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Appendix Case Law Summaries

1. Abuse

BJM v Nathan Eyre and Others

BJM sought damages for the consequences of physical and sexual abuse which occurred between 2001 – 2003. The heads of damage in issue were Pain, Suffering and Loss of Amenity (PSLA) and the input from other causes to the injury suffered; aggravated damages; and the increased cost of purchase of alcohol. BJM was awarded £70,000 for PSLA, calculated on a broad brush approach and after taking into account the problems he would have had but for the abuse. Aggravated damages of £20,000 were also awarded, the judge noting that she had applied the principles for the appropriateness of such an award (that is in exceptional circumstances) and avoided the possibility of double recovery. BJM contended that, had it not been for the abuse, he would have consumed no more than the recommended weekly maximum intake of alcohol for an adult male. However, as he had consumed more than that, he claimed that he should be reimbursed for the increased expense. The court rejected this element of the claim. In so doing it relied on the Court of Appeal decision in *Eagle v Chambers*, a decision which applied the same principle to increased cigarette consumption. There it was noted that there was something deeply unattractive in allowing a claimant to recover damages for such a head of loss, unless his injury was such that he had no choice but to increase the consumption.

EB v John Haughton

EB brought a claim directly against JH whom she alleged had behaved inappropriately when she was 10/11 years old in 1993. JH denied the allegations and had been acquitted of criminal charges in 2006. EB issued her civil claim in 2009. Significant points in issue were regarding limitation and aggravated damages. The case sets out the key issues to consider when determining limitation in abuse claims. With regard to aggravated damages they have now become an almost standard element of any abuse claim and are perceived by claimants' legal advisors as a means of increasing general damages, possibly by up to 3 times the amount which would otherwise be awarded. In this case the claimant's PSLA was assessed at £20,000 with no separate award being made for aggravated damages, the court noting that "*not every finding of sexual abuse of a child by an adult will attract an award of aggravated damages...*"

Raggett v (1) Society of Jesus Trust 1929 for Roman Catholic Purposes (2) Preston Catholic College Governors (Court of Appeal)

The Court of Appeal considered arguments regarding limitation in this high profile case where the claimant had garnered much publicity. He had been a partner at a City law firm but still argued he should be allowed to proceed with his claim out of time. The Court of Appeal upheld the first instance exercise of discretion in his favour. The case confirms that the ability of a defendant successfully to argue that the claim is out of time is limited. Following the decision in *A v Hoare,* most claimants will seek to argue that vicarious liability for abuse lies with the abuser's employer. Defendants can only challenge that on the basis there was no abuse, or that there was no closeness of connection between the employment and the acts of abuse. The case of *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church (2010)* showed that closeness may be wider than previously anticipated. The Raggett decision also confirmed again that the Court of Appeal is not easily persuaded to interfere in a first instance exercise of discretion.

Roman Catholic Church Vicarious Liability Preliminary Issue

The High Court heard arguments as a preliminary issue in July 2011 with regard to the existence or otherwise of vicarious liability of a Bishop for a priest in his diocese. The defendant argued that the Bishop did not have the requisite control over the priest to make him vicariously liable for his abuse of the claimant. The arguments have already seen much negative press coverage of the stance of the Roman Catholic Church in pursuing these arguments. Judgment is awaited and whatever the outcome it seems likely the issue will be taken to the Court of Appeal.

Various Claimants v Catholic Child Welfare Society and Others (Court of Appeal)

The claimants asserted they were abused by staff at the school they attended. The central issue considered by the Court of Appeal was whether the second defendant which provided many of the teaching staff could be vicariously liable. Whilst the case reconfirmed in principle the possibility of dual vicarious liability, in this case the second defendant was found not to have had the management and control at the school for vicarious liability to be established. The Supreme Court is to hear the Claimants' appeal in early 2012.

2. Asbestos

Asmussen v Filtrona UK Ltd

The High Court rejected this mesothelioma claim on the basis that it was more likely that exposure had occurred during the period 1955 -1960, which was the earlier of two periods of employment with the defendant. The court did not accept that, at this time, the defendant should have appreciated that the claimant was at risk of asbestos-related injury, and placed reliance on the guidance in *Baker* (see below) regarding contemporaneous standards.

Chandler v Cape plc

The High Court concluded that a parent company owed a duty of care to an employee of a subsidiary company where the employee had been exposed to asbestos and subsequently suffered asbestosis and the subsidiary company was no longer in existence. The court applied a three stage test of foreseeability, proximity and whether it was fair, just and reasonable for a duty to exist. These tests were found to be satisfied in this case. Claimants will now welcome the opportunity to pursue parent companies where the three stage test is satisfied, particularly where insurance for a subsidiary cannot be traced but that of the parent company can.

Currie v (1) Rio Tinto plc (2) Royal Mail (3) Lines Ltd (4) NDLB (5) Canadian Pacific (UK) Ltd

A claim concerning disputed allegations of negligent exposure to asbestos causing asbestosis was struck out because the defendants had been denied the opportunity to obtain histopathological evidence, which might have helped to establish the deceased's cause of death. This created a risk of injustice, although such evidence would not necessarily have been determinative of liability.

EL Trigger Litigation - Thomas Bates & Sons Ltd v BAI (Run-off) Ltd (CA); MMI v Zurich

Permission was granted for an appeal to the Supreme Court, which is due to hear the case on 5 December 2011. At issue is whether certain historic EL policies should respond when the asbestos fibres were inhaled (date of inhalation) or at the date when the tumour developed (date of tumour), which could be 40 or more years later. The Supreme Court's decision will have significant implications in determining which insurer (if any) will be liable to meet mesothelioma claims and whether claimants with this condition will be fully compensated.

Ivan Hinchliffe (Executor of the Estate of Aubrey Whitehead, deceased) v Corus UK Limited

The court had to consider whether or not the claim was statute barred. Having considered the evidence the court considered that the date of knowledge was 2002 and that the delay in prosecuting the claim had caused such prejudice to the defendant, including in relation to the possibility of contribution proceedings, that discretion to proceed should not be granted to the Claimant.

Knowsley MBC v Willmore (Supreme Court)

The Court of Appeal had found the local authority liable to a former pupil suffering from mesothelioma on the basis of intermittent and light exposure to asbestos. The Supreme Court upheld the Court of Appeal decision in March 2011 and held that the test should remain the 'material contribution' test, not

the 'doubling of the risk' test. One of the consequences of this joint judgment (see below) is that it has made it even more difficult for a defendant to argue that exposure to asbestos was de minimus and thus not causative of the mesothelioma. The judgments however also make it clear that the Supreme Court has some concerns about the impact on causation which flows from the *Fairchild* decision and the Compensation Act 2006. Whilst at the moment not willing to try and reverse the effects of those changes for mesothelioma cases there was a clear message that it would not be appropriate to try and apply similar arguments in anything other than a mesothelioma claim.

Sienkiewicz v Greif (UK) Ltd (Supreme Court)

The Supreme Court heard this case together with *Knowsley v Willmore* (see above) and upheld the Court of Appeal's decision. The claimant was exposed to asbestos dust during the course of her work. That exposure did not double the risk of developing mesothelioma when consideration was given to the environmental exposure she also had. However the defendant's breach of duty had materially increased the risk and therefore the defendant was liable for the consequences of the exposure.

Williams v University of Birmingham (Court of Appeal)

The Court of Appeal stayed its decision in this case pending the outcome of the Supreme Court's decisions in *Willmore* and *Sienkiewicz* (above). The issue for the Court of Appeal was whether it agreed that a claimant should succeed in a mesothelioma claim where the exposure levels to asbestos were below current acceptable limits and lower than the claimant's exposure levels outside of work. Judgment is awaited.

3. Catastrophic Injury

Alyson Booker v NHS Oldham and Direct Line

This Administrative Court decision provides the clearest statement yet that a claimant has the right to choose whether necessary care is funded privately or publicly and reaffirms the principle that care provided by the NHS is free at the point of delivery.

The claimant was 9 when she was involved in a road traffic accident rendering her tetraplegic. All parties accepted that she required two person 24 hour care for life. Liability was not in dispute and the claim was settled in October 2009, when the claimant was aged 19, based on a lump sum award of £2.95 million plus periodical payments to cover future private care of £247,500 per annum to commence on 15 December 2011. At the time of the settlement the care was being provided by the local PCT. The purpose of the delay was to allow the claimant to arrange appropriate private care. As part of the settlement the insurers agreed to provide an indemnity if the PCT withdrew the care prior to this date and the claimant undertook to challenge any PCT decision of that nature.

The PCT did withdraw funding for care on 1 October 2010 and the claimant challenged this decision by way of judicial review proceedings. The court rejected the PCT's argument that they should not have to fund a care package where the claimant had chosen to set up a private care regime in the future and was indemnified in the short term which meant that she did not need their support. The PCT's obligation to provide the care package was not dependent on the individual's ability to pay which is effectively what the PCT were arguing. The court was also concerned that PCTs should not become embroiled in litigation nor for parties to seek their permission before reaching settlement in all cases which would significantly increase cost and delay in cases.

Individual choice appears to be preserved in the recommendations of the Dilnot Commission on the funding of long term care (see the main report) but the interaction of private and publicly funded care regimes in personal injury cases may come under further scutiny as part of the Government's continuing review of the funding of care given the current economic climate.

4. Causation

Chubb Fire Ltd v Vicar of Spalding and Another (Court of Appeal)

It was held at first instance that the supplier of fire extinguishers was negligent for failing to advise the customer that the discharge from the fire extinguisher was likely to cause a mess (compared to a standard water type).

On appeal, the trial judge was held to have erred in concluding that the extinguisher would not have been installed if the above advice had been given. On the evidence, in response to the advice, further professional advice would have been taken and such advice would have been that the dry powder extinguisher in question was the "least wrong" option. As a result, the failure to warn was not causative of the damage created by vandals. Separately, actions of the vandals amounted to a new intervening act so that the supplier of the extinguisher was not responsible for the damage caused 7 years later.

The dicta of Atkins LJ is useful in analysing whether conduct amounts to a new intervening act, namely:

1. Does the intervening conduct render the original wrong doing merely a part of the history of events?
2. Was the conduct either deliberate or wholly unreasonable?
3. Was the intervention foreseeable?
4. Does the defendant owe the claimant any responsibility for the conduct of the third party?

Global Process Systems v Syarikat Takaful Malaysia Berhad (Supreme Court)

GPS claimed against all risks cargo insurers for the cost of replacing the three legs of a drilling rig which was being shipped from Texas to Malaysia. The rig was placed on a barge and the three legs extended 300ft into the air. After inspection and repairs, all three legs snapped off, one by one. Experts agreed that the loss occurred because of fatigue cracking caused by repeated bending of the legs under the influence of motions of the barge as it was being towed in addition to a "leg breaking" wave. Insurers relied on inherent vice to reject the claim.

The Supreme Court decided in favour of GPS that it was in fact perils of the sea and in particular "leg breaking waves", which were not certain to occur, which alone caused the damage, confirming the Court of Appeal decision. This was the case even though there was nothing unusual about the weather conditions. The question of proximate cause is one of fact, to be decided on common sense principles. All goods were susceptible to loss or damage from the fortuities of the weather on a voyage; that did not mean that such loss or damage arose from the nature of the goods; it arose from the fact that the goods had encountered one of the perils of the sea. It was a matter of common sense judgment whether initial unfitness or the intervention of a subsequent peril or both was or were the proximate cause.

Norris v Merial Animal Health Ltd

This case concerned a decision from Brighton County Court, in which the judge held the claimant could not recover damages from his employer, the defendant, for the infection he contracted following a total knee replacement operation where the agreed medical evidence was that the claimant would have required such an operation within a year of the accident in any event. The claimant's application for permission to appeal was granted, but the claim settled before the Court of Appeal could hear the substantive arguments. This is an important decision in the context of acceleration cases, as it confirms that defendants will only be liable for the period of acceleration and not any adverse consequences of surgery, provided that the defendant's breach has not increased the risk to the claimant of such adverse consequences.

5. CFAs

MGN v UK (ECHR)

The Mirror Group made an Article 10 application to the European Court of Human Rights (ECHR) challenging recoverable success fees. The application followed from the *Campbell v MGN* case in which MGN had unsuccessfully argued that when a claimant is extremely well off then it is not reasonable for them to instruct their solicitor to act under a Conditional Fee Agreement with a success fee. The ECHR considered the balance between the Article 10 right of freedom of expression and the Article 6 right to access to the court. It was unanimously decided that the Article 10 right had been breached by the requirement to pay the success fee. In making their decision the court noted a number of fundamental flaws in the recoverable success fee scheme. They referred to Lord Justice Jackson's review of the costs of civil litigation and his recommendations for far reaching reform.

Sousa v London borough of Waltham Forest (Court of Appeal)

This case was the first CFA case to come before the Court of Appeal after the ECHR's decision in *MGN v UK*. The issue was the use by an insurer of a CCFA in a claim for subrogated damages. In deciding that an insurer was entitled to fund the litigation using a CCFA with a success fee the Court of Appeal stated that they were bound by the House of Lord's decision in *Campbell v MGN* which confirmed that it was open for anyone, whatever their means, to fund the litigation by way of a CFA.

Yao Essaie Motto and Others v Trafigura Ltd and Another

Leigh Day represented some 30,000 claimants under a Group Litigation Order. At the end of the litigation the claimants, all Ivory Coast nationals, received a payment of around £1,000 each. Leigh Day then served their bill of costs, which incorporated a success fee of 100% and totalled some £105 million. The bill came before the Senior Costs Judge (SCJ) for consideration of 22 key issues that would then form the basis of the detailed assessment. The SCJ found that the risk had reduced on a sliding scale and therefore that a success fee of 100% throughout was too high. He reduced the success fee to 58% - immediately reducing the total bill by some £20 million. He then found that on the face of it the base costs were disproportionate. The litigation is ongoing but the SCJ has recently made another decision following on from an application from the claimant as to the date that interest should run from in a case funded by way of CFA. The SCJ found that the correct date from which interest should run is the conclusion of the assessment process rather than the date of the underlying order. It is likely that this decision will be appealed.

6. Civil Liability (Contribution) Act

Jubilee Motor Policies Syndicate 1231 v Volvo Truck & Bus (Southern) Ltd

In 2003, there was a collision between a lorry, owned by Fortress Recycling Limited (Fortress), and another vehicle being driven by Mr Hawkes, which caused him serious injury. The driver of the lorry was convicted of driving without due care and attention. Jubilee Motor Policies Syndicate 1231 (Jubilee) declined to indemnify Fortress under its insurance policy. Mr Hawkes therefore claimed against Fortress and added Jubilee as an additional party as Road Traffic Act insurers. This claim was settled by Jubilee in 2008.

The current litigation arose out of Jubilee's claim for a contribution against Volvo Truck & Bus (Southern) Ltd (Volvo), under the Civil Liability Contribution Act 1978 (the 1978 Act). This was on the basis that Volvo had failed to maintain the lorry (and in particular the brakes) as it should have done. Volvo applied for the contribution proceedings to be struck out and/or for summary judgment to be entered.

Volvo's position was that Jubilee did not have a reasonably arguable claim in law for a contribution under the 1978 Act. S 1(1) states that: *"….any person liable in respect of any damage suffered by another person may recover contribution from any other person liable* ***in respect of the same damage*** *(whether jointly with him or otherwise)."*

Volvo argued that if it was liable to Mr Hawkes, it would have been from the time of the accident in 2003 and arose out of it potentially being a wrongdoer causing the personal injuries. In contrast, Jubilee's liability emerged much later, in 2008, and arose out of it being a statutory indemnifier, not a wrongdoer. Therefore Volvo and Jubilee were not liable "in respect of the same damage".

The court accepted Volvo's arguments in full. The allegation was that Volvo was liable to Mr Hawkes in respect of his personal injuries. No similar allegation could be applied to Jubilee as it never caused Mr Hawkes to sustain personal injuries. Its liability arose out of the Road Traffic Act 1988. Leave to appeal was refused. "Damage" as referred to in S1(1) of the 1978 Act must therefore be distinguished from the more generic monetary "damages". Further, "in respect of" should here be read as synonymous with "for".

Jubilee also sought to run a subrogation argument. This failed as it had refused to indemnify Fortress under its insurance policy and it did not therefore have the benefit of the subrogation rights contained in it.

It is worth nothing that a different outcome would have been reached if Jubilee had confirmed policy coverage. In those circumstances, Jubilee would have been able to bring a contribution claim against Volvo, crucially in the name of Fortress, and there would have been liability in respect of the same damage, both Fortress and Volvo potentially causing the injuries to Mr Hawkes at the time of the accident in 2003. This is therefore perhaps a further consideration for insurers before declining policy cover where there is compulsory insurance.

Beachcroft successfully acted on behalf of Volvo and its insurers.

Mouchel Ltd v Van Oord (UK) Ltd (No 2)

Following remedial work to an offshore water cooling system for a power station for which the main contractor (K) was responsible, K sued the current claimant (M) who carried out design work. Those proceedings were settled with the M paying £100,000 damages, £18,000 interest and £400,000 costs. M then sought a contribution from the company that carried out the construction work for the project (VO), showing that M would have been liable to K and that VO were liable to K for the same damage. It was held in earlier proceedings that VO should contribute 35% of damages in relation to "issue 1" only, amounting to £8,546 (8.546%). The current litigation considered what contribution, if any, VO should pay M towards (1) the £400,000 costs paid to K and (2) the costs M incurred themselves in the earlier litigation with K.

It was held that where there was an overall settlement figure which included a sum attributed to costs, such a payment could found a contribution claim under the 1978 Act. A "contribution" was not limited to a contribution in respect of damages but included a contribution based on "liability for damage". It was necessary to ascertain what costs were attributable to issue 1, here 30%. 35% of 30% was 10.5%, which was close to 8.546%, which was the percentage contribution VO paid in relation to damages. As it was undesirable to differentiate between the percentage recovery of damages and costs, VO was ordered to pay 8.546% of K's costs.

However, the court could not find any grounds on which M could then seek a contribution in relation to its own costs in that earlier litigation with K as that did not form a liability to a third party in respect of damage. There was a general discretion under s51 Senior Courts Act 1981 but VO's conduct did not justify such an order. The cost of these third party proceedings would reflect the matter as between M and V.

7. Conflict of Laws

Homawoo v GMF Assurance SA and Others

The court was required to determine, as a preliminary issue, whether Rome II applied to a claim brought by the claimant for personal injury against the foreign insurance company. The claim arose out of an injury sustained in an RTA in France on 29 August 2007. The claimant argued that Rome II

did not apply to events before 11 January 2009 or, in the alternative, that Rome II only applied to proceedings commenced on or after that date. The defendant argued that since Rome II was published in the Official Journal of the European Union on 31 July 2007, in the absence of a specified date for entry into force, Rome II entered into force on 20 August 2007.

The court held that as there was no judicial decision on the temporal scope of Rome II it was necessary to refer the question to the European Court of Justice for interpretation before the preliminary issue could be determined. The Judge stated that there was no reason why Rome II should only apply where legal proceedings had been commenced or were determined by the court – it would often be the case that parties would seek to reach an agreement before the commencement of proceedings and its objectives (legal certainty and that uniform rules should enhance the foreseeability of courts' decisions) would not be achieved if the application of Rome II was dependent on the date of issue of proceedings.

The ECJ heard Homawoo on 15 July 2011 but no decision has yet been published.

Jacobs v Motor Insurers Bureau (Court of Appeal)

The appellant appealed against a decision that the respondent, the MIB, was obliged to pay him compensation in accordance with Spanish law as the law applicable to the accident under Rome II. Mr Jacobs, who was resident in the UK, had sustained a serious injury when he was struck by a car in Spain driven by a Spanish resident whose car carried what appeared to be a UK registration plate but the plate did not correspond with the vehicle. No one was able to identify any insurance undertaking which insured the Spanish resident or anyone else to drive the vehicle. Mr Jacobs therefore issued proceedings against the MIB in its capacity as a compensation body under Regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003.

The Court of Appeal held that different systems of law could govern different questions raised in the same claim. Whilst it followed that the obligation imposed on the MIB by Regulation 13(2)(b) carried the implicit proviso that the injured party had to show that the driver was liable by reference to the applicable law identified in accordance with the usual rules (in this case Spanish law), it was possible for a different system of law to apply to compensation under the scheme.

The mechanism by which the MIB's obligation to compensate under Regulation 13 was established was to treat the accident as having occurred in Great Britain. In the absence of any provisions limiting the scope of this it was difficult to see why this should not also apply to the principles governing assessment of damage. The court concluded that having regard to the language of Regulation 13(2)(b), compensation was to be assessed as if the accident occurred in Great Britain and that no issue of conflict of laws arose.

Robert Bacon v Nacional Suiza Cia Seguros Y Reseguros SA

The claimant was a 27 year old pedestrian, on holiday in Spain, who was struck by a car on a public road at around 11.45pm on 7 September 2007, his first evening there. The claimant suffered very serious injuries and was rendered paraplegic at the T1/T2 level. The claimant brought proceedings in England direct against the foreign insurer.

The parties agreed that Spanish law was applicable but the route by which they reached this conclusion differed. The claimant argued that the (English) Private International Law (Miscellaneous Provisions) Act 1995 applied, whilst the defendant argued that Rome II applied. The issue turned on the temporal scope of Rome II.

The defendant contended that Rome II applied to the Claimant's accident, because it post dated August 20 2007 (the date of Rome II's "entry into force"). Rome II was expressed to "apply from 11 January 2009", and since that date had long since passed, the court was bound to apply Rome II. The Claimant, on the other hand, contended that Rome II only applied to accidents which occurred after 11 January 2009, or alternatively only applied with respect to proceedings commenced after that date (the claimant issued his claim form in August 2008).

The matter came before the court on the trial of the preliminary issues of liability and the temporal scope of Rome II. The Judge was persuaded by the evidence that no liability could attach to the defendant's driver. However, the court indicated that, if it had been necessary to decide the issue, it would have held that Rome II only applied to cases where the event in question i.e. the accident occurred after 20 August 2007 and where legal proceedings were issued on or after 11 January 2009.

The claimant made an application to the Court of Appeal for permission to appeal. This was dismissed on 29 July 2011.

8. Concurrent Liability

Robinson v P E Jones (Contractors) Ltd (Court of Appeal)

In December 1991 the claimant entered into a contract with the defendant to build and sell a new build residential property. The property included an NHBC Guarantee and the contract restricted the defendant's liability for defects to both the extent and duration of any liability under the Guarantee. Completion of the house and purchase took place in 1992. Over 12 years later the claimant discovered that the chimney flues had not been constructed properly and proceedings were commenced in 2006.

For limitation reasons, the claimant had to formulate the claim in negligence (taking advantage of the latent damage extension), alleging that the defendant had a concurrent duty of care in tort. As there was no physical damage, the claim was for economic loss.

At first instance, the claim was dismissed. Whilst it was possible for a builder to owe a duty of care to protect a client from suffering economic loss, on the facts no such duty arose.

In the Court of Appeal, Jackson LJ explained that contracts and tort are separate sources of obligations and there is no reason why tort should impose identical duties to those agreed between the parties. The existence of a contract does not prevent a tortious duty arising however. A party will only acquire tortious liabilities through the assumption of responsibility – they are not automatic. Here there was nothing to indicate the assumption of a tortious responsibility. This was put beyond doubt by the contract (which excluded concurrent liability in tort) and satisfied the requirements of reasonableness under UCTA.

This decision has therefore clarified the position following opposing previous judgments in cases such as *Tesco v Costain* (2003). There is a crucial distinction in law between a person who supplies something defective and a person who supplies something which, because of its defects, causes harm. The reaffirmation of this narrow interpretation applies not only to construction cases but also to the manufacture of products. A claimant must now show some special relationship if a wider duty is to be imposed.

9. Corporate Manslaughter Act

R v Cotswold Geotechnical Holdings Ltd/Prosecution of Lion Steel Ltd

On 14 February 2011 Cotswold Geotechnical Holdings Ltd became the first organisation to be convicted under the Corporate Manslaughter and Corporate Homicide Act 2007, which came into force in April 2008. The Act introduced the new statutory offence of corporate manslaughter and targets gross systemic failures at senior management level and is intended to facilitate prosecutions by removal of the old common law requirement to identify an organisation's controlling mind.

Alex Wright, a geologist, was asphyxiated when an unsupported 3m trench in which he was working collapsed. In returning a unanimous verdict the jury accepted that the company had been in gross breach of its duty in failing to comply with health and safety guidance to support any trench over 1.2m deep. Mr Eaton, the principal director, who owned and controlled the company had been previously

advised of the need for precautions by the HSE but failed to act upon that advice. Accordingly there were gross failings and these were at the highest management level of the company.

Mr Justice Field, accepting that the company was in a parlous financial state fined it £385,000 payable over 10 years but did not order payment of prosecution costs, although he said that he would have done so had the company been more robust.

On 1 July 2011 the CPS announced that Lion Steel Ltd is to be charged with corporate manslaughter. This follows the death of an employee who fell through a roof panel and died as a result of his injuries. The company also faces charges under sections 2 and 33 of the Health and Safety at Work Act 1974 (HSWA). Three company directors will also face charges of gross negligence manslaughter and charges under section 37 of the HSWA which provides that directors or officers of a company can be prosecuted for the same HSWA offence as the company if that offence is proved to have been committed with their consent or connivance or attributable to any neglect on their part.

10. Credit Hire

Chen Wei v Cambridge Power and Light Ltd

This case has provided the first guidance on the Cancellation of Contract Regulations 2008 and their likely interpretation by the courts, in the context of the validity of credit hire contracts, including dismissing some of the potential challenges.

The Regulations came into force on the 1st October 2008, and apply to all agreements made after that date. Credit hire agreements will be caught by the Regulations if:

a) The agreement is “made” during a visit by the hire company to the claimant's home or place of work or to the home of some other individual, or during an excursion organised by the hire company away from their business premises, or after an offer made by the claimant during such a visit or excursion (reg. 5);

b) The agreement is not regulated by the Consumer Credit Act 1974 (reg. 6), by exemption or otherwise.

If the Regulations apply, the credit hire company is obliged to give the claimant written notice of his right to cancel the agreement and the notice must be given at the time the contract is made (reg. 7(2)) and the notice must contain certain specified information (reg. 7(3)).

Here the court determined 3 key issues:

1. Did the Regulations apply to the credit hire agreement;

2. Was the agreement enforceable between the hirer and credit hire company; and

3. Was the claimant entitled to recover the amount from the defendant, irrespective of the enforceability of the agreement between the hirer and credit hire company.

On the first issue, the Judge was clear that the Regulations applied. The preceding telephone interaction between the parties did not establish the point of contract for the purposes of the Regulations; rather the contract was made at the claimant's home at the time when he signed the written agreement.

The starting point for consideration of the second issue was whether, having established that the Regulations applied, they were complied with. It was not argued that the claimant had ever been provided with the requisite notice of cancellation and, as such, the agreement was found to be unenforceable between the claimant and the credit hire company. The claimant sought to advance a (new) argument promoted by the credit hire company, that the very continuation of the contract was such an affirmation of acceptance that the issue of the notice was irrelevant or should not apply.

Looking at the onerous obligations set out in the Regulations, amongst them criminal sanction for failure to provide appropriate notice, the court found – looking towards public policy – that this argument should fail.
The Judge found the agreement unenforceable and went on to address the further argument that a "liability" to repay may still arise, even if "enforceability" was not proved, dismissing it as irrelevant semantics.

In determining the third issue the Judge looked to the principles established in *Dimond v Lovell,* and found that the sums purportedly due under the agreement (which was deemed to be unenforceable between the parties) were not recoverable as a head of damages in tort.

He also went on to reject an argument that because a claim for loss of use as a head of general damage would undoubtedly subsist, sums could be awarded in lieu in respect of the claim for special damages quantified and particularised as credit hire charges.

W v Veolia Environmental Services (UK) Plc

Following the decision in *Chen Wei v Cambridge Power and Light*, defendants here enjoyed success in applying the Regulations and defeating claims. Credit hire companies sought to "meet fire with fire" by having policies of insurance issued to hirers at the time hire commences. These policies provide an indemnity for the credit hire charges outstanding at the end of the hire period or not met in full, in effect insuring the risk that the cost of hire is irrecoverable. Typically no premium is paid by the hirer up front.

Where allegations have been raised that claims fall foul of the Regulations, insurers have paid the hire charges to the credit hire organisation and then sought to pursue the negligent driver for the hire cost using their rights of subrogation.

The claim in this case involved a dispute for credit hire charges for a Bentley totalling £138,000. While the case dealt with other issues, the issue of most interest to defendant insurers is whether the device of insuring the late or non payment of credit hire charges can be used to circumvent the need for compliance with the Regulations.

The claimant was provided with a replacement vehicle by Accident Exchange who arranged for it to be delivered to his home where he signed a credit hire agreement and insurance application form. When the repair period exceeded the stipulated 85 day hire term a second agreement covering the later period was provided by post. The insurance policy provided an indemnity of up to £100,000 for legal costs and Accident Exchanges' charges.

Upon the defendant arguing that the claim should fail due to non-compliance with the Regulations, a claim form was submitted by Accident Exchange to the insurer and a payment made under the policy for the full amount, some £38,000 in excess of the limit of indemnity. A subrogated claim was then pursued for recovery of the entire hire cost.

The issues considered

- Were the two hire contracts compliant with the regulations?
- If there was non-compliance, did the payment of the hire charges by the insurer circumvent the breaches and allow recovery of the hire charges?
- Were subrogation rights available where the sums insured were credit hire charges?
- Was there a "double recovery"?
- Could the 'overpayment' of £38,000 be recovered?

The Findings

- The first contract was not compliant with the Regulations but because payment had been made for

- the charges (in this case by the insurer) the hire charges were nevertheless enforceable.
- The second contract was compliant with the Regulations and so no issues arose as to subrogation.
- Rights of subrogation apply to insured credit hire charges just as they apply to any insured loss, provided payment is evidenced.
- There were no issues of double recovery as the claimant would have to pass any payment received to the insurer.
- Although the overpayment by the insurer of £38,000 above the £100,000 limit of indemnity was not considered to be a good faith payment of the claim made under the policy, the full amount was nevertheless considered to be recoverable. The entire £100,000 was attributed to the first (non-compliant) agreement with the remaining £38,000 attributed to the second (compliant) agreement. Therefore the entire costs of hire were recoverable.

11. Defective Premises Act

Jenson v Faux (Court of Appeal)

The claimants bought a house in 2007 which had been extensively redesigned by the previous owners who had instructed the defendant to project manage the work. The work included extending the loft, changing the layout of rooms on the first floor, extending the kitchen into the side return, digging out the coal cellar and excavating a basement room. The claimants alleged that the basement was not waterproofed properly and had caused flooding and sued the defendant under the Defective Premises Act 1972, having no contractual arrangement with him.

The defendant issued an application for summary judgment maintaining that s. 1 of the 1972 Act only applied to the provision of a new dwelling and on the facts the house was the same dwelling both before and after the works.

The Court of Appeal held that this was an issue that could be dealt with summarily (expert evidence before a trial judge would not assist) and accepted the defendant's argument. Whilst there was a grey area within which it would genuinely be arguable that a dwelling had changed to the extent that it had a different identity, extension works or refurbishment would have to be much more substantial than in this case. The extent and cost of the works would not be decisive.

This is the second recent decision on the 1972 Act, see *Bole v Huntsbuild* (2009), and indicates a renewed interest in the cause of action. It follows the earlier unreported Court of Appeal decision in *Saigol v Cranely Mansions* (1985). Specific mention is made in the current judgment that these cases have been overlooked in the current edition of Clerk & Lindsell on torts.

12. Double Insurance

SHC Capital v NTUC Income Insurance Co-Operative Ltd

In this case from Singapore, an employee was injured at work and there was possible double insurance by the two parties in the litigation. SHC's policy excluded liability where there was any other policy in force, which in this case was the NTUC policy. NTUC however refused to indemnify the insured and SHC therefore paid out the full sum. SHC sought to recover the full amount of its payment from NTUC but the latter argued that they had paid as a volunteer and therefore could not recover.

It was held that SHC was not precluded from seeking reimbursement from NTUC. SHC had sought to persuade NTUC to pay but had been faced with a total refusal and therefore had made payment as a matter of "practical necessity", dealing with the claim expeditiously and avoiding damage to its business reputation. It followed that SHC had not paid as a volunteer.

If this approach is followed, it is vital that insurers pay under protest, arguing against liability consistently throughout the process.

13. Economic Loss

Linklaters Business Services v Sir Robert McAlpine Ltd and Others

A leak from the chilled water pipework of the air conditioning system in offices occupied by Linklaters led to the discovery of extensive corrosion caused by the failure of insulation around the pipes. One of the issues to be decided was whether the specialist insulation sub-sub-contractor owed a duty of care to the occupier of the building for the damage.

The 1991 House of Lords decision in *Murphy v Brentwood* established that where damage is to the building itself, that damage is to be treated as economic loss and irrecoverable in the absence of a contractual or other special relationship. The sub-contractor contended that a duty of care could exist where there was damage and it was not to work or materials or elements of the building actually provided by the sub-sub-contractor. The sub-sub-contractor argued that one should not differentiate between two components (insulation and pipework) which go to make up one installation (the insulated chilled water pipework). Damage to the pipework was therefore damage "to the thing itself" and could not give rise to a cause of action in negligence.

In an earlier application, Mr Justice Akenhead had not been prepared to grant summary judgment in favour of the sub-sub-contractor. Although his findings on this issue were obiter, Mr Justice Akenhead now agreed with the sub-sub-contractor that the insulated pipework was in effect "one thing" and no cause of action arose in tort between the sub-sub-contractor and the occupier.

Network Rail Infrastructure Ltd v (1) Conarken Group Ltd and (2) Farrell Transport Ltd (Court of Appeal)

Network Rail brought claims against the employers of heavy goods vehicle drivers who negligently caused physical damage to a bridge over a railway line and to electrical equipment at a level crossing owned by Network Rail. The defendants admitted liability and agreed that they should pay damages for the cost of and occasioned by the repairs. They took issue, however, with the claim for damages in relation to the sums paid to train operating companies as compensation under Track Access Agreements for the time that the railway lines were unavailable after the accident.

The Court of Appeal dismissed the appeal, holding that the losses claimed were a direct consequence of the damage and reasonably foreseeable. Loss of income consequent on damage to revenue earning property was flagged up by Jackson LJ as a well established category of recoverable economic loss. However, Network Rail could not simply dictate in the contract the sums to be paid, rather the sums sought had to be tested according to tortious principles. On the facts, the agreements had been drafted responsibly and with a view to achieving a fair result in the public interest and the appellants were liable for the compensation that Network Rail had had to pay to the train operating companies.

14. EL/PL

Dalton v NCC (Court of Appeal)

The claimant brought a claim against the local authority for an injury suffered when she fell over a loose, raised and wobbling paving block. The council sought to defend the claim on the basis that the height differential of the block (19.1 mm) meant that it was not dangerous and that in any case, under s.58 Highways Act 1980, they had taken all reasonable care to ensure the area was not dangerous (they had inspected the area 9 days before the accident albeit they had not noticed the block's instability). The Court of Appeal upheld the decision at first instance that the block was dangerous because of a combination of the height differential and its potential to wobble. They also held that a s.58 defence was not established due to the level of usage of the area and the inadequacy of the council's pre-accident inspection.

This case is a useful reminder that height differentials are not the only consideration for highway authorities when deciding whether or not to undertake repairs. Other factors, such as instability, should also be taken into account and inspectors should ensure that sufficient attention is given to any combination of defects, especially in areas of high vehicle and pedestrian usage.

Desmond v Chief Constable of Nottinghamshire (Court of Appeal)

The case concerned an application for an enhanced criminal records certificate by Mr Desmond. He had been arrested in connection with a complaint of sexual assault because he was identified as the man who had asked the victim for directions a short time prior to the assault and it was possible that the attacker was the same man. However, no positive identification to this effect was made and it was clear that, in the absence of any other evidence linking Mr Desmond to the attack, any case against him would fail on the basis of identification. In addition the investigating officer had reached the view that Mr Desmond was not responsible for the crime. When Mr Desmond later requested an enhanced criminal record certificate (under Part V of the Police Act) as he was seeking employment as a teacher, the chief constable exercised his discretion under the Act to authorise disclosure of the fact that he had been arrested but not charged, stating that this was because there had been insufficient evidence to proceed. There was no reference to the fact that the police had, in fact, concluded that Mr Desmond was not responsible for the crime, because the chief constable did not himself see that information. Mr Desmond issued a claim in negligence against the chief constable for the disclosure given.

There is a general principle of public policy that, in the absence of special circumstances, the police do not owe individual members of the public a common law duty of care when performing their operational duties of investigating, detecting, suppressing and prosecuting crime. The county court struck out the claim in negligence but the high court allowed the appeal in part, on the basis that the police had assumed responsibility to Mr Desmond to take reasonable steps to collate all the information available in order to make a decision on disclosure in the light of all relevant information.

It was held by the Court of Appeal that there was no duty of care, the decision being based on the statutory nature of the functions being carried out. The court stated the general principle that *"If the statute does not create a private right of action, it would be unusual, to say the least, if the mere existence of the statutory duty could generate a common law duty of care. The existence of a broad public law duty alone can scarcely give rise to a common law duty of care owed to an individual".* There are special cases in which a duty of care exists alongside the existence of a statutory framework for the actions. However, this was not such a case. There were no "special facts" suggesting that this particular chief constable had assumed responsibility to Mr Desmond in particular. The statute did not provide for a remedy in compensation or damages for breach of the statutory duty – indeed the court considered that:

"the structure and purpose of the statute strongly suggests that there should be no duty of care. If there were, there would be a plain conflict between the chief officer's putative duty to Mr Desmond and the statutory purpose of protecting vulnerable young people". In other words, there was nothing about this case which made it special or created a special assumption of responsibility – it was simply a case of operating a statutory framework.

There does not seem to be much doubt that Mr Desmond was badly done by and that the chief constable's decision within the statutory framework was not of a high quality. The chief constable had not fully investigated the basis of the earlier conclusion that there was "insufficient evidence to proceed" against Mr Desmond before authorising the disclosure, and the Court of Appeal thought this would have been an "arguable breach" of duty IF a duty of care had existed. However, a negligence claim was not the appropriate method for pursuing Mr Desmond's concerns about his treatment. In reaching its conclusion on the duty of care, the court was influenced by the possible availability of other remedies, and it should be noted Mr Desmond is still pursuing claims for breach of Article 8 ECHR and the Data Protection Act. The court also noted that he might have had more success if he had issued an application for judicial review rather than a negligence claim.

Dowson and Others v Chief Constable of Northumbria

The claimants raised allegations of harassment to prove a breach of the Protection from Harassment Act 1997. The court applied the test of whether the behaviour complained of had moved from being unattractive and unreasonable to oppressive and unacceptable. The behaviour was found not to have crossed the threshold and therefore all the claims were dismissed.

Kim Ali v City of Bradford Met DC (Court of Appeal)

It was the Court of Appeal's finding that a highway authority will not be liable for breach of statutory duty under Section 130 of the Highways Act 1980 and/or in nuisance for an accident suffered by a member of the public on a public footpath as a result of slipping on an accumulation of mud and debris. Mrs Ali's claim was therefore dismissed.

Scout Association v Mark Barnes (Court of Appeal)

The Court of Appeal determined that when assessing breach of duty, the question of whether a defendant took "such care as in all the circumstances of the case was reasonable" depends not only on the likelihood that someone may be injured and the seriousness of such injury which may occur, but also the social value of the activity which gave rise to the risk and the cost of preventative measures. All these factors need to be balanced against each other. The Scout Association's appeal was dismissed as it was found that the risk of injury to boy scouts playing a game which required them to run and locate objects in the dark far outweighed the social value of the game.

Uren v Corporate Leisure (UK) Ltd and Others (Court of Appeal)

The Court of Appeal advised that sporting activities, such as team games undertaken as part of a fun day, were almost never risk-free and a balance had to be struck between the level of risk involved and the benefits the activity conferred on the participants and thereby on society generally. In this case, the claimant had suffered serious personal injury after diving head first into an inflatable pool as part of a relay game. The court found that his employers and the organisers of the event, the MOD and Corporate Leisure (UK) Limited who supplied the equipment and personnel for the series of games were each under a non-delegable duty to the claimant and other participants of the game to take reasonable care to ensure that they were not exposed to an unacceptable risk of serious injury. On the facts, it was clear that both defendants had not carried out a suitable or sufficient risk assessment for the game. A reasonable measure to reduce the risk of serious injury would have been simply to prevent participants entering the pool head first. The claimant's appeal was allowed.

15. Experts

Axa v Allianz Insurance Plc and Others

Axa provided insurance in respect of all risks of physical damage to a road network in Mexico and reinsured 70% into the London market. Surveys were carried out to confirm the quality and maintenance of the road but reinsurers were not satisfied with them. As a result, a clause was inserted into the reinsurance contract requiring Axa to prove that the roads were built to a required standard. During cover, Hurricane Juliette caused considerable damage to parts of the insured road network. Reinsurers subsequently appointed Halcrow to inspect the damaged road. A year later, following arbitration, Axa paid out US$15m. Reinsurers refused cover and Axa commenced proceedings against them.

A dispute arose as to whether reinsurers could assert privilege over three reports produced by Halcrow during the year following the damage, Axa arguing that (1) litigation between Axa and reinsurers was not reasonably in prospect; (2) the documents were not made for the dominant purpose of such litigation; (3) confidentiality in the reports had been lost (one of the reports was already in the hands of Axa, via brokers); and as Halcrow were reinsurers' expert, the court should know Halcrow's views at the time of inspection of the road.

It was held that the litigation was reasonably in prospect, though the case was borderline. The fact that the initial survey had failed was material in making this decision. However, the reports were not privileged as they failed the dominant purpose test. Along with the standard of road building, they were also assessing the extent the hurricane caused damage and verifying quantum, which did not bear on coverage and the dispute.

Even if the reports had been privileged, given that Halcrow had been appointed by the defendants as their experts, the judge commented that documentary evidence of their investigations could not properly be withheld, particularly if that evidence was unhelpful to the reinsurers' case. Their duty as experts would require them to inform the court of any matter known which was inconsistent with or which cast doubt on their expert opinion and he could not see how Halcrow could perform this without reference to the other reports.

In order to retain privilege therefore, it may assist to obtain one report on issues in relation to which litigation is in prospect and another on the rest.

This decision in very much in line with the recent Court of Appeal decision in the personal injury pre action protocol case of *Edwards-Tubb v J D Wetherspoon* (2011) below.

Edwards-Tubb v JD Wetherspoon Plc (Court of Appeal)

In this case the Court of Appeal considered whether a medical expert's report obtained pre-action should be disclosed when a party chooses not to rely on it and seeks leave to rely on the evidence of another expert in the same field.

The claimant suffered a personal injury at work. Before proceedings were issued his solicitors notified the defendants of three possible surgeons they may instruct as expert and invited objections as required under the Pre-action Protocol. The defendants raised no objections and the claimant's solicitors instructed one of the three experts who provided a report in May 2007. That report was never relied on or disclosed by the claimant to the defendants.

When proceedings were issued in October 2008, the claimant served a report from an orthopaedic surgeon who had not been one of the three surgeons notified to the defendants during the protocol period. The defendants applied for disclosure of the previous expert's report on the basis that although they had no right to its disclosure, this should be a condition of the permission the claimant needed under CPR 35.4 to rely on a new expert. The claimant argued that the court's power to order disclosure was limited to changes of expert after the issue of proceedings whilst the defendants submitted that there could be no sensible distinction between a change of expert before and after issue.

An order was made permitting the claimant to rely on the new expert, but the order was made conditional on the disclosure of the unused report of the original expert. On appeal, the judge held that the report was privileged and discharged the condition. The defendants appealed.

The Court of Appeal confirmed the court should usually order a party to disclose an expert's report obtained before proceedings, which it subsequently decided not to use, as a condition for granting leave to that party to use a different expert in the proceedings. This was to prevent expert shopping. There was already authority for this condition being imposed when the original report had been obtained post-issue of proceedings and the court saw no reason to distinguish the position pre- and post-issue of proceedings.

Jones v Kaney (Supreme Court)

The subject matter of this appeal was an earlier claim by Mr Jones who alleged that he was suffering from post-traumatic stress disorder as a result of a road traffic accident in 2001. Jones engaged Dr Kaney, a clinical psychologist, as an expert witness. Dr Kaney was initially supportive of that claim but later went on to sign a joint statement agreeing that Jones was "deceptive and deceitful" which seriously compromised his claim. Jones therefore commenced these proceedings in negligence against Dr Kaney, whose defence was a plea of witness immunity. Blake J in the High Court found

that he was bound by the authority of *Stanton v Callaghan* (2000) but, recognising a point of wider public interest, granted a 'leap frog certificate' for the Supreme Court to determine the matter.

In the leading judgment, Lord Phillips said that he was surprised that expert immunity had not been challenged in the past but concluded that there was "no justification for continuing to hold expert witnesses immune from suit in relation to the evidence they give in court or the views they express in anticipation of court proceedings".

It is likely that expert fees will increase in light of higher professional indemnity premiums. It will also be important to review each expert's terms and conditions, in particular for any limitation or exclusion of liability and it may be worth requiring a minimum level of insurance cover. Experts are now also likely to be more measured in pitching their initial views in order to avoid repercussions later.

16. Fire

Harooni and Federal Motors Manufacturers Ltd v Rustins Ltd

The claimants owned and occupied, respectively, a warehouse located within a complex of others. A fire began in a carpet warehouse belonging to a third party and in turn destroyed the claimant's warehouse (to the north of the carpet warehouse). The claimant brought a claim both in negligence and under *Rylands v Fletcher* against the defendant, the owner of a paint-storage warehouse (to the south of the carpet warehouse), on the basis that the ignition of 200,000 litres of flammable and very flammable materials had caused the fire to spread to its own premises.

Due to errors on the proposal form, the claimants' insurers avoided its policy, leaving the claimants to make a recovery from the defendant, even though it was a fellow innocent victim.

The court held that as a matter of fact the ignition of the claimants' warehouse could not have been caused by the fire at the defendant's warehouse. The origin of the fire was in the third party's premises and was likely to have spread from there directly to the claimants' premises. Even if some fire damage had spread from the defendant's premises, it could not be said that the claimants' premises would not have burned down in any event.

In relation to *Rylands v Fletcher*, the judge affirmed the test that if there was an escape of fire from A's land to B's, that was the result of non –natural dangerous material stored on A's land, A would be liable. Here, even if the claimants had managed to show that the fire had emanated from the defendant, the storage of even highly flammable products did not inevitably render it a "non-natural" use of land. It was common sense that where the defendant was not responsible for the fire and the fire merely passed through or over the defendant's land, albeit burning some flammable material on its way, there was no liability.

Maritsave Ltd v NFU Mutual Insurance Services

The claimant insured its property against all risks, including fire. The property was unoccupied and the claimant warranted that all outside doors and windows would be firmly secured to prevent unauthorised entry. A fire was deliberately started inside the property. Following investigation it was apparent that there were several potential points of intruder entry at the time of the fire, including a door where the bolts were unlocked. It was not possible to determine how long it had been unbolted prior to the fire and the director of the claimant company gave evidence that it had been secured the last time he inspected it. A window was broken and its catch damaged, but again it was not possible to determine whether it had been damaged before the fire or in the process of the intruder gaining access. There was also evidence from a fire-fighter that there was an alternative entry point by the damaged rooflight.

The defendant argued that the claimant had breached its warranty by failing adequately to secure either the door or window. However, the court accepted the witness evidence and there was no evidence that the window catch had been broken before the fire. The defendant therefore failed to establish the alleged breach of warranty.

This judgment underlines the onus on insurers to prove a breach of warranty and that it is not to be undertaken lightly. Contemporaneous evidence gathering in such a scenario is vital.

(1) Trebor Bassett Holdings Ltd and (2)The Cadbury UK Partnership v ADT Fire And Security Plc

This case concerned a recovery action for substantial losses arising from a fire at a Cadbury popcorn factory in 2005 and related solely to issues of liability. Mr Justice Coulson in the Technology and Construction Court decided that the design of the CO_2 fire suppression system in the factory was flawed. It was held that the system was inadequate and that the supplier, ADT, was in breach of contract – specifically an implied obligation to exercise skill and care when designing the system.

The court held that the claimants' standard terms and conditions applied and therefore the standard terms and conditions of ADT (which purported to limit its liability to a nominal value) were not applicable.

It was also decided that a number of acts and omissions by the claimants were significant and contributed to the loss. In particular, Coulson J identified the lack of effective fire segregation as well as the decision not to install sprinklers and, as a result, he reduced the amount of damages recoverable from ADT by 75%.

Beachcroft acted on behalf of the claimants.

17. FOS

Andrews v SBJ Benefit Consultants

The claimant had been a member of an occupational pension scheme. The defendant financial services firm advised him to transfer his pension benefit into a personal scheme, which he duly did. It was undisputed that Mr Andrews would have been better off had he not followed that advice. SBJ Benefit Solutions therefore agreed to pay him compensation, but the parties could not agree on the redress calculation. Mr Andrews therefore submitted a complaint to the FOS. An Ombudsman determined that SBJ Benefit Solutions should pay £100,000 in compensation, being the current upper limit for an award under the scheme. He also made a non-binding recommendation that the balance over and above the award, on a proper calculation, should also be paid to Mr Andrews. That award was open to acceptance by Mr Andrews for one month. On acceptance, it would become binding on the firm up to £100,000. Mr Andrews was warned by the FOS that he might be precluded from bringing court proceedings for the balance if he accepted the award. He did so and that was the preliminary issue which was to be determined by the court.

His Honour Judge Pelling, QC, held that the FOS is akin to a court or tribunal and that its final awards are judgments for the purposes of the application of the "merger doctrine". As such, a claimant's right to bring legal proceedings, on the same facts, is extinguished once he has accepted the ombudsman's award. The doctrine only applies once a complainant has accepted an ombudsman's final determination. In other words, it remains open to the complainant to seek an award from the FOS and look to agree terms of settlement with the relevant firm on the element of any non-binding recommendation before deciding whether to accept. The complainant may subsequently seek any recovery in court, so long has he has not first accepted the terms of the award. Otherwise, it becomes final and binding on both parties and therefore acts as a bar to any subsequent civil claim. The court refused Mr Andrews permission to appeal.

18. Fraud

Aviva Insurance Ltd v Roger George Brown

Following claims for subsidence, for which insurers paid over £176,000, the defendant policyholder stated that he could not live at the property (13 Friern Barnet Lane) due to chronic asthma, providing a GP certificate in support. He therefore sought the cost of renting alternative accommodation.

The policyholder obtained a valuation of the rent payable for another property (no 38) and sent it to insurers, commenting that he had "spoken to the agents who have been in touch with the owner". The policyholder in fact owned that property. The property was not agreed. The policyholder then suggested moving into the neighbouring property (no 15). This was again owned by a company of which the defendant was director and majority shareholder. Subsequently, title was transferred to the defendant and the company granted a lease. The policyholder arranged to sublet the property and insurers paid over £58,500 for alternative accommodation. Insurers alleged fraud on the basis that the policyholder owned no 38 and could have lived there for free. Further, the tenancy agreement between the company and the policyholder for no 15 was false as the policyholder was in charge of the company and his majority shareholding had not been disclosed.

The issue was whether the policyholder had acted dishonestly, both objectively by the ordinary standards of reasonable people and subjectively, realising himself that such conduct was dishonest (the *Twinsectra Ltd v Yardley* test). In relation to no 15, whilst the court was prepared to accept that the policyholder had been objectively dishonest, the court accepted the policyholder's evidence that he thought that the company was a separate legal entity and he was entitled to rent the property from it. The policyholder thought, correctly, that he had told insurers of his interest in no 15 (in relation to access for the remedial works) and he had therefore not realised himself that he had acted dishonestly.

However, in relation to no 38, it had been falsely represented that the owner was someone other than the policyholder and the court was satisfied to a high degree of probability that the policyholder himself realised that what he was saying was dishonest. This amounted to fraud and the whole claim was forfeited including the genuine cost of repairs for subsidence. It was irrelevant as a matter of law that no 38 had not been pursued as a viable option. The claimant insurer could therefore recover the sums already paid.

Daniel Locke v James Stuart and AXA

In this case the court recognised the importance of allowing evidence from Facebook and other social networking sites to be put before it in fraud cases.

The court gave guidance that such evidence should be in a short, relevant summary, identifying which facts are in dispute, in order to avoid too much documentation being placed before the court.

The linking evidence that can be obtained through social networking sites is often key to defeating suspected staged accidents and this guidance will therefore be crucial to the future case management of fraud cases.

Edward William Nield and Acromas Insurance Co Ltd v Graham Loveday and Susan Loveday

The claimant brought a personal injury action following a road traffic accident. In signed statements of truth he claimed that the accident had caused him a painful soft tissue injury to his neck and lower back and that as a result he could not work or drive, was often reliant on a wheelchair as he could hardly walk, had great difficulty with stairs, had to be cared for by his wife all the time, feared going out and particularly travelling by car, and could no longer go caravanning or work on cars or engines as he had done. However, surveillance footage from a private investigator appeared to show that he was far more active and able than alleged and his claim had been grossly exaggerated.

The courts committed the claimant to prison for nine months for contempt of court and his wife, who had verified false statements to support his claim, admitted her contempt and was given a suspended six-month sentence.

Goldsmiths Williams v Travelers Insurance Company Ltd

The claimants sought to recover directly from a company's liability insurers, having obtained judgment against the liquidated company following two counts of mortgage fraud. Insurers sought to rely upon a fraud clause which exempted them from liability in the case of loss arising from dishonesty or a fraudulent act or omission committed or condoned by all of the directors of a company. It was common ground that one of two directors had been fraudulent on both counts of mortgage fraud. The other director had been fraudulent in respect of the first loan but not the second, although he had been generally aware of and had condoned the first director's fraud over a period of years.

It was held that the correct interpretation of the policy was that the second director's knowledge of a general course of fraudulent activity amounted to condoning specific acts of fraud arising from that conduct even though he was not actually aware of those specific acts. On that basis the fraud exception applied to both frauds.

Imtiaz Ahmed v Steven Elliott and Road Range Accident Assistance

In this case the judge made a finding of fraud, on the basis that no vehicle was ever hired out to the claimant by Road Range Accident Assistance, an accident management company, and the claim for hire charges was therefore false.

Further, as a result of Road Range being a party to the instigation of the false claim, a non-party costs order was made against them and they have now paid some £26,000 in costs, against an initial damages claim from the claimant, Imtiaz Ahmed, of little more than £2,600. This decision is important as it sends out a strong message to accident management companies that act in bad faith and shows that the courts are willing to punish them in terms of costs.

Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd

The claimant insured industrial premises in Blackpool with the defendant, the policy containing the following fraudulent claims clause:

"We will at our option avoid the policy from the inception of this insurance or from the date of the claim or alleged claim or avoid the claim:

a. If a claim made by you or anyone acting on your behalf to obtain a policy benefit is fraudulent or intentionally exaggerated, whether ultimately material or not or
b. A false declaration or statement is made or fraudulent device is put forward in support of a claim."

A fire occurred at the premises and a claim was notified to Aviva for over £2m. Insurers were held to be entitled to avoid the policy on the following three grounds:

1. During the currency of the policy, the claimant had made a fraudulent claim in respect of damage to a drain, exaggerating the repair costs by some £2,500 and using a fraudulent invoice which incorrectly stated that the invoice was "paid in full with thanks". Under the fraudulent claims clause, the entire claim was lost and the policy could be avoided ab initio.

2. The claimant had failed to disclose to the defendant at inception that the principal shareholder and director of the claimant company had made a fraudulent claim against a prior insurer, having taken out a policy on property which had to their knowledge already been damaged by flood and then submitting a flood claim.

3. The claimant had failed to disclose that the principal shareholder/director had made a series of false statements, or had failed to disclose material facts, to other insurers in earlier years. In particular, he had failed to mention a criminal conviction and it was held that the non-disclosure of that conviction to an earlier underwriter remained a material fact for the present insurers even though the conviction itself was spent and did not of itself have to be disclosed to the present insurers under the Rehabilitation of Offenders Act 1974.

This decision is of particular interest in light of the recent issue paper from the Law Commission on the remedies for fraud. Whilst there was here an express fraud provision allowing for avoidance of the whole policy, the current common law position is that an insured does not forfeit monies already paid out to it in respect of prior honest claims. Our understanding is that there is considerable support from the market for avoidance as a remedy for fraud and we may therefore see more broadly worded express fraud clauses providing such a remedy.

Noble v Owens

The claimant had been seriously injured in 2003 when his motorbike collided with a car driven by the defendant. There was no dispute as to liability and in March 2008 the defendant was awarded £3.4million in damages. This award was based on the severe impairment of his mobility, which was supported at the time by medical opinion stating that it was unlikely that his condition would improve. The claimant expressed his intention to use the compensation to provide services for his future care, but instead purchased a property with adjoining land. He caused disharmony with his neighbour, who discovered that he had received a large insurance pay out and contacted the Insurance Fraud Bureau (IFB) to report that he was not disabled. The IFB then contacted the defendant's insurers who instructed surveillance to be carried out on the claimant. He was observed carrying out various activities without mobility aids. As a result, the defendant obtained an ex parte injunction freezing most of Mr Noble's damages. The issue of fraud was subsequently referred back for trial.

The burden was on the defendant to prove that the claimant had dishonestly and knowingly misrepresented the extent of his disability in order to obtain a substantial part of the damages. The standard of proof was the balance of probabilities, although the more serious the allegation the stronger the evidence needed to be. Evidence from the medical expert was again sought and he contended that although it was unusual, some patients did make slight improvements a few years after surgery. The claimant's wife stated that he was not capable of carrying out the observed activities on a daily basis and the reason for his apparent improvement was his over-reliance on painkillers. It was also noted that the claimant was not seen walking un-aided prior to the first hearing in 2003. It was concluded that although the claimant had not used his damages to acquire the services and facilities for which they were awarded, which did count against him, it did not follow that he had therefore dishonestly misrepresented the true extent of his disability. The re-assessment of damages was therefore dismissed.

This decision highlights the difficulties that insurers face in seeking to prove fraud. This should not preclude pursuing such action (see *Zurich Insurance Co Plc v Hayward* below) but rather serve as a reminder for the need for very carefully prepared evidence.

Sharon's Bakery (Europe) Ltd v (1) Axa Insurance UK Plc (2) Aviva Insurance Ltd

The claimant suffered a fire at their bakery. Some of the equipment damaged had come from a related company. The claimant had obtained finance to acquire the equipment through a finance company which had requested an invoice from whoever had supplied the related company. A false invoice was created for this purpose. A second false invoice was created after the fire showing sale of the equipment from a bakery equipment supplier to the claimant.

Insurers succeeded in avoiding the policy on two grounds. Firstly, there had been non-disclosure relating to the use of the invoice in the finance transaction which constituted a moral hazard which it was material for insurers to know. The court rejected the claimant's contention that the invoice provided to the finance company was merely put forward as a valuation of the equipment. Further, the second invoice amounted to the use of fraudulent means or devices which, if believed, would have yielded a not insignificant improvement in the claimant's prospects.

Yeganeh v Zurich Plc (Court of Appeal)

The claimant claimed under his household insurance policy following damage to his property and its contents by fire. A schedule of contents had been submitted, including a number of expensive clothing items. A supporting statement as to the existence and purchase of these items was provided by a third party, who had intermittently shared the claimant's flat and gone clothes shopping with him. The defendant insurer's expert had found little to no trace of the claimed items on inspection, but the claimant's expert, months later, found numerous traces of clothing not identified by the defendant's expert. At trial the defendant raised the contention that the claimant must have "directly or indirectly" planted those clothing traces to support a false insurance claim. This was accepted by the judge.

The claimant appealed and the Court of Appeal determined that if the claimant had made a false insurance claim then the third party must have been complicit in this. Therefore it was incumbent on the judge to make the necessary and crucial finding of fact as to the dishonesty or otherwise of the third party's evidence, which he had failed to do. Secondly, the theory that the traces of clothing had been planted left a number of questions unanswered that had not been investigated by the experts and the judge had erred in accepting the suggestion that the traces of clothing had been planted without sufficient analysis of how this might have been achieved. The appeal was allowed and the claim has been remitted for rehearing.

Beachcroft acted for the defendant.

Zurich Insurance Co Plc v Hayward (Court of Appeal)

In 2003 Mr Hayward made a personal injury claim against his employer which was settled at £135,000. The settlement was by a Tomlin Order and so was concluded without the input or decision of the court. New evidence subsequently arose which showed that the activities performed by the claimant in his own back garden contradicted the picture he painted on medical evidence. Therefore Zurich commenced a recovery action against Mr Hayward, alleging that he had made fraudulent representations which had induced Zurich to make a settlement offer substantially higher in value than it would otherwise have been.

Zurich's claim was initially struck out on the basis that settlement had been made by Tomlin Order and was indistinguishable from a consent order. It was said that such an order carried with it judicial sanction and the authority of the court and it was therefore not possible to revoke such a settlement or to re-open litigation on the matter.

This decision was successfully appealed by Zurich. The appellant was not prevented from alleging the settlement was obtained by fraud and the action was not an abuse of process as the appellant was acting in response to fresh evidence. The Court of Appeal held that because the Tomlin Order was not the result of judicial decision, but was a compromise between the parties, it could be re-opened in the event that one of the parties had been induced to enter the agreement through misrepresentation or fraud. Therefore it could be set aside where, whilst fraud was suspected prior to the compromise of the claim, sufficient evidence only came to light after settlement and payment.

Beachcroft acted on behalf of Zurich.

19. Legal Expenses

Stark v DAS Osterreichische Allgemeine Rechtsschutversicherung AG (ECJ)

In May 2011 the ECJ handed down judgment. Two points of Austrian law were relevant: 1) that legal expenses insurance contracts may state that a policyholder can only select lawyers who have their chambers in the geographical location where judicial proceedings are to be conducted; and 2) that lawyers in certain ancillary services in civil law disputes are remunerated by a flat fee. That fee is doubled if the service is provided outside the lawyer’s geographical location.

Mr Stark was the policyholder under a legal expenses policy provided by DAS. He brought an employment claim against his former employer in the Labour and Social Security Court in Vienna. Mr Stark lived approximately 600km away from Vienna and instructed a lawyer local to him. He made a claim under his legal expenses policy and DAS paid his lawyer €5,782.19 by reference to the single flat rate not the double flat rate. DAS also made an application seeking an order that Mr Stark pay the premium of €211.46 due under the policy. Mr Stark made a counter-claim for €3,000, being the balance between the single flat fee DAS had paid and the double flat fee which his lawyer charged and which was not paid by DAS.

Mr Stark ultimately asked the European Court of Justice to decide whether the restriction placed on legal expenses policyholders by Austrian law was contrary to Article 4(1) of Directive 87/344/EEC which guarantees freedom of choice of lawyer.

The ECJ ruled that the question at issue was not, in fact, a question pertaining to the freedom of choice of lawyer, but instead on the scope of cover available under an insurance policy and that such a question is not subject to the Directive. It noted that Mr Stark had been able to select his lawyer freely but that did not mean that the insurer was required to reimburse all the lawyer's fees, regardless of geographical location.

The Court did note however that this should be *"on condition that that freedom is not rendered meaningless. That would be the case if the restrictions imposed on the payment of those costs were to render de facto impossible a reasonable choice of representative by the insured person."*

English legal commentators (particularly those who want to see unrestricted freedom of choice pre-proceedings) tend to misinterpret both this decision and the *Eschig* decision from 2009. Both in fact arguably support the current position in England and Wales, that freedom of choice is restricted prior to issue of civil proceedings.

20. Limitation

AB v MOD, The Nuclear Test Veterans Litigation (Court of Appeal)

This case concerned claims by a group of ex-servicemen (the so-called nuclear test veterans) for damages against the Ministry of Defence for alleged exposure to ionising radiation during nuclear tests carried out in the 1950s. The Court of Appeal ruled unanimously that the claimants were outside the time limit for bringing their claims as they had had enough knowledge of their injury to start investigations much sooner. On causation, it concluded that there was no prospect of the claimants being able to demonstrate that exposure to the radiation had more than doubled their risk of developing cancer which was required to satisfy the "but for" test. Note this decision was prior to those in *Sienkiewicz* and *Willmore*. The claimants were granted leave to appeal to the Supreme Court at the end of July 2011.

Renwick v (1) Simon & Michael Brooke Architects (2) Attwell & Associates (3) Aquarend Ltd

In 2000, the claimants engaged architects (D1) and structural engineers (D2) to extend and refurbish the claimant's home including constructing a large waterproofed basement room beneath the garden. The structural work was commenced and finished in 2001, but the room subsequently suffered significant flooding in March 2002. D1 and waterproofing contractors (D3) were then alleged to have given negligent advice on the use of remedial internal rendering which was completed in 2002. Minor damp problems remained and in 2008 the problem had again become serious. The claimants finally began proceedings in 2010. D2 applied for summary judgment on the basis that the claims in contract and tort against it were statute barred on the basis that any claim in contract ran from the date of the breaches which had all occurred no later than 2002 and that any claim in tort ran from the date when serious flooding first occurred between 2001 and 2002.

It was held that by 2002 the claimants had the requisite knowledge of sufficient material facts under s14A Limitation Act 1980 (in relation to negligence) to start the claim; they could have started collecting evidence and taking advice. The time limit on the claim therefore started running from this

point and so by 2010, the claim was statute barred. However, if the claimants could amend their proceedings to claim negligent advice by D2 in relation to the remedial waterproof render, then time would not start to run until there was the requisite knowledge for bringing an action in relation to that further damage and that claim may fall within the limitation period.

A similar decision was also reached in April this year in *Clinton Eagle v Redlime Ltd*, where a claim was barred as time had started running when the claimant gained sufficient knowledge that there was a real possibility that cracking to the walls of dog kennels and sinking of the drainage system was attributable to the defendant's construction of the concrete base. He had referred to a "subsidence problem" and sought legal advice more than three years earlier, even though he did not get his own structural engineer's report until within the three year period.

21. Motor

Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims (ECJ preliminary view)

On 6 September 2011, Advocate General Mengozzi of the European Court of Justice, on referral from the Court of Appeal, gave an opinion on the conjoined cases of *Wilkinson v Churchill* and *Evans v Equity Claims Limited* which concerned the statutory liability of an insurer to meet a judgment against a driver not insured under the policy. In both cases the insured was injured whilst a passenger in a vehicle driven, with the insured's permission, by someone whom the insured knew to be uninsured.

In both cases the insurers accepted that by virtue of s.151(5) of the Road Traffic Act 1988 (RTA) they were liable to compensate but argued that they could reclaim that compensation from their insured by virtue of s.151(8). This section allows an insurer to recover any compensation it is bound to pay as a result of s.151(5) from the insured provided he 'caused or permitted' the use of the vehicle involved. The question is whether this right of recovery can be exercised when it is the insured who is the claimant. In *Wilkinson* the judge held there was no right of recovery, whilst in *Evans* the court found that there was.

The Advocate General concluded that what insurers sought to do was contrary to Article 13(1) of the Sixth Codifying Directive as, in accordance with that Article, insurers are only permitted to exclude claims by victims who know the vehicle to be stolen. He emphasised that the Directive had the intention of protecting victims and that the Directive did not distinguish victims who had a contractual relationship with insurers.

In accordance with Article 10(2) of the Sixth Codifying Directive, it was acceptable for victims' claims to be excluded when the vehicle was uninsured and the victim knew the vehicle to be uninsured i.e. particularly claims brought in accordance with the Uninsured Drivers' Agreement 1999. Perhaps surprisingly, the Advocate General thought that such cases would be exceptional and that Articles 10(2) and 13(1) were in no way incompatible with each other.

The ECJ is likely to make a ruling within the next six to 12 months and it is usual for the court to follow the opinion of the Advocate General. Thereafter the Court of Appeal will either (a) apply the ECJ's ruling according to domestic law, by interpreting s.151(8) in accordance with the Sixth Directive or (b) hold that whilst the Road Traffic Act 1988 is not in accordance with EU law, insurers are not required to pay the claims, leaving the claimants to seek redress against the government in accordance with *Frankovich v Italy* (1992).

22. Noise Induced Hearing Loss

Baker v Quantum Clothing Group (Supreme Court)

The Court of Appeal had caused considerable concern among those who have employed or insured noisy work environments as it had applied a wider interpretation of s.29 Factories Act 1961. The Supreme Court overturned the Court of Appeal’s decision and clarified the correct approach to the question of 'safety' within the meaning of the Factories Act. It made clear that there is no such thing as an unchanging concept of safety. In doing so it has ensured that before a work place is deemed

unsafe, there should first be a thorough examination of the state of knowledge at the time, not just an assessment of the statistical risk.

23. Non-Disclosure

Garnat Trading and Shipping (Singapore) Ltd and Another v Baominh Insurance Corporation (Court of Appeal)

The claimants sought damages against the defendant insurance company following the loss of a floating dock and workshop which sank in the course of a voyage from Russia to Vietnam. A towage plan was prepared and approved, certifying the force of wind and height of wave that the floating dock was able to withstand (the technical information). On the voyage, the dock encountered a typhoon with conditions in excess of the towage plan limitations without suffering significant damage but a few

days later a tropical storm caused severe damage, requiring the dock to be abandoned. Insurers submitted that they were entitled to avoid the policy because there had been non-disclosure of the technical part of the towage plan. (They also argued that the dock was unseaworthy, in breach of the implied warranty of seaworthiness.)

It was held that the towage plan and technical information contained within it had in fact been disclosed and that there had been a fair presentation of the risk. Clarke J however noted that section 18 of the Marine Insurance Act 1906 (which requires the insured to disclose every material circumstances known to it) did not require "minute" disclosure. Rather, it required the insured to call the attention of the underwriter to the relevant facts and matters in such a way that, if the underwriter desired further information, he could ask for it. On such basis, insurers would have waived the provision of such information if in fact it had not been disclosed.

Further, a warranty that the towage plan was to be inspected and approved by a third party was in every draft of the insurance policy until the very last moment. The draft warranty rendered disclosure superfluous as it indicated that insurers were not relying on the insured to make disclosure to it of the content of the towage plan. The disclosure remained superfluous as the draft warranty was only deleted because insurers were satisfied that the third party had in fact approved the towage plan.

Finally insurers had been unable to show inducement as, if the full information had been provided, they would have insured on the same terms on which they did in fact insure.

This decision was upheld by the Court of Appeal in July.

Clarke J also criticised the lack of written record of key meetings and discussions that took place with underwriters and this plainly did not assist insurers' cause on this occasion. At a time when electronic disclosure is a hot topic (see the CPR section in the main report), it highlights the importance of underwriters recording their discussions and, subsequently, document preservation and retrieval.

The appeal was dismissed in the Court of Appeal.

Sugar Hut Group Ltd and Others v Great Lakes Reinsurance (UK) Plc and Others

The defendants insured the claimant companies under a property insurance policy in respect of four nightclubs, one of which was damaged by fire, although the cause was never ascertained. The defendants argued that they were not on risk as a result of a material non-disclosure that the claimants' predecessors in title had gone into administration due to financial difficulties and that when the policy had been endorsed to refer to new companies, there was not simply a change of name but rather a substitution of new insureds.

The defendants also alleged that the claimants had breached various warranties, namely the requirement: to keep cooking equipment and ducting "free from combustible materials"; that extraction ducts be "checked at least once every six months by a specialist contractor"; that a NACOSS Central Monitoring Station Alarm is installed and operational; and to comply with any risk improvement notices

issued by insurers following the survey. All the alleged breaches were unrelated to the fire in question.

Applying the two stage test in *Pan Atlantic*, it was held that a prudent underwriter would have wanted to know why the claimant companies had been formed, what had happened to the predecessor companies and why they were no longer to be the subject of insurance. On the facts, the judge was also satisfied that the actual underwriter was induced by the answers provided. Moreover, the specific questions put and answers given in the proposal form did not serve to limit the duty of disclosure or waive the obligation to disclose matters beyond the particular questions raised.

Whilst it was not necessary to consider the defendant's other arguments, the Judge held that the combustible material warranty was a true warranty bearing materially on the risk of loss and insurers were entitled to regard it as an important protection. As to the six monthly inspection, the court was more sympathetic to the argument that this was merely suspensory but as the claimants were in actual breach at the date of the fire, this did not assist the policyholders.

Further, the alarm warranty was again held to be a true warranty whereas the need to comply with the more detailed risk improvement notices might be suspensory only. As the alarm fell short of the required standard and risk improvement notices had not been complied with, again there would have been no cover at the time of the fire.

This case serves as a reminder of the draconian effect of breach of warranty and how the court will construe terms to lessen the impact where possible, as in *Kler Knitwear* (2000).

Synergy Health (UK) Ltd v CGU Insurance and Others

Towergate acted as broker for Synergy, a large commercial laundry company. During 2005, Synergy acquired a new site at Dunstable. Insurers required an intruder alarm to be installed. The broker chased Synergy who confirmed, by letter (which was then sent by the broker to insurers), that the alarm would be installed by the end of December 2005. Due to a breakdown in communications within Synergy, that never happened. Neither the broker or insurers were informed that the alarm had not, in fact, been installed and the policy later renewed on 1 May 2006. On 3 February 2007, the Dunstable site suffered a serious fire resulting in material damage and business interruption losses of £6.5m. Insurers avoided the policy on the basis of non-disclosure and misrepresentation concerning the failure to install the alarm. Synergy sued insurers and, in the alternative, the broker.

Insurers' avoidance failed on inducement as it was found that they would have renewed the policy on precisely the same terms even if the failure to install the alarm had been disclosed to them.

The alternative claim against the broker failed in its entirety. It was held that the failure to install the alarm had nothing to do with any failing on the part of the broker, but arose from a serious breakdown of communications within Synergy. Having chased about its installation and been told it would be completed by the end of December 2005, the broker was entitled to assume the alarm had been installed and was not obliged to query any further.

Even if the Judge had found a causative breach of duty by the broker, he would have reduced any damages payable by 90% to reflect the extraordinary level of contributory negligence on Synergy's part, in failing to install the alarm.

Finally, in relation to the quantum of the claim under the business interruption section, it was held that depreciation not deducted as a consequence of the fire should be brought into account as a saving, reducing the amount of indemnity to which the insured was entitled under the policy. In order to reach such result, the policy wording was given a purposive construction.

Beachcroft acted on behalf of the broker.

24. Nuisance

Barr and Others v Biffa Waste Services Ltd

The claimants brought a claim in nuisance against the defendant waste-disposal company. The claimants' properties were located near to a landfill site operated by the defendants and they asserted that over a five-year period they had been affected by odour emitting from pre-treated waste at the defendant's site. There were no allegations of negligence or breach of the defendant's waste-management permit.

The court held that there was no defence of statutory authority here to defeat the claims in nuisance. However, as long as the defendant complied with the terms of its environmental permit, it was protected against common law nuisance (the defendant's activities not being an unreasonable user of land as they were in compliance with the permit). This did not however relieve the defendant of its obligation to carry out site activities properly – it could still be liable in nuisance if it failed to run the site properly and created a nuisance as a result.

The court did determine, however, that if the defendant had been liable then the appropriate threshold in an odour nuisance case would have been one "odour complaint day" each week and the general damages would have been £1,000 per year per household for each year when the threshold was exceeded.

25. Occupiers Liability Act 1957

Furmedge and Collings v Chester Le Street District Council and Others

D3 was the designer of an inflatable pvc structure in which the claimants were walking. The structure broke free and was lifted into the air, causing two deaths and injuries to others. D1, a local authority on whose property the event took place, settled the claims and sought a contribution from D2, a non profit making charity that organised the event. D3 had been found guilty of Health and Safety at Work Act 1974 (HSWA) breaches but had died with no funds or insurance to pay the claims.

Both D1 and D2 had already pleaded guilty to breaches of HSWA. D1 did not deny that it was an occupier for the purposes of the Occupiers Liability Act 1957 but, obiter, the judge indicated that it was not as it had no control over the use of the structure. D2 was found to have been an occupier, as its employees played an active and controlling role in its construction and worked as stewards with control over its use, and owed a duty of care to those entering the structure.

Both parties were at fault in failing to recognise the inadequacy of the risk assessment provided by D3 and in failing to take steps to ensure that the structure was provided with sufficient anchors. D2 bore a greater responsibility, assessed at 55%. Non causative acts and omissions, including D2's direct knowledge of the structure's susceptibility to instability in windy conditions, were taken into account in deviating from the 50/50 starting point.

It is clear from this judgment that, where a landowner or tenant invites a third party to hold an event on its land, consideration should be given as to who controls the running of the event, as this will affect their potential liability as occupier. Clear, preferably documented, demarcation of responsibilities and thorough risk assessments are crucial. Another lesson from this case is that, when considering the relative liability of joint occupiers, the court may, when apportioning blame, take into consideration acts and omissions which play no causative role in the occurrence of an accident.

26. Payment Protection Insurance

R (on the application of British Bankers' Association) v FSA and FOS

The High Court dismissed the British Bankers' Association's (and Nemo Finance Limited's) legal challenge against the FSA and the Financial Ombudsman Service in relation to their approach to handling payment protection insurance complaints.

Significantly, principles-based regulation received the support of the High Court. The judge found that the true role of the Principles for Businesses (Principles) was "the overarching framework for regulation". They were best understood as "the ever present substrata to which the specific rules are

added" and "the overarching source of obligation". He ruled that it was inappropriate to take the view that specific rules could exhaust the application of the Principles. Compliance with specific rules in the Insurance Conduct of Business Sourcebook therefore did not displace the requirement to comply with the Principles.

27. Policy Coverage

AXL Resources Ltd v Antares Underwriting Services Ltd

The claimant metal trading company was insured by the defendant under an all risks policy, which incorporated a clause excluding "mysterious disappearance and stocktaking losses". The claimant lost 20 metric tonnes of cobalt from a warehouse in Antwerp in unexplained circumstances. Insurers

argued that there had been a mysterious disappearance and refused to pay out. After service of proceedings, it was reported that a criminal gang had been arrested for the theft of the cobalt. AXL therefore applied for summary judgment but this was contested on the basis that (1) the effect of the exclusion was to require the insured to prove the circumstances of the loss, which they had failed to do, and (2) the words "mysterious disappearance" should bear their ordinary meaning and apply to any circumstances that were hard to explain.

Gloster J analysed the position on the burden of proof on each of the parties in relation to a mysterious disappearance. Firstly, it is for the insured to show that it has suffered accidental loss, although it is not necessary to prove that the loss has any specific cause. Then, as is established law, the burden is generally on insurers to show whether the exclusion applies.

As to guidance on the meaning of the phrase, it was held that "normally, it will involve a situation where the cause of the loss cannot be identified or the circumstances in which the property has been lost arouse speculation or are hard to explain". Here there was now strong evidence of theft and a failure to prove the exact date and details did not mean that there had been a mysterious disappearance.

This decision distinguishes the position in *Widefree v Brit* (2009) where a diamond ring was thought to have been stolen from a jewellers by a "distraction" theft but some CCTV footage had been destroyed. In that case, the all risks policy contained a clause which excluded loss of "Property Insured found at stockholding where the Insured is unable to prove the date and circumstances of any loss." As a result of the specific wording in that case, the burden of proof of the cause of the loss was held to be on the insured as it clearly contained an obligation for the insured to prove the circumstances of the loss.

Ground Gilbey Ltd and Another v Jardine Lloyd Thompson UK Ltd

Following a major fire at Camden Market in north London, the owners sought to recover their losses from their insurers. The fire was caused by a portable liquefied petroleum gas heater. The insurer had added a new endorsement to the policy, namely a survey condition requiring completion of all risk improvements. The insurer had then imposed a risk improvement measure requiring the removal of portable heaters. The owners settled their claim against the insurer for £3.825 million which was said to be 70 per cent of the full value of the claim. The owners then issued proceedings against their insurance brokers to recover the loss they incurred in settling the claim with their insurers. The owners alleged that the brokers were negligent in that they failed to draw attention to the survey condition or pass on the risk improvement measure.

The brokers defended the claim by arguing causation. The brokers submitted that even if they had advised that cover would be in jeopardy if the risk improvement measure was not complied with, the owners would not have complied. Further, the brokers argued that the insurer did not in fact have a defence to liability on the basis of the survey condition.

The judge held that the imposition of the risk improvement measure had a material and potentially deleterious effect on the insurance cover and the brokers were under a duty to draw it to the owners' attention and obtain their instructions in relation to it. If proper advice had been given indicating the urgency and importance of the matter, the judge held that the owners would have taken steps to

comply with the risk improvement measure. The causation argument therefore failed. Breach of the survey condition and the risk improvement measure were relied on by the insurer or raised on its behalf as a ground for avoiding liability under the policy. The court did not need to decide whether the insurer had a good defence to the claim, only whether in all the circumstances the settlement was reasonable. The judge considered that the settlement was within the range of reasonable settlements. The appropriate measure of loss was the difference between sum actually recovered from the insurer and what the owners would have recovered if the brokers had not been negligent, namely £1.775 million. There was no finding of contributory negligence on the part of the owners.

The case highlights the continuing duties owed by a broker. A broker owes his client a duty to take reasonable steps to obtain a policy which clearly meets his client's needs and is suitable for the client. He has a duty to draw to the client's attention any onerous or unusual terms or conditions and should explain their nature and effect. After the risk has been placed, there is a continuing duty and where an

insurance broker becomes aware of information which may affect the policy cover, he is under an obligation to act in his client's best interest by drawing it to the attention of his client and obtaining his instructions in relation to it. Merely passing on information will not be sufficient.

Land of Leather Group Action

In December 2010, Zurich agreed a discounted compromise settlement with a group of claimants in the 'toxic sofa' group litigation against Land of Leather and other retailers. The claimants alleged that they had suffered dermatitis following contact with dimethyl fumarate (DMF) in leather sofas manufactured by the Chinese company, Linkwise, which were sold through Land of Leather. They had challenged Zurich's refusal to indemnify Land of Leather for Linkwise claims owing to a breach of condition precedent, but this was rejected by Teare J in the Commercial Court. Teare J held that the claims control clause, a condition precedent, applied to both inwards and outwards claims. The insured was therefore prohibited from settling potential recovery claims. The Linkwise claimants appealed, and the discounted settlement compromised that appeal, leaving the Commercial Court decision unaffected. The claims for a further 2,000 claimants, including 900 against Land of Leather, who alleged they suffered injuries following contact with other manufacturers' sofas (for which liability was denied), were dismissed in February 2011 after they failed to provide evidence of contamination.

Beachcroft acted on behalf of insurers.

Teal Assurance Co Ltd v (1) W R Berkley Insurance (Europe) Ltd (2) Aspen Insurance UK Ltd

Teal was a captive insurer who issued a number of policies covering professional indemnity liabilities and design defect "mitigation" costs in excess of a self insured retention (and deductibles) and did not exclude US claims. Teal issued a further policy (the top and drop layer) in excess of the several layers of cover above and reinsured this risk under an excess reinsurance policy with the defendants. This excess policy and reinsurance excluded US claims. US and non US claims arose and the critical issue was whether the US claims exhausted the underlying policy so that the non US claims fell under the excess policy and therefore allowed a claim under the reinsurance.

It was held that a loss is suffered when liability is established and the amount of liability has been ascertained and quantified, whether by action or arbitration or by settlement, and not earlier. In the case of reinsurance, the right of the reinsured to an indemnity arises once its own liability has been ascertained and quantified and does not depend on the reinsured paying the original insured. Therefore, the losses eroded the underlying policy in the order in which they were suffered by the insured, which in the case of liability cover depends on when liability was established and ascertained in amount and in the case of mitigation cover depends on when the insured incurred the costs and expenses.

This was not affected by the fact that the excess policy included a clause which stated that "liability to pay under this Policy shall not attach unless and until the Underwriters of the Underlying Policy/ies shall have paid or admitted liability or have been held liable to pay the full amount of their indemnity inclusive of costs and expenses". This was a pre condition to the excess policy responding but did not affect the order in which losses were to be taken to erode the underlying policy.

28. Privilege

Akzo Nobel Chemicals and Akcros Chemicals v Commission (ECJ)

Legal professional privilege gives a client an absolute right to withhold confidential evidence from production to a third party or the court. It enables a client to confide in their lawyer and to receive advice without the risk of it being disclosed at a later date. It applies to both oral communications and documents. However, the right will only apply if the communication is with a qualified lawyer. In England and Wales legal professional privilege extends to in-house counsel. That is not the position in most of Europe.

The European Court of Justice had to decide whether the privilege should apply to protect advice communications by in-house lawyers from disclosure to the European Commissioners in their investigations of cartel operations. Although Akzo Nobel had built up strong support for its case and several organisations intervened in support of the appeal, the ECJ took the view that the current legal situation in the member states did not justify consideration of a change in the case law towards granting in-house lawyers the benefit of legal professional privilege. The ECJ held that an in-house lawyer should not enjoy the same status as an external lawyer as he does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. In-house lawyers are bound to their client by a relationship of employment. Consequently, it was considered that an in-house lawyer was less able to deal effectively with any conflicts between his professional obligations and the aims of his client. This judgment will make it more difficult for companies to take effective advice from their in-house legal department.

R (on the application of Prudential Plc and Prudential (Gibraltar) Ltd) v Special Commissioner of Income Tax and Others (Court of Appeal)

The Court of Appeal rejected an attempt to extend legal professional privilege (LPP) to accountants giving legal advice on tax matters and has confirmed that LPP should only apply to qualified lawyers.

Prudential submitted that the determining factor should not be the status of the adviser but the nature of the advice. Prudential argued that there was no functional difference between a lawyer or an accountant giving tax related legal and regulatory advice because both were subject to professional controls and ethical duties. The Court of Appeal held that it was bound by authority to find that LPP applied at common law only in respect of advice by members of the legal professions of England and Wales and could not be extended to someone who was not a lawyer even if the advice they were giving was legal advice that they were competent to give. It was for Parliament to formulate any appropriate extension to the scope of LPP.

The Supreme Court has granted Prudential leave to appeal. Both the Law Society and the Institute of Chartered Accountants have been granted leave to intervene in the appeal to the Supreme Court.

The current position provides clarity and certainty. Extending it to other professional advisers who give advice on points of law would raise issues as to its scope. For the time being, the same advice on a particular point of law would be privileged if given by a lawyer but not if given by an accountant. Arguably, an accountant acting in the best interests of his client ought, in some circumstances, to refer the client to a lawyer to obtain advice that he has the skills and experience to give simply because that advice would then be protected by privilege.

29. Professional Indemnity

Brown v InnovatorOne PLC

This is one of the biggest commercial cases to come to trial in 2011. Beachcroft act in this matter for the professional indemnity market, defending a London law firm. The firm is alleged to have dishonestly assisted a convicted fraudster to manage complex tax relief schemes for personal gain. He is alleged to have relieved investors of cash subscriptions of more than £40million. The headline claim, with interest and costs, is alleged to be more than double this amount. It is a long-running saga which has spawned numerous satellite disputes involving many insurers of different parties.

The principal action is due to come to trial in October 2011. The court will consider six exemplar tax schemes and decide such issues as whether there was valuable technology purchased by the investors, whether the law firm was an "operator" of unregulated collective investment schemes, whether the firm should have known that the key individual behind the schemes was dishonest, and whether payments made from their client account were made in breach of trust.

Controversially, the 555 claimants are bringing the claim using third party funding, after-the-event insurance and a conditional fee agreement, all of which have contributed to the costs escalating dramatically.

If the case is not resolved, the trial will last about 4 months with judgment not expected until about Easter 2012.

D Morgan Plc v Mace and Jones (a firm)

The claimant sought to recover loss of profits of over £40 million from the solicitors who advised on planning conditions relating to the development of a quarry site in Merseyside. The judge rejected any negligence causative of loss and found no merit in the claim for loss of profits. He held that the methodology adopted for the calculation of the loss of profits was "fundamentally flawed". He found that there was no credible evidence that there was any actual loss of profits at all.

The defendant subsequently sought an order for indemnity costs. Mr Justice Coulson confirmed that the appropriate test for indemnity costs was set out in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (Costs) (2002)* where the Court of Appeal held that an order for indemnity costs could only be made where there was some conduct or circumstances which took the case out of the norm. Indemnity costs could not be awarded solely because there was a failure to beat a Part 36 offer.

The judge held that the exaggerated and fundamentally flawed nature of the claim against the solicitors took the case close to the boundary of what might be considered "the norm". However, the failure to give proper disclosure and dilatory conduct of the proceedings by the claimant were not factors which warranted an indemnity order. The balance was tipped in favour of the defendant by the claimant's failure to accept a Part 36 offer made a couple of months before the trial. This failure, assessed against a background of speculative litigation, was deemed sufficient to justify indemnity costs. This decision was reinforced by the fact that the claimant was found to have given highly unreliable evidence in the witness box and had, on occasion, told "deliberate untruths".

An order for costs on the indemnity basis from the last date on which the Part 36 offer could have been accepted was therefore justified.

Beachcroft acted on behalf of the defendant.

(1) Haugesund Kommune (2) Narvik Kommune v (1) Depfa ACS Bank (2) Wikborg Rein & Co (Court of Appeal)

Two Norwegian councils entered into swap agreements with Depfa ACS Bank. As statutory restrictions on borrowing apply to Norwegian councils, the Bank instructed solicitors to advise on whether the councils had capacity to enter into the transactions. The solicitors advised that the swap contracts were not loans for the purposes of the relevant Norwegian local government legislation and that the councils had full capacity to enter into them. They also advised the Bank that a claim against a Norwegian council could not be enforced. The swap agreements were subsequently held to be invalid. Although the Bank had a claim in restitution for the loans made, the judgment was not enforceable against the councils. The bank sought to recover its losses from the solicitors.

The Court of Appeal, overturning the first instance decision, held that the solicitors were not liable for the loss. Applying the *SAAMCO* principle, the solicitors were only liable for losses within the scope of their duty. The solicitors were instructed to advise specifically on the capacity of the councils to enter into the contracts. They did not have a general retainer to report or notify problems about the proposed transactions or to advise the Bank on whether to proceed with the transactions or not.

Although the solicitors were negligent in their advice, and the Bank would not have entered into the transactions unless it had received the advice it did, the solicitors were not responsible for all the consequences of the advice having been relied upon. They were only responsible for the consequences of that advice being wrong. If the Bank's loss was due to the invalidity of the transactions, then the loss would be within the scope of the solicitors' duty. However, the Court of Appeal held that it was not the invalidity of the transactions, but the impecuniosity of the councils that was the real cause of the loss. This was not within the scope of the duty and was a risk which the Bank always shouldered. The solicitors were therefore not responsible for the loss.

Lexi Holdings Plc (in administration) v DTZ and Others

The advisers in this case were granted permission to amend their defence to include the "illegality defence". The principle, ex turpi causa non oritur actio which prevents a claimant from bringing a civil claim for loss suffered as a consequence of his own illegal act, had previously been used successfully by auditors to defend a negligence claim in the House of Lords in *Stone & Rolls v Moore Stephens*.

The cases were similar in that the claims were made by an administrator and a liquidator. Both involved a "one-man company" that had failed. The controlling mind of both companies had been involved in fraudulent activities. However, unlike Stone & Rolls, this was not a "whistle blowing case" as the professional advisers were not engaged to detect or prevent fraud. The alleged negligent advice was in respect of a bridging loan given by the company. The defendants alleged that this was part of an overall dishonest scheme. The court was satisfied that there was an arguable case that the ex turpi causa principle applied to the claim. The court had real concern that, without investigation "compensation might be ordered in circumstances which would undermine the integrity of the justice system". A defendant will however need to prove that there is a causal connection between the criminal act and the loss asserted.

Safeway Stores Ltd and Others v Twigger and Others (Court of Appeal)

Further clarification of the ex turpi principle was given by the Court of Appeal in this case. Safeway had admitted participating in an exchange of pricing information relating to dairy products which infringed certain provisions of the Competition Act 1988. As a consequence it was liable for a fine in the region of £10.6 million. Safeway sought to recover this sum from the directors and employees who were responsible for this infringement by bringing a claim against them for breach of contract, breach of fiduciary duty or negligence. This would have resulted in the fine potentially being paid by the D&O insurers.

The defendants sought summary judgment on the claim on the basis that the claim should be barred on public policy grounds relying on the ex turpi principle. Safeway argued that the ex turpi causa doctrine did not apply where a company was rendered liable to a fine by virtue of the actions of its directors and employees.

The trial judge held that the contraventions of the Competition Act were sufficiently illegal or unlawful to engage the ex turpi principle. He also held that a penalty payable under the Act was akin to a fine. This was not challenged on appeal.

The Court of Appeal held that Safeway was personally responsible for the infringement. It could not therefore be argued that the ex turpi principle did not apply because the company was only vicariously liable. As the Competition Act 1998 attributed responsibility for the infringement to Safeway, it would be inconsistent with this if Safeway could pass on the liability to their employees (or the employees' D&O insurers). The Court of Appeal accepted the illegality defence and dismissed the claim against the directors and employees.

Scullion v Bank of Scotland Plc (t/a Colleys) (Court of Appeal)

Surveyors and their insurers had been facing a potential flood of claims from investors in the buy-to-let market seeking to recover lost rental income before this Court of Appeal decision allowing the surveyors' appeal.

The case involved the buy-to-let purchase of a residential flat. The lender had obtained a valuation from the surveyors which provided a capital value of £353,000 and a rental value of £2,000 per month. Mr Scullion had agreed to pay £352,950 for the flat, but actually paid only £299,800 in consequence of a hidden, yet substantial, discount. Following the purchase, Mr Scullion had difficulties finding a tenant and eventually let the flat at a rent of only £1,050 per month, far short of the amount required to meet the payments due under the mortgage. Mr Scullion subsequently sold the property for £270,000. He then sued the surveyors alleging negligent overvaluation.

At first instance, the surveyors were found to have owed Mr Scullion a duty of care - despite the valuation report being addressed to the lender - and to have negligently overstated both the capital value and rental estimate. The judge found the true value of the flat to be £300,000, with the correct rental estimate being £1,050 per month. The court went on to find that Mr Scullion had sustained no capital loss as he had paid no more than the flat was actually worth, but that he was entitled to recover rental losses of £72,234 plus interest. The court's approach to loss was tantamount to finding that the surveyor had given a warranty that the purchase would be entirely self funding, which he certainly had not.

The Court of Appeal found that the surveyor did not owe Mr Scullion any duty of care. The case of *Smith v Bush [1990] 1 AC 831* was distinguished. In *Smith v Bush*, the House of Lords found that purchasers of modest residential properties for owner occupation could rely upon a lender's valuation, on the public policy grounds that they would not have the means to obtain their own valuation advice. In contrast, this case involved a purely commercial arrangement and Mr Scullion was not an 'ordinary domestic householder purchasing his home'.

This conclusion rendered it unnecessary for the court to consider the issue of loss in detail. However, the obiter comments of Lord Neuberger MR accepted that the first instance approach treated the negligent valuation as a warranty. He considered that any calculation of loss should make due allowance for void periods and so on, and that it should not in any event exceed the difference between the true rental value and that contained in the valuation report over the term of ownership.

30. SHE

R v Tangerine Confectionary Ltd and R v Veolia (Court of Appeal)

Here, the Court of Appeal dealt with 2 key issues, namely the relevance of an accident in relation to breach of the HSWA and also the extent to which foreseeability is a relevant ingredient in the commission of such an offence.

It has become common practice, particularly since the decision in *R v Chargot,* for a death or serious injury to be alleged by the Crown as being evidence in itself of a breach and commission of an offence which then shifts the burden of proof to the defendant to show it took all reasonably practicable steps to guard against a risk. In this appeal, whilst the Court of Appeal reaffirmed the principle that an HSWA offence can be committed without any injury or death occurring, it also recognised that where the Crown puts in evidence of injury or death (in a case where causation of an accident is not relied on), it has the potential to divert attention from the real issues about the breach itself. The case of *R v Chargot* has been interpreted in some quarters to mean that once there has been an injury, that fact establishes the existence of a relevant risk. However, the Court of Appeal confirmed that while the fact of an injury may be evidence of the existence of the risk in such cases it will be no more than that. Where such a debate takes place during a prosecution, the Court of Appeal advised that the Judge should normally warn the jury that it should guard against being over influenced by the fact of a death in particular.

The main crux of this appeal was about the impact of the Supreme Court decision in *Baker v Quantum Clothing* (see above) and whether foreseeability forms part of the requisite ingredients for an HSWA offence. The Supreme Court, by a majority, in *Baker* concluded that foreseeability of harm or danger was a necessary ingredient to be considered when assessing harm or lack of safety in relation to the application of Factories Act 1961.

The Crown here maintained that the concept of foreseeability when assessing the risk should be confined to Factories Act cases. However, the Court of Appeal did not consider that to be possible given the virtually identical wording of the provisions of the HSWA and the Factories Act. Accordingly the court concluded that foreseeability of risk (danger) is relevant to whether a risk to safety exists.

Threlfall v Hull City Council (Court of Appeal)

The claimant was employed as a street scene operative and his duties included clearing gardens of rubbish. He suffered a serious laceration of his finger whilst using gloves supplied by the Council.

The claimant argued that the gloves were unsuitable for the job and therefore failed to meet the standards required by the Personal Protective Equipment Regulations. The defendant asserted that there was no previous issue with the gloves and nothing to alert them that they were unsuitable. At first instance the judge held that the risk of laceration was low and there was no duty on the defendant to provide the best possible gloves provided that they were adequate for the risk. The Court of Appeal however concluded that the trial judge had incorrectly applied the wording of the Regulations and held that effectiveness was a key consideration when looking at whether the gloves were suitable. The equipment did not prevent the identified injury and therefore it was unsuitable no matter how appropriate.

Wandsworth London Borough Council v Covent Garden Market Authority

This decision emphasises the importance of the 21 day period for submitting appeals against Enforcement Notices. The case confirmed that the Employment Tribunal had erred in allowing an extension of time for submission of Appeal Notices in respect of ten Improvement Notices. The extensions were originally granted on the grounds that an interview under caution, pursuant to the Police and Criminal Evidence Act 1984, of the respondent was pending. Delaying the submission of Appeal Notices on these technical grounds was found not to be a factor which the Employment Tribunal should have taken into account, when considering whether it was reasonably practicable for the statutory authority to submit its Appeal Notices within the 21 day time limit.

The question of whether it is reasonably practicable to submit an Appeal Notice in respect of an Enforcement Notice is a question of fact for the Employment Tribunal, but it is hard to foresee many situations where delay in submitting an Appeal will be allowed, especially where the organisation in receipt of the Improvement Notice has access to legal advice. Generally, failure to appeal within 21 days is likely to result in the Appeal Notice being disallowed.

31. Stress & Harassment

Dermott v London Borough of Harrow

The court looked at the interplay between contract and tort in the employee/employer relationship where a grievance was brought against the claimant who subsequently was off work due to "stress". The claimant's case was dismissed. This case provides a reminder of the importance of looking carefully at the timing of any potential breach and the claimant's medical condition at that stage, particularly in cases where the claimant has a pre-existing history of psychiatric illness.

Iqbal v Dean Manson Solicitors (Court of Appeal)

When considering a claim under the Protection from Harassment Act 1997 (PHA) regard must be had to course of conduct which was alleged to amount to harassment and not to individual incidents.

Jones and Lovegrove v Ruth and Ruth (Court of Appeal)

At issue in this case was whether the claimants needed to prove that their injuries were foreseeable in order to succeed in their claim under the PHA. J, L and R owned adjoining properties. R had carried out extensive work on their property, including the addition of a third storey. The claimants argued that they had suffered anxiety and distress as a result of R's intimidating behaviour towards them, which amounted to harassment, contrary to section 1 of the PHA. The judge at first instance had

agreed there had been harassment which had caused J psychiatric injury but had refused to award damages as J had not established that her injuries/losses were reasonably foreseeable. The Court of Appeal, however, confirmed that foreseeability of injury or loss under the PHA is not required. As a result damages were awarded. This is likely to encourage a growing trend where stress at work claims

focus not on overwork, long hours etc linked to allegations of negligence (where foreseeability is relevant) but on bullying and harassment where foreseeability, certainly if the claim falls under the PHA, is irrelevant.

Mitton and Others v Benefield and Another

The claimant alleged harassment by the defendants and in turn they alleged they were harassed by the claimant. The court found the latter position was the correct one. The claimants behaviour had crossed the line to criminal behaviour under the PHA. It was a serious case and each defendant was entitled to general damages of £7,000 for anxiety and special damages to be assessed. This is not the first case where damages for anxiety alone in the absence of any psychiatric illness have been awarded. The Judge did decline to follow the guidance which is used in Employment Tribunal matters for awards of injuries to feelings following the decisions in *Vento* (2002) and *Martins* (2007) where the level of damages can exceed £30,000.

32. Third Parties (Rights Against Insurers) Act

Omega Proteins Ltd v Aspen Insurance UK Ltd

The insured meat processing company had combined liability cover with Aspen. The policy contained an exclusion for liability arising "under any contract or agreement unless such liability would have attached in the absence of such contract or agreement". Judgment had already been obtained against the insured for breach of contract. The earlier claim was not pursued in tort and therefore there was no finding of negligence against the insured. The insured became insolvent and the claimant attempted to recover from Aspen under the Third Parties (Rights Against Insurers) Act 1930. In such an action, the claimant can be in no better position than the insured would have been in bringing a claim against its insurer and therefore the exclusion for liability arising in contract applied but the claimant argued that the insured also had a liability in tort.

The court held that the claimant could go behind the judgment to establish that although the insured was liable in contract, it was also liable it tort. The burden was on the insurer to show that there would have been no liability in the absence of a contract and they failed to do this.

33. VAT

Barratt, Goff and Tomlinson v The Commissioners for Her Majesty's Revenue & Customs

This First Tier tribunal decision was reported in the legal press as meaning that VAT is not payable on medical reports and records as they are disbursements. The position has been rather confused as a result of those articles which overlooked that at the beginning of the judgment the court stated "The question of whether the expenditure incurred is liable to VAT has diminished in importance since 2007 as a result of an amendment to Item 1(a) of Group 7 of Schedule 9 of the VAT Act 1994....That amendment provided that only those services "consisting of the provision of medical care" were to be exempt from VAT. Consequently, the majority of the experts providing reports are now VAT-registered, so that the cost of their reports will be subject to VAT in any event".

Most medical experts are VAT registered and therefore VAT will be payable on their fees whoever obtains them. So the point in issue is limited to the fee of those experts that are not VAT registered and the provision of medical records. This will come down to who obtains them. If it was the solicitor VAT cannot be recovered, if it was a medical reporting organisation then it can be.

34. Without Prejudice Negotiations

Oceanbulk Shipping and Trading v TMT Asia Ltd (Supreme Court)

The defendants sought to adduce evidence of exchanges between the parties made during without prejudice negotiations and before a settlement agreement was concluded as they were said to be relevant to the proper interpretation of the settlement agreement. At first instance, the Judge held that the evidence was admissible. This was overturned in the Court of Appeal but the Supreme Court has now unanimously held that the evidence is admissible.

Parties must therefore be clear that they cannot simply write or say what they like under the banner of it being "without prejudice" and expect that information never to be put before a Judge (and in effect be used against them).