appreciated that it might not have got to the bottom of the problem in the sense of understanding what the root cause of the booms' failure was. Thus, although Euro Pools hoped that it could make the boom design work by using bags in place of tanks, and that solution would fall within the deductible, it nonetheless wanted to make a general precautionary notification.

46. Stripped to its bare essentials, I conclude that the circumstances which had been notified during the first policy year were that the booms, which were powered by an air drive system, were not rising and falling properly. The fact that Euro Pools did not know at

that stage what was the fundamental cause of the problem with the air drive system (whether a flaw in the structural design of the system, defects in the tanks, or in the air bags) cannot, in my view, on the particular facts of this case, make any difference. In practical terms, Euro Pools knew it had a real problem with the failure of the booms to rise and fall properly (in other words with the air drive system in place) and it knew that the problem might not be capable of resolution by the use of inflatable bags. It knew that it might face potential Claims from third parties as a result of the booms not operating properly in the relevant swimming pools.

47. As Akenhead J said in *Kajima* at [111] (c), a notification of circumstances will be taken to cover the defects causing and the symptoms and consequences of the circumstances notified. That may not be the position in every case, but in the present case it would not be appropriate, in my judgment, to over-analyse the problem by dissecting every potential cause of the problem as a different "notifiable" circumstance. Euro Pools were clearly aware in the requisite sense of the fact that there was a serious problem in the failure of the booms to rise and fall properly and that, as a result, it might be facing Claims from third parties for that reason.

What were the potential third-party Claims in respect of which EP undertook the mitigatory works for which it now claims an indemnity?

48. Before addressing this issue, it is important to stress the following point which was sometimes lost in the formulation of the arguments before us. It follows from the wording of Condition 2 that, in order for Euro Pools to be entitled to cover under a particular policy in respect of remedial work undertaken to mitigate a potential third party Claim[2], that potential Claim must "arise from" circumstances notified during the period of insurance of the policy under which an indemnity is claimed. In other words it is the potential Claim which must arise from the circumstances notified. This approach differs from that apparently taken by the judge (e.g. at [74] of the judgment) and the parties themselves, each of whom from time to time appeared to have thought that the relevant issue was whether the mitigatory work, or the decision to undertake mitigatory work, arose from the circumstances notified. This is not a distinction without a difference: the question whether the mitigatory work arose from the circumstances notified might arguably have to take account of the subjective beliefs of Euro Pools as to why that work was necessary; on the other hand, the question whether the potential third party Claims would have arisen from the circumstances notified addresses the objective question whether the circumstances giving rise to a potential Claim 'arose from' the circumstances notified.

49. The analysis below proceeds on the basis that the correct approach is to consider whether the circumstances giving rise to a potential third party Claim, in respect of which remedial work was undertaken and an indemnity is sought, objectively 'arose from' the circumstances notified.

50. Euro Pools submitted that any notification in February and/or June 2007 related only to the use of steel tanks, and any mitigatory work related merely to potential third party Claims in respect of failure of the booms to rise and fall because of the defects in the

[2] I use a capital letter to denote a third party "Claim" as opposed to a claim by an Insured under the policy.

steel tanks themselves; whereas the indemnity claimed related to the replacement of both bags and tanks in favour of a hydraulic system.

51. I disagree with Mr Elkington QC's analysis that a distinction is to be drawn, on the one hand, between mitigatory work in respect of boom failures due to failure of tanks and, on the other hand, mitigatory work carried out in 2008 in respect of failure of bags and replacement of the air drive system with a hydraulic system. On the facts of this case I find that approach unrealistic. I prefer Mr Hough QC's submission that the history of the matter as summarised in particular at paras 20-28 above demonstrates that the claims made on RSA under the insurance were for the cost of works to mitigate the risks of potential third party Claims based on booms in supplied pools failing to rise and fall. The basis of any potential third party Claim by owners of swimming pools would be for that failure; it would not have mattered to the latter what the technical reason was for the non-functioning of the booms.

52. Moreover, as I have already said, Mr Elkington QC's analysis wrongly assumed that the causative link or identity of process had to be between the work done to remedy boom failures due to failure of tanks and the work done to remedy boom failures in respect of bags and the replacement of the air drive system with a hydraulic system. In my judgment, as I have said, that is the wrong way of looking at things. What the Insured in fact had to show in order to attach a claim in a later year to a previous notification in an earlier year was that:

    i) the costs and expenses in respect of which a claim was made by it under Insurance Clause 5 of the policy in the later year were "necessarily incurred in respect of any action taken to mitigate a loss or potential loss that otherwise would be the subject of a claim under this Insurance"; and

    ii) pursuant to Condition 2, the potential Claim from the third party would arise from the circumstances previously notified in the earlier year.

53. So conversely, in order to demonstrate that a claim under Insurance Clause 5 for an indemnity against costs and expenses did not arise in respect of circumstances previously notified, it would be necessary for the Insured to demonstrate that the action taken was to mitigate a loss or potential loss that would **not** be the subject of a Claim by a third party arising from the circumstances previously notified.

Did those potential third party Claims arise from the circumstance(s) notified in 2007, in the sense of there being some causal link between the circumstance(s) and the potential third party Claims?

54. Mr Elkington QC, on behalf of Euro Pools, submitted that there was no causal connection between the circumstances notified under the First Policy, namely problems with some metal tanks, and the remedial works which were the subject of Euro Pools' claim, namely "the cost of changing the drive system for the Booms". Again, I disagree. Given my articulation of the circumstances which were notified, as set out above, and my characterisation of the third party Claims, as likewise set out above, any potential third party Claim would, in my judgment, be one "arising from" the set of circumstances notified to RSA in February and/or June 2007. As Mr Hough QC pointed out, the latter notification was especially significant in that, although Euro Pools expressed the hope that its design modifications (introducing bags) would resolve the problems in booms,

it was deliberately making a precautionary notification to the expiring policy in case those modifications did not succeed (which is precisely what happened).

55. Applying the test from *Kajima*, I find it impossible to say that there was no more than a "purely coincidental" connection between the problems notified in February and June 2007 and the work carried out from mid-2008 to install hydraulics. Nor can it be said that there would have been only a "purely coincidental" connection between the circumstances notified in 2007 and any potential third party Claim made for a boom failure after mid-2008. I accept Mr Hough QC's submission that, if there had not been repeated failures of booms incorporating tanks, there would have been no need to install bags; nor to modify those bags; nor to install hydraulics in mid-2008. There would never have been any prospect of third party Claims, or any need to install hydraulics to avoid them. Again, it is highly unlikely that Euro Pools would have been proposing to install hydraulics in all sites, if it had not had a series of boom failures which were notified in February and June 2007.

56. I also consider that one example of what I regard as Euro Pools' incorrect approach to the question of causal connection is the evidence relating to some swimming pools (namely in Crawley and Braunstone) where tanks had only ever been used to raise the booms. The evidence showed that Euro Pools was proposing to install a hydraulic system into those booms to avert the risk of third party Claims. That was because booms with tanks had suffered repeated failures, as notified to insurers in February and June 2007. But that is inconsistent with Euro Pools' case that there was no causal connection between the repeated failures of tanks which began in early 2007 and the later decision to replace tanks with hydraulics.

57. There is also an air of unreality about Euro Pools' case that the remedial works carried out from mid-2008 had no causal connection to the matters notified in 2007. Its case was that it was only on 2 May 2008 that for the first time it made the critical notification of the new relevant circumstances under the Second Policy and that any work carried out before that date did not relate to such notification. But the schedules provided by Euro Pools in relation to the booms claim (which it claims attached to the Second Policy by virtue of the May 2008 notification) listed (i) substantial work on booms at Cardiff from March 2008; (ii) work on booms at Clondalkin claimed for the period from October 2007 to April 2008; and (iii) structural analysis work included in booms claim for work done at Cardiff in February 2007.

58. Moreover, as Mr Hough QC pointed out, when finally Euro Pools made the decision to install hydraulic cylinders into booms, it expressly traced the causal sequence back to the failures of early 2007. That can be seen in the notes of the meeting with the loss adjuster on 15 May 2008, in the loss adjuster's reports dated 21 July 2008 and 15 August 2008 and in Mr Wyllie's own email of 23 September 2018.

59. The reality is, therefore, that the remedial works were carried out in order to mitigate a loss or potential loss that might have been the subject of a potential Claim from a third party on the grounds that the booms, powered by an air drive system, were not rising and falling properly.

60. Accordingly I would allow RSA's appeal under Ground 1.

61. For the sake of completeness I should say that, on the appeal, no argument was presented to the effect that, for the purposes of Condition 2, the requirement to show a causal connection was any different in relation to a claim for an indemnity in respect of mitigation costs under Insurance Clause 5, from that in relation to an indemnity in respect of an actual third party Claim under Insurance Clause 1.

Appeal Ground 2: The effect of Dr Kirby's evidence

62. Mr Hough QC, on behalf of RSA, submitted that, even if one were to accept the evidence of Dr Kirby (as found by the judge) to the effect that poor welding contributed to all the boom failures of early 2007, that evidence did not undermine the logic of RSA's arguments set out in relation to Appeal Ground 1. In particular, the fact remained that the repeated failures of air-fed booms caused Euro Pools to attempt a sequence of design solutions, leading to its decision to install a hydraulic drive system. Mr Hough also emphasised that Dr Kirby accepted in terms that the works from mid-2008 were in part due to the problems notified to the First Policy.

63. Mr Elkington QC, on the other hand, submitted that the evidence of Dr Kirby indeed undermined RSA's position. He contended that, if the tank failures notified to the First Policy had occurred as a result of poor weld preparation and the air drive system would have worked had those flaws been addressed, those circumstances were not causally connected to the remedial works that form the subject of Euro Pools' claim, which involved the replacement of an air drive system with a hydraulic system.

64. As I have already stated above, the judge accepted Dr Kirby's evidence to the effect that, had the problem with the welds to the tanks been identified, the air drive system would have worked. That led the judge to the conclusion that, on that evidence, there was no causal link between the failures in the tanks and the decision to abandon an air drive system and move to hydraulics.

65. In my judgment, the evidence of Dr Kirby and indeed of Mr Cotterill, insofar as it went to answer the question "what objectively was the real reason for the tanks failing?", was not actually relevant to the decisions which the judge had to make under this head. What she had to decide was: (a) what was the scope of the circumstances notified by Euro Pools in 2007; and (b) whether the mitigatory work in relation to which it was claiming an indemnity was being taken to mitigate a potential loss from third party Claims arising from the circumstances previously notified. What was clear was that Euro Pools at the time did not know, or was not aware of, the actual technical reason or reasons for the system failing to drive the booms up and down. What it did know, and the circumstances which I have found that it notified, were the fact that the booms located at various of its swimming pools, which were powered by an air drive system, were not rising and falling properly. It was not obliged to notify the actual cause of the mechanical defects in the tanks (since it was not aware of them) and did not do so.

66. Accordingly, since I regard the judge's reliance on this point as logically incorrect, I would allow the appeal on Ground 2.

Appeal Ground 3: Logical flaw in Euro Pools' case

67. Mr Hough QC submitted that that Euro Pools' case regarding the booms claim, as accepted by the judge, contained a central inconsistency or logical flaw. He contended

that, on the one hand, Euro Pools argued that the boom defects it identified in February and June 2007 were not causally connected to the problems that emerged in mid-2008, because those problems concerned deficiencies in the inflatable bag system and Euro Pools had not been aware of such deficiencies at the time of the 2007 notifications; but that, on the other hand, Euro Pools simultaneously argued that the boom defects it identified in May 2008 were causally connected to all later works on booms, including those involving the replacement of defective hydraulic equipment after 2010, despite the fact that Euro Pools had not been aware of such deficiencies at the time of the May 2008 notification.

68. In response, Mr Elkington QC on behalf of Euro Pools, submitted that there was no logical flaw in its case. That was because the costs incurred from mid-2008 in installing a hydraulic system did not arise out of the circumstances notified in 2007, as in 2007 it was not believed that the air drive system was fundamentally flawed; whereas the costs incurred from late 2010 onwards arose out of the notification made in May 2008, because they arose from Euro Pools' ongoing efforts to replace the air drive system with a working hydraulic system.

69. Given my conclusions in relation to Ground 1 of the appeal, there is no need for me to determine this issue or express any view in relation to these arguments.

Appeal Ground 4: The effect of Dr Kirby's evidence

70. Mr Hough QC submitted that the judge was in any case wrong to accept Dr Kirby's explanation for the failure of booms over the competing explanation of Mr Cotterill. In particular, he argued, the judge erred in adopting Dr Kirby's evidence because (i) Mr Cotterill's competing evidence had not been tested in cross-examination; and (ii) Dr Kirby's explanation lacked adequate justification and was speculative. On the other hand, Mr Elkington QC on behalf of Euro Pools, submitted that the judge was entitled to prefer Dr Kirby's evidence for the reasons she gave at [74] of the judgment. In particular she had reviewed the experts' reports and heard them cross-examined.

71. Given my view that Dr Kirby's evidence is irrelevant, there is no need for me to express any view in relation to this issue.

Appeal Ground 5: The judge's reasoning based on knowledge / foresight

72. The judge held at [76] of the judgment that, even if the same design flaw caused both the 2007 failures and the 2008 failures, the latter still could not be said to arise from the circumstances notified in 2007 because Euro Pools was only capable of notifying circumstances of which it was aware, and it was not aware in 2007 of any such design flaw. Mr Hough QC submitted that the judge was wrong to hold that she would have rejected RSA's argument even if Mr Cotterill's technical analysis had been accepted on the basis that "the requirement of knowledge of circumstances was not satisfied at the time of the notification in February 2007"; see [76]. He contended that, on Mr Cotterill's analysis, both the circumstances notified in February and in June 2007 and the circumstances which gave rise to the installation of a hydraulic system from mid-2008 were symptoms of a fundamental flaw in Euro Pools' air drive system. He submitted, relying on *Rothschild, Kidsons* and *McManus* that a policyholder who notified a circumstance capable of giving rise to a claim could be covered for later claims which causally related back to that circumstance even if he/she had not foreseen

the sequence of events or the precise nature of the problems which would trigger the later claims.

73. On the other hand, Mr Elkington QC, on behalf of Euro Pools, submitted that the judge had made no error of law and that Mr Hough QC was wrong to assert that her reasoning in that paragraph of her judgment implied a requirement that the Insured foresaw, at the time a circumstance was notified, the causal route by which the circumstance would give rise to a claim.

74. Again, in the light of my conclusions in relation to Grounds 1 and 2 of the Appeal, it is not necessary for me to decide this point. If it had been, I would have determined the issue in favour of RSA. I disagree with the judge's analysis. The authorities to which I have already referred demonstrate that an insured must be aware of a circumstance in order to notify the insurer of that circumstance; but there is no requirement that he be aware of the full causal origins and implications of the circumstance notified.

The further issues arising raised by Euro Pools in its Respondent's Notice

Respondent's Ground 1: In addition to the notification of circumstances made in May 2008, was a further notification made on 30 June 2008, which RSA subsequently confirmed it would treat as a valid notification under the Second Policy?

75. Mr Elkington QC submitted that Euro Pools made notifications of circumstances during the Second Policy period, by emails dated 2 May and/or 30 June 2008 respectively. In particular he contended that, in addition to the notification of circumstances made in May 2008, a further notification was made on 30 June 2008, which RSA subsequently confirmed it would treat as a valid notification under the Second Policy.

76. It is not necessary to deal with this ground in any detail.

77. So far as the first alleged notification is concerned, it is disposed of by my conclusion on Appeal Ground 1. The email of 2 May was simply a query about an existing insurance claim which attached to the First Policy period. The email was not presented, and did not read, as a fresh notification. It was dealing with a continuation of problems previously notified. Insofar as it could be said that the judge concluded at [77] that there had been a valid notification of circumstances in May 2008, she was wrong – not least because she had found in the immediately preceding paragraphs that the problems notified in May 2008 were not attributable to the matters notified previously. For reasons which I have already stated, that finding was wrong as a matter of law. The suggestion in Euro Pools' written argument that RSA in its Defence had admitted that there was a notification to the Second Policy was also misconceived.

78. Euro Pools also contended that its email of 30 June 2008, referring to failures of booms at Cardiff, which was passed on by its brokers to RSA that day, was a notification of circumstances under Condition 2, which RSA said would be treated as a valid notification to the Second Policy and caused the later work on booms to attach to the Second Policy.

79. I accept Mr Hough QC's submission that this point was a red herring. In summary, the facts appear to have been that the email of 30 June 2008 said that there might be an issue with foam buoyancy within moveable booms at the Leeds pool. In fact, Euro

Pools' booms did not incorporate foam (and had never done so). The email was sent by Euro Pools directly after a complaint made by the main contractor at Leeds about problems with foam buoyancy blocks in moveable floors. The reference to booms appears to have been an error resulting from the email having been written by a colleague while Mr Wyllie was away. Mr Goddard of RSA responded by email dated 30 June 2008, saying that it was not clear whether this was a new notification of circumstances or a communication about the existing booms claim. He instructed the loss adjuster to investigate. When he later accepted the email as a notification to the Second Policy, he did so on the express basis that it was "a further floor problem" and nothing to do with booms. It appears that the foam buoyancy problem was thereafter treated as a separate insurance claim, which was not pressed.

80. Accordingly, I would reject Respondent's Ground 1.

Respondent's Ground 2: Does notification of circumstances under the First Policy preclude indemnification under the Second Policy?

81. Logically, this is the first question which arises on this appeal, as, if it were to be answered in favour of Euro Pools, it would render the remainder of the appeal moot. Mr Elkington QC, on behalf of Euro Pools, submitted that, even if, contrary to Euro Pools' arguments on the appeal, the potential third party claims in mitigation of which Euro Pools had undertaken remedial work 'arise from' both: (i) circumstances notified under the First Policy; and (ii) circumstances notified under the Second Policy, the Policies properly construed did not preclude Euro Pools from claiming an indemnity under the Second Policy.

82. In my judgment, this argument has to be rejected. The scheme of the Policies was that the Insured's right to be indemnified was subject to the notification requirement:

> "as soon as possible after becoming aware of circumstances to give notice of circumstances which might reasonably be expected to produce a [third party] Claim";

see Condition 2. The Policies likewise operated strict time limitations of cover based on that requirement; thus:

i) Condition 2 provided that "Any Claim arising from such circumstances shall be deemed to have been made in the Period of Insurance in which such notice has been given";

ii) the principal Insuring Clause (Insurance Clause I) provided that RSA would indemnify Euro Pools against legal liability in respect of third party Claims "first made against [Euro Pools] and notified to [RSA] during the period of Insurance"; and

iii) the clause relating to mitigation costs (Insurance Clause 5) provided cover against costs and expenses incurred "to mitigate a loss or potential loss that would otherwise be the subject of a claim under this insurance".

83. Moreover, Exclusion Clause 18A(1), which I have already quoted above, made the position absolutely clear that RSA would not be liable in respect of

> "the consequence of any circumstance
>
> 1) notified under any insurance which was in force prior to the inception of this Insurance
>
> 2) known to the Insured or which should have been known to the Insured at the inception of this Insurance which might reasonably be expected to produce a Claim".

The parties had thus agreed that RSA would not be liable under the Second Policy for "the consequence of" any circumstance notified under the First Policy or which should have been notified. If a potential third party Claim 'arises from' circumstances notified under the First Policy, it is also clearly the 'consequence of' that circumstance. It follows that RSA would have no liability to indemnify Euro Pools in respect of remedial work undertaken to mitigate or avoid such a Claim.

84. Euro Pools sought to rely on the fact that RSA had not, to date, expressly relied on Exclusion Clause 18A(1). Whether or not that was the case, in my view is irrelevant. This Court is required to construe the Policies and no allegation of estoppel was raised in this context.

85. Accordingly, the Policies properly construed do indeed preclude Euro Pools from claiming an indemnity under the Second Policy in respect of a potential third party claim (or mitigation costs to avoid such a claim) that arises from circumstances notified to the First Policy. It follows that I would reject the Respondent's Ground 2.

Respondent's Ground 3: If Euro Pools was not entitled to an indemnity under the First Policy in any case, would that preclude entitlement under the Second Policy?

86. Given my conclusion that the Policies properly construed do indeed preclude Euro Pools from claiming an indemnity under the Second Policy in respect of a potential third party claim that arises from circumstances notified to the First Policy, the issue raised in Respondent's Ground 3 does not arise for consideration.

87. Euro Pools submits under Respondent's Ground 3 that, even if entitlement to an indemnity under the First Policy does preclude entitlement to an indemnity under the Second Policy, RSA's appeal must still fail because Euro Pools is not entitled to an indemnity under the First Policy for various reasons.

88. However, in my judgment, it is not entitlement to an indemnity under the First Policy that would preclude entitlement to an indemnity under the Second Policy; rather, it is simply the fact that the potential third party claims, in respect of which an indemnity is sought, arise from circumstances already notified to the First Policy. As long as those third party claims arise from circumstances notified to the First Policy, a claim for an indemnity under the Second Policy will be barred - regardless of whether Euro Pools crystallised its claim to an indemnity under the First Policy by, for example, proving a loss or notifying RSA of planned remedial works.

89. It follows that I would reject the Respondent's Ground 3.

Disposition

90. It follows that I would allow RSA's appeal.

Males LJ:

91. I agree. As we are differing from the judge, I add the following comments on what appear to me to be the decisive issues.

Notification of circumstances

92. I need not refer to the authorities which have been comprehensively cited and analysed at [39] and following above. The following points are of particular relevance in the present case.

93. Notification of "circumstances … which might reasonably be expected to produce a Claim … for which there may be liability under this Insurance" is both an obligation and a right. It is a condition precedent to the insured's right to indemnity in respect of such circumstances but, once given, any Claim arising from the notified circumstances is deemed to have been made in the period of insurance in which notice was given. ("Claim" with a capital "C" refers to a claim by a third party such as a customer against the insured).

94. "Circumstances" is a broad term. Sometimes the insured will be able to specify with a high degree of precision what it is that gives rise to the possibility of a Claim. On other occasions, however, it may be able to do little more than to point to the fact that something is not working for a reason which has yet to be ascertained – sometimes referred to as a "can of worms" or "hornet's nest" notification. Provided that this is something which might reasonably be expected to produce a Claim by a customer for which the insurer may (not necessarily will, but may) be liable under the policy, there is no reason in principle why a notification should not be in these terms. The insured does not need to appreciate the cause of the problem or the consequences which may result.

95. In order to give a valid notice, the insured must be aware of the circumstances in question. You cannot notify something of which you are not aware. It is awareness of the circumstances which triggers the duty and the right to notify. But you can notify a problem even if you are not aware of the solution.

96. It may later transpire that the problem is something which is not covered under the policy, such as a failure of workmanship rather than a design fault. That does not prevent a notification from being given. It is sufficient that there is a reasonable expectation that the circumstances in question may produce a Claim for which there may be liability under the policy. The question whether there is liability under the policy arises at a later stage when a Claim is eventually made against the insured.

97. Once there has been a notification of such circumstances, the question will be whether any Claim which does materialise is one "arising from such circumstances". This requires "some causal link", but this is not a particularly demanding test of causation.

98. Three broad questions will generally need to be considered when there is a notification of circumstances in one year followed by a Claim in a later year. These are: (1) what

was the scope of the circumstances which were notified? (2) does the necessary causal link exist? (3) is there liability under the policy for the defect in question?

99. As in this case, the insured may decide not to wait for a Claim to materialise but instead to incur costs and expenses to mitigate "a loss or potential loss that otherwise would be the subject of a claim under this Insurance". That is likely to be a common course of action as, if there is thought to be a design fault, it does not make much sense to do nothing about it and wait for a Claim to be made. The insured will be entitled to an indemnity for costs and expenses necessarily incurred in respect of such mitigating action, provided that appropriate notice has been given to the insurer of the insured's intention. The costs and expenses incurred will attach to the policy year during which the notification is given.

100. When, having given notice of circumstances which might reasonably be expected to produce a Claim, the insured makes a claim on the policy for the costs incurred in taking mitigating action, the causation question will be slightly different. It will be whether the costs and expenses were incurred by the insured in order to mitigate (or avoid) a Claim which might reasonably be expected to arise from the notified circumstances. Again, what is needed is a causal link.

101. In this case the judge found at [66] that the insured gave notice of circumstances which might result in a Claim in February 2007 but she decided at [76] that it was only notice of "a problem with the tanks and not with a wider problem with the air drive system". That was, as I read the judgment, because she found that the insured had no knowledge of anything other than a problem with the tanks in February 2007 and therefore (regardless of the terms of the notification) could not have given notice of any wider problem. The judge made no findings whether the communication in June 2007 amounted to a further notification or, if so, what its scope was.

102. The judge's finding on the expert evidence at [74] was that the problem was one of defective welding and not a design fault at all. If the welding had been properly done, the air drive system would have worked. It is an irony of the case that, if that is so, there would have been no cover under the policy for any Claim made by a customer. However, nobody knew this at the time. The parties' shared understanding was that there was a design fault for which there was cover under the policy and the insured took steps by way of mitigation in an attempt to put the matter right. There was no dispute about the fact that, subject to the questions already identified as to the scope of the notification and the existence of a causal link, the insured was entitled to an indemnity in respect of such steps. No submission was made to us to the effect that, because (on the judge's finding) any Claim by a customer would not have been covered under either policy, the cost of mitigation work could not be recovered.

The scope of the 2007 notification(s)

103. Accordingly the first question which arises is as to the scope of the 2007 notification(s) so far as the booms are concerned. The judge set out the relevant communications at [29] to [36] of the judgment (see [13] to [19] above). Mr Jonathan Hough QC for the insurer submitted, and I would accept, that there were four matters notified in February 2007, namely that (1) Euro Pools had inherited a design whereby air was fed into tanks in order to enable the booms to rise, (2) the tanks were starting to fail at some pools, (3) it was thought that this was caused by failures of the internal bracing within the

tanks, and (4) Euro Pools intended to resolve the problem by adding additional bracing, but it might switch to the use of airbags.

104. It is apparent therefore that at this stage Euro Pools did not know for sure what the problem was, although it had some ideas both as to the problem and as to possible solutions. At one level this could be described as a problem with the tanks, although it was also described more generally as "a weakness in booms". The weakness in question was that the booms did not do what they were supposed to do, that is to say to rise and fall when required to do so.

105. Further information was provided in June 2007 which was also clearly intended to comprise notice of relevant circumstances. Mr Hough submitted, and again I would accept, that the matters notified were as follows, namely that (1) there had by now been failures at three pools, (2) the cause of the problem was that water and air were not draining from the tanks quickly enough, (3) Euro Pools believed that airbags were the solution to the problem, and (4) while replacement of the tanks with airbags was a cheap solution, Euro Pools was concerned to protect itself by giving a notice which would cover the possibility that this proposed solution did not work.

106. Obviously the immediate concern was with the tanks which provided the drive mechanism for the raising and lowering of the booms. That was the existing design which was not working properly. However, it would not be right to characterise this notification as limited to a problem to do with the tanks. Any Claim by a customer was likely to be a broad complaint that the booms were not rising and falling properly when required to do so. That was the reason why mitigating action was required. Euro Pools needed to do something to make the booms work properly. If whatever it did was unsuccessful, it would need to do something else.

107. Nor would it be right to characterise the notification as being limited to pools where there had already been a failure. If there was a design fault which had manifested itself at those pools, there was an obvious risk that the same problem would arise at other pools.

108. In my judgment the problem notified, fairly considered, was that the drive mechanism for raising and lowering the booms was not working properly due to what was believed to be a design fault. The solution was thought to be replacing the tanks with airbags, but it was expressly recognised that this might not work and that some other solution, as yet unidentified, might need to be found. Euro Pools wanted to ensure, by giving notice, that it would be covered by the 2007 policy if that turned out to be the position. Those were the circumstances which were notified during the 2007 policy year.

109. Viewed in this way, there is no question of Euro Pools not having the requisite knowledge of the notified circumstances.

Causal link

110. Euro Pools then went through a sequence of measures to try and make the booms rise and fall properly. It used air bags in place of tanks in booms that were being installed but despite making modifications to the bags it continued to encounter problems. Eventually it decided that the booms could not be made to work with tanks or airbags and that it was necessary to install hydraulic cylinders as an alternative design solution

for the raising and lowering of the booms. That is what it did, both in booms which had only ever had tanks and in those where airbags had been used.

111. Each of the further design changes was made because the previous change had not resolved the problem. The installation of hydraulic cylinders was intended to solve the same problem as had been notified in the 2007 policy year, namely that the booms were not rising and lowering properly. There was an unbroken causal chain running through this sequence of design changes.

112. It follows the cost of this mitigating action attached to the 2007 policy year. Although the ability to give notice of circumstances in one year which may produce a Claim in a later year is usually a benefit to the insured, in the present case, because the 2006/07 policy limit has been exhausted, this conclusion means that the claim must fail.

A 2008 notification?

113. The judge found at [77] that there was a valid notice of circumstances in May 2008 under the second policy. It may be that this finding was a consequence of what I would regard as her unduly narrow characterisation of the 2007 notice. Be that as it may, it is clear in my judgment that the communications in May 2008 (see [38] to [42] of the judgment and [22] and [23] above) did not amount to a notice of new circumstances but rather the provision of further information about circumstances which had already been the subject of notification in 2007, in particular that the solution then envisaged had not worked.

114. The submission of Mr Ben Elkington QC for the insured that there may be a valid notification in one year of circumstances which have already been notified in a previous year therefore does not arise on the facts. I would find it difficult, however, to envisage that this was in accordance with the intentions of the parties as reflected in the policy or policies in question.

Hamblen LJ:

115. I agree that the appeal should be allowed for the reasons given by Dame Elizabeth Gloster and Males LJ.