Professional indemnity insurance: *Europools v RSA*

Jonathan Hough QC
Ben Elkington QC
Josh Folkard

4 New Square
Professional Liability & Regulatory Conference
4 February 2020

4 NEW SQUARE T: +44 (0) 207 822 2000
LINCOLN'S INN F: +44 (0) 207 822 2001
LONDON WC2A 3RJ DX: LDE 1041
WWW.4NEWSQUARE.COM E: CLERKS@4NEWSQUARE.COM

Ben Elkington QC, FCIArb

Call: 1996 Silk: 2012

Ben is a busy and experienced silk with a strong following. For many years he has been ranked in the directories as a leading silk in the fields of professional liability, insurance, commercial dispute resolution and property damage. He acts for both claimants and defendants, insureds and insurers, clients and professionals.

Despite the modern trend for cases settling, Ben regularly appears in Court. He has been described as ***"An exceptional advocate who is quick on his feet and has a great rapport with judges."*** - Legal 500 2020, Insurance and Reinsurance ***"Very tenacious and a relentless advocate."*** - Legal 500 2020, Professional Negligence

Ben's lay clients value his modern, down to earth and commercial approach. ***"He is very bright, very personable and makes complicated things really clear."*** - Chambers & Partners 2020, Professional **Negligence.** ***"Ben is really easy and clear with clients and very approachable; he just gets it." "He gives clear, pragmatic advice."*** - Chambers & Partners 2020, Commercial Dispute Resolution

Ben's professional clients enjoy working with him**.** ***"Very bright, good humoured and great to work with in a pressured situation"*** - Legal 500 2020, Commercial **Litigation** ***"An absolute dream to work with. He is super responsive and very user-friendly. He is also very good at tailoring his advice to the clients."*** - Chambers & Partners 2019, Professional Negligence**.** He was delighted to be described as ***"one of the most user-friendly barristers at the Bar."***- Chambers & Partners 2018, Insurance

Ben's practice encompasses all the professions. He has particular expertise of claims against insurance brokers, and has appeared in several of the leading cases in the field. For many years he has been the editor of the corresponding chapter in Jackson and Powell on Professional Liability.

Ben is a Fellow of the Chartered Institute of Arbitrators and he accepts appointments to act as arbitrator.

Jonathan Hough QC

Call: 1997 Silk: 2014

*"**He is incredibly user-friendly and has the brain the size of a planet.**" "**His written work is absolutely superb**" "**A terrific advocate who has a very good courtroom manner and is very robust and persuasive, which goes down well with judges.**"*- Chambers & Partners

*"**Recommended for his intellectual prowess and excellent court skills.**"* - Legal 500

Jonathan is ranked by the legal directories as a leading silk in five practice areas: insurance / reinsurance; professional liability; administrative / public law; inquests / inquiries; and consumer law. In all his fields of practice, he has appeared in many reported and important cases.

In the area of insurance law, Jonathan acts for and against major insurers, reinsurers and underwriting agencies in litigation and arbitration. He has particular expertise in the following classes of risk: general commercial liabilities (EL/PL/Products); property; motor; professional indemnity; legal expenses; trade credit; D&O; title insurance; personal accident / disablement; and financial risk. His recent reported cases in this field include *Euro Pools v Royal & Sun Alliance Insurance plc* [2019] Lloyd's Rep IR 595; *AXA Corporate Solutions SA v Weir Services Australia Pty Ltd* [2018] Lloyd's Rep IR 50; and *PM Law v Motorplus Ltd* [2018] EWCA Civ 1730.

His professional liability practice covers a range of professions, including lawyers, insurance professionals, surveyors and financial professionals. He is very experienced in substantial litigation for and against professionals, and in related insurance matters. One of his cases in this field was featured in

The Lawyer's Top 20 Cases of 2018. His other recent reported cases in this field include *Accident Exchange v McLean* [2018] 4 WLR 26 and *Denning v Greenhalgh Financial Services Ltd* [2017] PNLR 19. He is an editor of Jackson & Powell on Professional Liability.

Joshua Folkard

Call: 2013

Josh has a broad commercial practice focussed on professional liability, insurance, property damage and the conflict of laws.

He was Junior Counsel for the Claimant/Respondent in *Euro Pools v RSA* [2019] EWCA Civ 808, and advises frequently in notification cases relating to that decision. In addition to *Euro Pools*, Josh was involved in the Court of Appeal hearing in *Milton v Brit Insurance* [2015] EWCA Civ 671 (concerning the construction of a fire policy and in particular the meaning of the phrase "*left unattended*"). Josh has a particular interest in conflicts of laws, and has advised in a jurisdiction dispute between England and Scotland relating to claims arising under an insurance policy.

Josh has spoken on "*Versloot Dredging and the sudden death of fraudulent devices*" and is co-author with Alison Padfield QC of the talk '*Limitation Periods in Insurance Claims: A Varied Landscape, or How to Avoid the Quicksand*'.

Professional indemnity insurance notifications and *Euro Pools Plc (In Administration) v Royal & Sun Alliance Insurance Plc*

Ben Elkington QC, Jonathan Hough QC and Joshua Folkard, 4 New Square

I. Introduction

1. The effect of notifications of circumstances and claims is an important issue in many professional indemnity ("**PI**") insurance cases. Is a notification of circumstances too speculative to be valid? What is the scope of a notification? Have there been multiple separate notifications with the effect of attaching different categories of claim to different policy years, or has there been a single early notification followed by elaboration upon it? Which categories of claims attach to different policy years, or fall into gaps in coverage? Questions such as these can have huge financial significance in disputes between insurer and insured, and between insurers of different years of cover.

2. In this talk, we shall address an important recent case in the Court of Appeal in which we all appeared, *Euro Pools Plc (In Administration) v Royal & Sun Alliance Insurance Plc* [2019] EWCA Civ 808; [2019] Lloyd's Rep IR 595 (at first instance, [2018] Lloyd's Rep IR 575). That case provides comprehensive guidance on the principles to be applied when interpreting and determining the effect of notifications of circumstances. It also illustrates some of the practical challenges of this exercise. After considering the case itself, we shall look at its ramifications.

II. *Euro Pools v RSA*

A. The Facts

3. Euro Pools plc ("**EP**") specialised in designing and installing moveable floors and booms (dividing walls) in swimming pools. It had two relevant PI policies, both underwritten by Royal & Sun Alliance Insurance Plc ("**RSA**") and covering successive periods: (i) 30 June 2006 to 29 June 2007 ("the **First Policy**"); and (ii) 30 June 2007 to 29 June 2008 ("the **Second Policy**"). Each covered EP's liability for damages and costs arising from professional negligence, and each was subject to an aggregate limit of indemnity ("**LOI**") of £5 million. Each policy contained an extension covering costs incurred by EP to mitigate a loss or potential loss that would otherwise be the subject of a claim on the particular policy.

4. Condition 2 of each policy was a reasonably conventional clause addressing notification of circumstances. It provided:

> *"The Insured shall as a condition precedent to their right to be indemnified under this Insurance give written notice to the Company (regardless of the Insured's Contribution) as soon as possible after becoming aware of circumstances… which might reasonably be expected to produce a Claim irrespective of the Insured's views as to the validity of the 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."* [Emphasis added]

The last sentence is a typical form of deeming provision which requires that any third party claim arising from circumstances notified to a particular policy year should be treated as attaching to that policy year (even if the claim itself is made in a later policy year).

5. In February 2007, EP notified RSA of a series of failures in moveable swimming pool floors, which were buoyant platforms moved up and down through the water by a rope and pulley system. EP had developed and installed in various pools a design of moveable floor which used rope of a material called Vectran and electric winches. These were failing repeatedly, and the company had decided to replace the design with one using steel ropes and hydraulic drives. It wanted to claim on its insurance for the cost of installing the new design in order to avert the risk of third party claims.

6. At the same time as it made that notification, EP also notified RSA that some booms (moveable dividing walls) which it had installed in various pools were failing. These booms used an air-fed drive system, whereby they would be raised by introducing air into metal tanks and lowered by withdrawing the air. Some had not been rising properly, and EP was considering design changes. EP hoped that this was a minor problem to which it had an inexpensive technical fix, such that any claim would fall within the insurance excess.

7. RSA accepted the claim for mitigation costs in relation to the pool floors (the main Floors Claim). It instructed a loss adjuster, Mr Murphy, to deal with EP by overseeing the mitigation work; approving items of work; and channelling some of the indemnity payments. It was common ground that the main claim for mitigation works on pool floors attached to the First Policy and that claim was not contentious.

8. In June 2007, shortly before expiry of the First Policy, EP through its brokers made a further notification that failures in booms were continuing and could give rise to claims. EP indicated that it was modifying the design to use large bags (in place of tanks) to take the air within booms in some pool sites. It stated that it wanted to make a precautionary notification in case of future problems.

9. In November 2007, a failure occurred in the commissioning of a pool floor (not a boom) in Leeds. A pulley failure had occurred during a test raise of the pool floor, causing it to float to the surface and suffer damage. It was ultimately established that this was due to design failures in the steel rope / electric winch design which had been developed since February 2007 (notably a failure to incorporate cable retainers). Work to remedy this design flaw was carried out. EP and RSA treated this work as subject to a claim attaching to the Second Policy (the Leeds Pool Claim), separate from the main Floors Claim.

10. Over the period from late 2007 to early 2008, EP found that the bags used in the booms were failing, such that booms were not rising evenly or fully. It tried a series of design modifications, including modifying the bags and valves and (in at least one site) reverting briefly to a glass-reinforced plastic tank. By May 2008, EP had decided that the right course was to replace the air drive system in all booms with a system whereby hydraulic rams would push up the boom. It asked RSA to approve this course of action, and RSA instructed the loss adjuster to

investigate (with the assistance of an engineer). The advice was that the modification to a hydraulic system was advisable, and EP proceeded to install that system into all sites, namely those where the booms had only ever incorporated tanks; those where the booms had only ever incorporated air-bags and one site which had first used tanks then bags. This installation work was overseen by RSA's loss adjuster, who approved items of work and managed periodic payments. At the time, all of this work was treated by both EP and RSA as being within the scope of an insurance claim attaching to the First Policy (the Booms Claim), by virtue of the notifications of February and June 2007.

11. Unfortunately, the hydraulic systems installed between late 2008 and late 2009 themselves began to fail from around late 2010. EP engaged a team of experts to investigate the cause, which was thought to be various defects in the design of the hydraulics. With the help of these experts, it designed a new hydraulic system. In early 2013, the loss adjuster reported to RSA that works involving replacement of hydraulics would be needed which would entail significant additional cost.

12. In May 2013, RSA met EP and pointed out that sums incurred on remedial works covered by the First Policy (i.e. sums within the main Floors Claim and the Booms Claim) were now £4.3 million, leaving a balance from the LOI of £700,000. At that point, it was apparent that the remaining balance might well not cover the intended works on the booms. EP changed its position on claims attachment, arguing that remedial works on booms from May / June 2008 had been covered by the Second Policy. On this basis, it argued that there was substantial additional cover, as the LOI of the Second Policy had not been much eroded whereas the main Floors Claim had eroded most of the LOI of the First Policy. It also made a separate argument that the loss adjuster had made commitments binding RSA to fund the cost of the programme of mitigation works irrespective of the application of any LOI.

B. <u>The First-Instance Decision</u>

13. The parties could not agree any form of resolution, so in January 2016 EP issued proceedings claiming sums it said remained outstanding. Its total claim was for £4.5 million plus an indemnity for future mitigation costs (estimated to be worth £1.6 million).

14. At trial, there were a number of issues, which the Judge (Mrs Justice Moulder) resolved as follows:

(a) Did the Booms Claim attach to the First Policy or the Second Policy? The Judge accepted EP's argument that it attached to the Second Policy. This was the most financially significant issue, and it was the subject of the appeal. It is addressed in more detail below.

(b) Did the Leeds Floor Claim attach to the First Policy of the Second Policy? The Judge accepted EP's argument that it attached to the Second Policy on the basis that the failure of the Leeds pool floor had not arisen from the circumstances notified in February 2007 but from separate and subsequent design defects.

(c) How did limitation apply to the claims? The Judge accepted RSA's contention that the cause of action in respect of each item of mitigating expense accrued when incurred and that it was not open to EP to appropriate RSA's claim payments to time-barred debts. RSA's payments made less than six years before issue of proceedings should be allocated pro-rata between expenses incurred before and after the time bar date. This had a significant effect on the value of the claim.

(d) Had RSA through the loss adjuster entered into a freestanding undertaking to cover the disputed losses, such that RSA was committed either by a collateral contract or by an estoppel? The Judge agreed with RSA's case that there had been no commitment as alleged.

(e) Was RSA obliged by an implied term to cover the costs of actions by EP against a subcontractor (WYG)? The Judge accepted RSA's case that its implied obligation to cover such costs was limited to costs incurred while RSA was prosecuting the relevant claim, such that nothing more was recoverable in this respect.

(f) How were the various mitigation costs claims to be assessed? There were some minor issues of quantum which the Judge resolved.

(g) Was the £50,000 "insured's contribution" under each policy to be deducted from the LOI such that the maximum amount which RSA could be obliged to pay was £50,000 less than £5 million? The Judge held that the LOI sat above the insured's contribution as a matter of construction.

The effect of the Judge's conclusions was that RSA was liable to pay £2.4 million plus interest.

C. The Appeal

(i) Issues before Court of Appeal

15. RSA launched an appeal in respect of the Judge's conclusion on issue (a), the attachment of the Booms Claim. On that issue, the Judge's essential reasoning (at judgment, [70]-[77]) was as follows:

(a) The problem identified by EP in early 2007 and notified during the period of the First Policy (in February and June 2007) had been one of failures of bracing in tanks within booms. It had not been a fundamental flaw in the air-drive design for raising and lowering booms.

(b) The Judge accepted the evidence of EP's technical expert, Dr Kirby (a metallurgist), that the failures of tanks during the period of the First Policy had been due to poor weld preparation, which did not in fact betoken a flaw in the air-drive design. By contrast, the remedial works to which the Booms Claim related had resulted from EP's distinct decision in May 2008 to abandon the air-drive design. Accordingly, the Booms Claim had not arisen from circumstances notified during the period of the First Policy.

(c) The Judge recorded that RSA's expert, Mr Cotterill (an engineer), had concluded that the initial failures of tanks had been due to repeated pressurisation and depressurisation which was a feature of the air-drive system. She said that, even if she had preferred that view, she would still have said that the remedial works on booms had not arisen from the circumstances notified during the First Policy period. That was because EP had not itself known in February or June 2007 that there was a flaw in the air-drive design. It had only known of a problem with tanks in booms which used that design, but thought that problem could be resolved by installing bags in place of tanks. EP's notification of circumstances could not be regarded as extending beyond EP's knowledge of the problem.

16. There was no cross-appeal. RSA was successful in the appeal, the Court of Appeal holding that the Booms Claim attached to the First Policy and that all remedial works on booms were

indemnifiable under that policy. Because of RSA's success at trial on the issues of limitation and collateral agreement / estoppel, the effect was that EP recovered only £126,000.

(ii) Court of Appeal's Judgment

17. The leading judgment in the Court of Appeal was given by Dame Elizabeth Gloster, who identified the following key principles (at [39]):

(i) A deeming provision such as that in Condition 2 of the RSA policies should be construed and applied in accordance with its commercial purpose, which is to provide an extension of cover for all claims in the future flowing from the notified circumstances. See *HLB Kidsons v Lloyd's Underwriters* [2008] Lloyd's Rep IR 237 at [21].

(ii) Consistent with that purpose, a provision which refers to circumstances that *"may"* give rise to claims sets a deliberately undemanding threshold test. See *J Rothschild Assurance v Collyear* [1999] 1 Lloyd's Rep 6 at [22]. In the present case, the use of the words *"might reasonably be expected to produce a claim"* were identical in effect to *"may produce / lead to a claim"*.

(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 *"hornet's nest"* notification, i.e. one about a problem the exact scale and consequences of which are unknown: see *HLB Kidsons* (first instance) at [76]; *Kajima UK Engineering v The Underwriter Insurance Co* [2008] EWHC 83 (TCC) at [99(c)]; *McManus v European Risk Insurance Co* [2013] Lloyd's Rep IR 533 at [43].

(iv) Although the insured must be aware of circumstances that may give rise to a claim in order to notify such circumstances, that does not predicate that the insured needs to know or appreciate (a) the cause (or all the causes) of the problems which have arisen or (b) 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. RSA was right to say that an insured may notify a problem in general terms without fully appreciating its cause or potential consequences (e.g. because the insured is not

a technical specialist). If the insured does so then the insurance will cover claims which have some causal connection to the problem notified.

(v) If there has been a valid notification of circumstances, then any claim arising from those notified circumstances will be considered to have been made within the relevant period of insurance. What is required is a causal rather than purely coincidental connection: see *Kajima* at [99(f)].

(vi) When construing a communication to determine whether it is a notification and its scope, one applies conventional principles of construction: see *HLB Kidsons* (first instance) at [76].

(vii) The approach to conventional PI notification clauses is as set out in the judgment of Toulson LJ in *HLB Kidsons* (CA, at [2009] 1 Lloyd's Rep 8) at [134]-[142]. At one end of the spectrum, there may be cases where a notification is attempted but the circumstances are too vague and remote to be regarded as circumstances which may give rise to a claim. In such cases, the insurer is entitled to refuse the notification. In the middle, there may commonly be cases where different people would reasonably form different views about whether the known circumstances might give rise to a claim. In such cases, the insured is not obliged to make a notification but the insurer would be obliged to accept any notification made. At the other end of the spectrum are cases where any reasonable person in the insured's position would recognise a real risk of a claim. In such cases, the insured is obliged to make a notification and the insurer is obliged to accept it.

18. The Grounds of Appeal were addressed as follows:

(i) RSA argued that the notifications of February and June 2007 should be construed as being to the effect that *"the booms, which were powered by an air drive system, were not rising and falling properly"*. They were not, as EP had submitted, limited to the fact that steel tanks attached to booms at three specified pools had failed. It was apparent from the notifications that EP was concerned about repeated booms failures; that it was not sure of the technical cause; and that it was making a precautionary notification. RSA then argued, based on this construction of those

notifications, that the entire sequence of remedial works was causally connected to the notifications. The Court of Appeal agreed with RSA's construction of the notifications (see [41]-[47]) and with its case on causal connection (see [54]-[60]).

(ii) RSA argued that the Judge had been wrong to conclude that Dr Kirby's evidence affected the proper conclusion. Dr Kirby's evidence addressed what was objectively the real reason for the tanks' failing in early 2007, and concluded that it was due to poor weld preparation in specific tanks. But that was irrelevant to the question of what EP had notified at the time and whether subsequent mitigation works had arisen from the notified circumstances, because nobody in early 2007 had appreciated that the problem was poor weld preparation. The Court of Appeal agreed with that submission also (see [62]-[66]).

(iii) RSA argued that there had been a logical flaw in EP's case. Its case was that the boom defects identified in early to mid-2007 were not causally connected to the problems emerging in mid-2008 because a design change (the move to air bags) had intervened. However, it maintained that the works required from late 2010 to replace hydraulics had been causally connected to the problems identified in mid-2008 even though a greater design change (the move to hydraulics) had intervened. These two submissions were logically inconsistent and betrayed the weakness in EP's arguments. The Court of Appeal considered it unnecessary to resolve this issue.

(iv) RSA argued that the Judge had been wrong to accept Dr Kirby's evidence (if relevant at all) since (a) RSA's expert's competing evidence had not been challenged in cross-examination and (b) Dr Kirby's explanation lacked justification and was speculative. The Court of Appeal considered it unnecessary to resolve this issue, since Dr Kirby's evidence was irrelevant.

(v) RSA argued that the Judge had been wrong in a critical aspect of her reasoning. She had reasoned that EP could only notify circumstances of which it was aware and that in early to mid-2007 it had not been aware of a fundamental flaw in the air-drive design for raising booms. Such awareness had only come later. Dame Elizabeth Gloster did not consider it necessary to decide the point, but expressed support for RSA's argument. At the time of notifications to the First Policy, EP did not need to be

aware of the full causal origins and implications of the circumstance notified. Yet the notification still had the effect of attaching to the First Policy all claims arising from that notification. See: [72]-[74].

D. Legal Ramifications

(i) Lessons to be Learned from the Euro Pools Case

19. We would suggest that the following key lessons can be learned from the *Euro Pools* case:

(a) When determining the effect of a purported or actual notification of circumstances, it helps to adopt a structured approach, asking (i) whether the notification is too speculative to be a valid notification of circumstances at all; (ii) what is the scope of the notification (which is primarily an objective question of construction but does not allow a notification to be interpreted as extending beyond the insured's knowledge); (iii) is there a causal link between the circumstances notified and the claims later made (or, in a mitigation costs case, the claims which mitigation costs are intended to avert).

(b) When considering the scope of a notification, it is important to focus on what the notification actually says and to construe it against the factual background contemporaneously known to insurer and insured alike. *"Circumstance"* is a broad word and reflects the fact that an insured may not be able to specify with great precision what it is that poses the risk of a third party claim. In borderline cases, it may be debatable whether a communication is (i) a successful *"hornet's nest"* notification which attaches a wide range of future claims to a policy or (ii) too speculative to count as a notification at all. This makes it more important than ever that insureds should take careful advice on notifications and later communications with insurers, all of which need to be phrased very carefully. Equally, insurers need to consider carefully their position and its potential consequences when a notification is made, since the response can in practice help to determine the bounds of the notification and since astute questions can enable the insurer later to decide what claims have arisen causally from the notification.

(c) An important insight offered by the *Euro Pools* case is that an insured does not need to appreciate the cause of a problem or foresee its consequences in order to make a notification of the problem and be covered against claims relating to its consequences.

Thus, where an insured is not aware of the technical cause of a set of problems (e.g. structural / engineering defects) which are emerging, it can properly notify the problems and it can expect to be covered against third party claims which have any causal connection to those problems. Later, when the cause is apparent, the scope and effect of the notification will not be subject to a kind of retrospective limitation. (After all, in the *Euro Pools* case, if Dr Kirby had been right that the cause of the boom failures was all down to poor weld preparation by the tank manufacturers, any later claim against EP should not have been a claim covered under a PI policy at all and no mitigation cost could have been covered by RSA.)

(ii) Potential Scope and Applications of EuroPools

20. The Court of Appeal held that a notification of circumstances will be taken to cover (a) the defects causing and (b) the symptoms and consequences of the circumstances notified (para 47).

21. The second of those statements is not surprising. If a circumstance is notified, then one would expect that a claim that relates to the symptoms and consequences of the notified circumstances should be covered.

22. Take the example of an architect who designs a block of flats. In Year 1 the doors are found to be sticking, so the architect notifies its insurer that the doors are sticking. If in Year 2 the doors are sticking so much that they all need to be replaced, one would expect that to be covered.

23. The more significant statement is the first one. The notification will be taken to cover the defects causing the notified circumstances. Assume that the doors were sticking because the building was subsiding, and it was subsiding because its foundations were not properly designed. Assume also that in Year 3 the building collapses, and the architect is sued for the cost of rebuilding the block of flats. Would a claim for the cost of rebuilding the block of flats fall within the notification in Year 1?

24. According to the Court of Appeal, the notification includes the defects causing the circumstances notified. The circumstances notified to Year 1 were that the doors were sticking. The defects causing those circumstances were the inadequate design of the foundations. Therefore, if the inadequate design of the foundations also caused the building

to collapse, then a claim relating to the collapse of the building would fall within the scope of the notification.

25. The argument that the claim relating to the collapse of the building fell within the Year 1 notification might be even stronger depending on how the notification was drafted. For example, if the notification said (i) the doors are sticking, (ii) we do not know why the doors are sticking, (iii) it could be a failure in the design of the building, and (iv) we want to make a precautionary notification in case there are further problems.

26. The decision appears to have expanded what we might think of as a hornet's nest notification. Until now most people have thought such notifications related to the examples given by Elizabeth Gloster, i.e. where there has been a general regulatory warning about a particular class of business, or a concern about work done by a former employee or prior entity.

27. However, Lord Justice Males thought that such a description was appropriate to a case where there was a specific problem, but the underlying causes of that problem were yet to be ascertained. Hamblen LJ agreed with his judgment.

28. Take the example of a firm of solicitors who in Year 1 notifies its insurer about a potential claim from a buyer in a conveyancing transaction, because the purchase monies were not sent to the seller but were sent to a third party. One would expect the notification to be limited to that transaction.

29. However, what if the purchase monies were sent to the third party because the solicitor was acting dishonestly, and that dishonesty only came to light in Year 2? The cause of the claim would be the solicitor's dishonesty. So if in Year 2 lots of claims were made by other clients, would those claims be covered by the notification to Year 1? The decision in Euro Pools suggests that they would be.

30. One can think of further examples. Take the case of a design and build contractor who designs and builds bridges. In Year 1 a bridge that it has designed and built starts falling down so that it notifies its insurer that there is a problem with the bridge. It believes the problem was a workmanship issue, so in Years 2 and 3 it builds more bridges using the same design. Those bridges all collapse and it turns out there was a flaw in the design of the bridges. Since the flawed design was the defect causing the circumstances that were notified in Year 1, would all the claims relating to the bridges constructed in Years 2 and 3 attach to the Year 1 policy? The decision in Euro Pools suggests that they would.

III. Conclusion

31. *Europools v RSA* is the first substantial appellate guidance on the scope of notifications to professional indemnity policies since *HLB Kidsons* [2009] 1 Lloyd's Rep 8 (which overturned the decision of Gloster J, as she then was, in some respects). The decision appears to have significantly expanded the 'hornet's nest' concept to the causation plane, thereby potentially increasing the scope of notifications of circumstances beyond that previously envisaged. Whilst in *Euro Pools v RSA* that worked against the insured, the decision has the potential significantly to increase the liability of insurers in some cases.

Ben Elkington QC, Jonathan Hough QC and Joshua Folkard

4 New Square Professional Liability & Regulatory Conference