

Fat or fiction?

The risk of obesity claims against the UK food industry is growing.

Today, on a global scale, more than a billion adults are overweight. Constantly bombarded with reality TV shows such as “Supersize me v Superskinny me” and “The Biggest Loser”, we live in a society increasingly obsessed with losing weight. This obsession has seen a steady rise in product liability actions based on food consumption being brought against the food industry, particularly in the US. This article gives food providers and their insurers a taste of the main ingredients of obesity claims.

What are obesity claims?

The underlying allegation in such claims is the negligent provision of fatty and unhealthy food that injures consumers of

such food by causing obesity and obesity-related diseases such as Type 2 diabetes, hypertension and high cholesterol.

Who is to blame?

Food manufacturers, particularly fast food chains, are increasingly in the spotlight for their potential failure to take responsibility for providing healthy food to their consumers. There is also the question of the onus on doctors to give patients advice about their dietary needs. And celebrity chef Jamie Oliver recently highlighted the responsibility of schools in providing healthy lunchtime options to children. However, as with the tobacco litigation, there is also the



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ongoing debate about consumers' personal responsibility, individual choice and common sense when it comes to regulating what and how much they eat.

The Pelman case

The most pivotal test case so far is Pelman v McDonald's. This is the first obesity claim to be litigated against a fast food company and is yet to go to trial in the US. The claim was filed in 2002 by the parents of two New York teenagers who claimed to be "regular" McDonald's customers. They are seeking damages for their daughters' obesity, which they allege was caused by McDonald's negligence, deception and failure to warn. The lawsuit has been allowed to proceed on the basis of violation of the New York's Consumer Protection Act. Its outcome is eagerly awaited, as it could prove a catalyst for similar claims across the globe.

UK law and regulation

Given that the first obesity claim is yet to be brought in the UK, there is an uncomfortable uncertainty about how claimants (and more importantly, the courts) would interpret relevant legislation, including the Food Safety Act 1990, the Consumer Protection Act 1987 (CPA) and the General Product Safety Regulations (GPSRs).

Under the CPA, a person who is injured by a defective product can sue for compensation without having to prove the producer negligent, provided that they can demonstrate that the product was defective and that the defect caused the injury. The CPA covers all consumer products (including food) and a claimant must begin court action within three years of the date they were injured. However, deciding exactly when an obese person has been injured by a fatty food and proving that the fatty food product is "defective" will doubtless generate extensive legal and academic debate.

Under the GPSRs, a product must be "safe". The GPSRs define a "safe product" as any product that, under normal or reasonably foreseeable conditions of use, presents no risk or only the minimum risk compatible with the product's use. The extent to which a product is considered safe will be determined by having regard to a number of factors, including the characteristics and labelling of the product. Again, it may be difficult to argue that excessive consumption of a food product is "reasonable use". However, if the food labelling is judged to be misleading in terms of its fat content, addictive nature or

nutritional value, there may still be scope for criminal prosecution.

German perspective

At least the current German approach towards obesity claims is good news for food manufacturers. In the 2004 German case of *Kieske v Haribo*, the claimant was overweight and fell ill after eating a 400g bag of Haribo's assorted liquorices everyday for four months. Liquorice contains glycyrrhizic acid, which in high amounts can affect potassium levels. Once the claimant had recovered, she tried to sue Haribo under German product liability laws for its failure to warn her of the presence of glycyrrhizic acid in its liquorice and its effects. She also sued Haribo for selling king-sized packets, which she said induced overconsumption.

Two years ago, Cadbury's had to recall one million chocolate bars due to a low level contamination of salmonella.

The regional court of Bonn dismissed Mrs Kieske's claim and held her responsible for her illness because of her overconsumption. According to the court, the liquorice was not defective because it contained glycyrrhizic acid. German manufacturers are only required to list glycyrrhizic acid on food labels in Germany when its concentration in the liquorice is over 0.2%. As Haribo's product has a smaller concentration, Haribo was not obliged to list the acid. The court further ruled that manufacturers need only warn of their product's risks where they can reasonably expect the risk will arise from the "normal" use of the products – and 400g of liquorice a day for four months was not



“normal”. It also decided that Haribo’s decision to sell a king-sized packet was reasonable.

Harmful ingredients

The Haribo case also highlights the increasing potential of claims arising from products containing only a small quantity of potentially harmful products. Two years ago, Cadbury’s had to recall one million chocolate bars due to a low level contamination of salmonella. In the light of the recall, the Advisory Committee on the Microbiological Safety of Food (ACMSF) said that the presence of salmonella in ready-to-eat foods was “unacceptable” at any level. Professor Tom Humphrey of Bristol University Veterinary School commented that food such as chocolate, with a potentially large market of children, should have no salmonella present.

This hint of a zero-tolerance approach reveals an interesting contrast with the acceptable low-level approach taken in the Haribo case. It further suggests that food manufacturers may come under scrutiny if they only cater for the average adult and do not consider the fact that people vary in susceptibility to certain levels of ingredients.

Labelling

Food labelling seems to be the key to reducing risk of liability for obesity claims. In 2006, Cadbury’s Schweppes and the Biscuit, Cake, Chocolate and Confectionery Association took the lead in providing guideline daily-amount icons on their food labels, which invite consumers to see the back of the pack to find out more. Tesco has similarly developed “Totals Values” on food labels, which take into account the nutritive value and importance of a food in a diet.

Recently, Professor James of the London School of Hygiene and Tropical Medicine spoke in the US and called for stricter global rules on marketing and food labelling. As the chairman of the International Obesity Taskforce, he suggested the use of a “traffic lights” labelling scheme so that consumers could immediately assess fat, sugar and salt content and make informed decisions about their food. Such labelling would simultaneously reduce the risk of claims being brought against food manufacturers for potentially misleading their consumers or failing to warn them of their products’ risks.

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Advertising

UK food manufacturers also need to ensure that they are complying with the advertising watchdog.

In December 2005, the European Commission published its green paper “Promoting healthy diets and physical activity: a European dimension for the prevention of overweight, obesity and chronic diseases”. Proposals included restrictions on the advertising and marketing of food products, and the fostering of healthy dietary choices among the young.

Last year, the Food Standards Agency Nutrient Profiling Scheme developed restrictions on food and drink products that

are rated as being high in fat, salt and sugar (HFSS) according to a nutritional value score system. For example, the use of celebrities and cartoon characters is now banned in advertising of HFSS products aimed at primary schoolchildren. More recently, a TV advertisement for Nutella was banned after the marketing agencies held it was “misleading”. The advertisement claimed that the chocolate and nut spread was part of a balanced breakfast for children, but neglected to refer to its high sugar and fat content.

International manufacturers

In the context of obesity claims, international manufacturers need to be wary of the US Consumer Product Safety Commission (CPSC), which already has the power to fine a company in excess of a \$1m for merely failing to notify them immediately (i.e. within 16 days) from the time they knew that a defect in its products could lead to a severe risk of serious injury.

Looking ahead

Depending on how the American Pelman case unfolds against McDonald’s, there could well be similar claims against fast food chains on an international scale. Some commentators have even predicted the possibility of subrogated claims being brought by the government against food manufacturers for NHS obesity-related care claims.

Either way, food providers and their insurers should seek ways of minimising their exposure to such claims. A starting point would be to ensure that all labelling of food allows their consumers to make informed choices when purchasing and consuming such products.

The magnitude of potential obesity claims may be hard to digest but it is certainly serious food for thought.

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Nailing the real culprits

A French court has ordered a classification society and charterers to pay EUR 192m pollution damages.

Over the years there have been many attempts in different jurisdictions to make classification societies and charterers liable for the consequences of shipping casualties. Usually these have foundered on the rocks of legal principles such as privity of contract. Now, however, there has been a judgment that is unfettered by Anglo-Saxon juridical concepts or international law agreements such as the MARPOL convention.

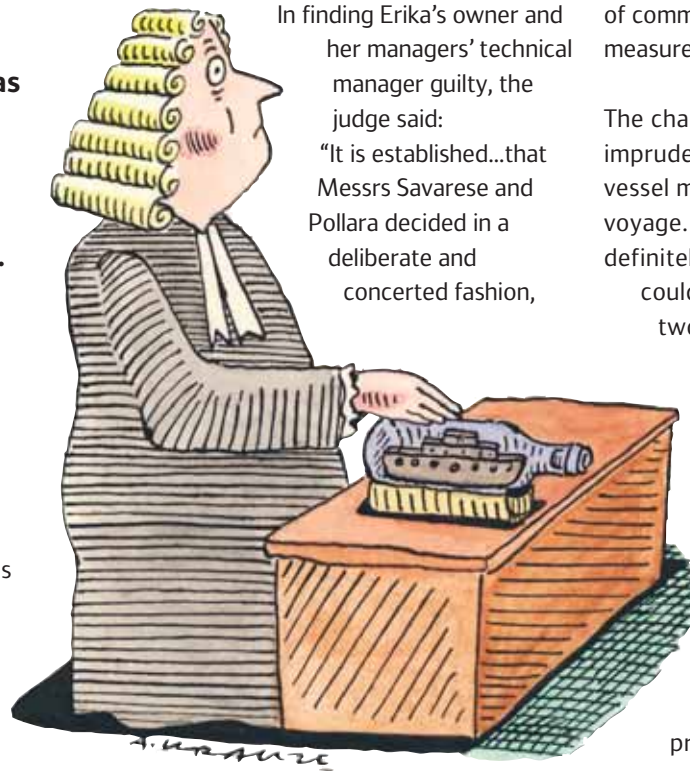
A French court has recently ordered the classification society, RINA, and the charterers, Total, to pay damages of EUR 192m for the extensive oil pollution resulting from the sinking of the Maltese tanker, Erika, off Brittany in December 1999. The court announced its verdict following the prosecution of 11 individuals and four corporate defendants.

The Erika sinking resulted in France's worst ecological disaster, leaving a slick stretching along 400km of coastline and killing approximately 150,000 seabirds.

Court findings in detail

Four defendants – the shipowners' technical manager, the head of the management

company, the classification society and the charterers – have been ordered to share the payment of damages totalling EUR192m. The charterers have also been fined EUR 375,000.



In finding Erika's owner and her managers' technical manager guilty, the judge said: "It is established...that Messrs Savarese and Pollara decided in a deliberate and concerted fashion,

for reasons of cost, to reduce the [maintenance] work carried out in Bijela in such proportions that they could not be ignorant that it endangered the safety of the ship."

The court found the classification society, RINA, guilty of "imprudence" because although its survey discovered substantial corrosion in Erika's No 2 ballast tank, instead of acting immediately and requiring thickness measurements to be taken, "under the pressure of commercial restraints" it did not require the measurements to be taken for several months.

The charterers, Total, were found guilty of imprudence in relation to an inspection of the vessel made over a year before her final voyage. The court said: "If the ship had been definitely set aside on 24 November 1998, it could not have been chartered a year and two days later by TTC for its final voyage". For its part, Total is reported to have "found it hard to understand how it could be found guilty for shortcomings in a procedure that it had introduced voluntarily to improve its shipping safety standards". However, the judge wondered why the managers' superintendent and the class surveyor had not also been prosecuted.

A bold decision

This is a bold and creative judgment that cuts through the legal obfuscation and catches the real culprits. It seems likely that, given

half a chance, the managers' superintendent and the class surveyor involved would also have been put on trial.

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But what is the actual result of the court's decision? The fines will probably not be paid by the individuals responsible but by their respective companies or maybe their insurers. Classification societies worldwide and others responsible for surveying ships will now hastily review their terms of cover. And classification society surveyors and shipping company superintendents who are regularly put "under pressure of commercial restraints" might sensibly seek alternative – and definitely non-seagoing – employment.

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Direct offshore foreign insurers

Key Australian regulatory exemptions have now been finalised.

The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) are jointly reminding direct offshore foreign insurers (DOFIs) and local insurance brokers about the new authorisation requirements for foreign insurers. These come into effect on 1 July 2008.

The upshot of the financial services amendments is that a DOFI wishing to continue to operate in the Australian market must have APRA authorisation unless it can show that it falls within one of the exemptions.

The exemptions have now been finalised by the Australian Treasury. They are much the same as those proposed last September, although there have been some changes.

The exemptions

The exemptions are as follows:

Exemption 1: high value insureds. A high value insured must satisfy one of the following tests:

- it and the entities it controls have a consolidated gross operating revenue for the financial year of \$200m or more; or
- it and the entities it controls have consolidated growth assets for the

financial year valued at \$200m or more; or

- it and the entities it controls have at least 500 employees for the financial year. This figure has been increased from the 300-employees figure previously proposed.

Two alternative tests – a premium-based and an insurance cover-based test – were considered but neither has been adopted.

Exemption 2: atypical risks. These are now settled as:

- nuclear;
- war;
- terrorism;
- satellite or space;
- biological;
- medical clinical trials;
- aviation liability; and
- shipowner's protection and indemnity other than for pleasure crafts.

All intermediaries holding an Australian financial services licence (AFSL) will be required to warn insureds who rely on this exemption about the risks of using an insurer not authorised in Australia.

Exemption 3: customised exemption. This exemption applies to a risk that cannot be placed with an authorised insurer but which does not fall within Exemption 1 or 2 above.

The criteria have now been settled as:

- a lack of market capacity;
- a material difference in price;
- a difference in non-price terms and conditions that has a material impact on the business of a consumer; and
- the accrual of material benefits that help the continuity of the relationship between an insurer and the business of a consumer.

The upshot of the financial services amendments is that a DOFI wishing to continue to operate in the Australian market must have APRA authorisation unless it can show that it falls within one of the exemptions.

Again, intermediaries holding an AFSL must warn insureds who rely on this exemption about the risks of using an insurer not authorised in Australia.

Exemption 4: new DOFI exemption. This is a new exemption for an arrangement with a DOFI that is required by the law of a foreign jurisdiction.

Generally

Draft regulations embodying these exemptions will be released for public comment shortly.

An application to APRA will be required if business is to be written in Australia after 1 July 2008. Clearly, that process will take time. There will be a limited transition period after 1 July 2008, providing that a substantial application for authorisation has been submitted by 31 May 2008.

From 1 July 2008, intermediaries holding an AFSL and that includes insurance brokers will only be able to place insurance business with APRA-authorised insurers in accordance with the exemption regime as finally announced.

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Getting mediation to work

A personal view.

Recently, I was involved in a mediation where the only benefit was to add to the costs. During the course of a frustrating day, it became clear that our opponents were not prepared to compromise and would only settle at maximum value. Although this was not a novel experience, the case drove me to think about the usefulness of the warnings from the courts about the consequences of refusing to submit to the mediatory process.

Cost of refusal to mediate

Why do people agree to mediate if they have no intention of reaching a compromise? The short answer is because, these days, we all know that a refusal to mediate may well result in a

party being penalised in costs, even if it is subsequently successful at trial.

There have been many instances where judges have emphasised this point. Perhaps the most well-known example is the Court of Appeal decision in *Dunnett v Railtrack plc* [2002] 2 All ER 850.

In that case, the court dismissed the claimant's appeal, which (in the form it was argued before the court) was bound to fail. However, the court refused to award the successful defendants their costs, even though the unsuccessful claimant had refused to accept a £2,500 settlement offer from the defendants. This was because Railtrack had weighed up the chances of resolving the case through mediation and rejected the process on the grounds that it was unlikely to achieve anything other than extra

costs. But if it had simply attended a mediation and made its £2,500 offer – or indeed made no offer at all – it would have escaped criticism. Looking at the judgment in *Dunnett*, it is easy to understand why the court had considerable sympathy with the unfortunate claimant.

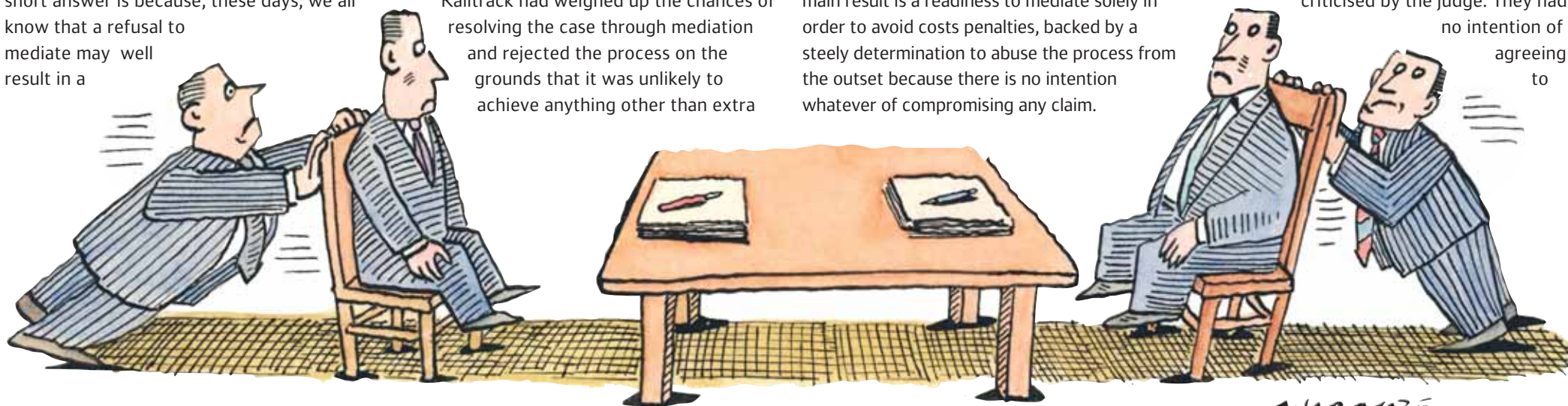
Actual result

But when you look at what cases such as *Dunnett* – and the later Court of Appeal decision in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, where in a Fatal Accidents Act case the Court set out the measures which might be adopted to encourage mediation – have actually achieved in practice, the answer is a depressing one. The main result is a readiness to mediate solely in order to avoid costs penalties, backed by a steely determination to abuse the process from the outset because there is no intention whatever of compromising any claim.

I became accredited as a mediator 18 years ago. Since then, I have handled a wide range of mediations ranging from modest disputes between neighbours to complex commercial matters. During that time, I have come across

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many parties who have made it plain that they attended mediation just to avoid being criticised by the judge. They had no intention of agreeing to



anything other than the full value of their claim when they were claimants or of conceding anything at all when they were the defendants.

Compulsion does not work

In my experience, there is nothing more guaranteed to ensure the intransigence of a party than forcing them into a process against their will. The mediations that I have dealt with either as a mediator or a party representative have only been successful where the parties have positively chosen to negotiate and reach a sensible compromise.

Looking back at the documentation available before the Civil Procedure Rules came into effect, it is difficult to remember any suggestion that the role of the courts should be to force parties to mediate. On the other hand, I do remember the words “encouraging the parties to use alternative dispute resolution”.

To non-lawyers, the only reason why legal professionals are so strongly in favour of mediation is because (despite the Civil Procedure Rules) the court process is unnecessarily slow, complex and expensive. It is not surprising therefore that members of the public find it a bit rich when the very people who are responsible for this state of affairs turn round and demand that lay people should not use the courts but go away and sort out their disputes for themselves.

The way forward

This loophole in the mediation process has prompted the suggestion that the courts should be able to look behind the mediation curtain and become involved if a party is in fact abusing the process. On a selfish note, I would

have been delighted if, in my recent case, a court had been able to intervene because it might well have led to a different (and happier) result. However, it is highly doubtful whether the process would work if all the parties felt that, if they rubbed the mediator up the wrong way, they might find themselves being reported to a managing judge.

The solution should be in the hands of solicitors and not the courts. Too often, solicitors see mediation as nothing more than a step in the proceedings. For the courts to continue to make threats is counterproductive. There are still many solicitors who do not fully understand or appreciate the benefits of mediation and other forms of alternative dispute resolution and do not, therefore, properly advise their clients. Changes are happening now, with the new allocation questionnaires (effective as from 1 April 2008) and the 47th Civil Procedural Rules update. From now on, solicitors will have to confirm that they have explained the benefits of settlement and options to clients.

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Not a CAR crash

Despite recent judicial events, construction (all risks) insurers are not giving contractors a guarantee against defects in workmanship.

Following the Court of Appeal’s decision in Seele Austria GmbH & KG v Tokio Marine Europe Insurance Ltd (7 May 2008), the construction (all risks) (CAR) market has been apprehensive about its possible exposure to contractors as a result of including a standard defects exclusion clause in policies.

The Seele Austria case concerned coverage under a combined contract works (construction all risks and third party liability) policy. The subcontractor claimed an indemnity for the cost of rectifying defective windows in a development in London’s Paternoster Square. The insurers denied liability. At trial, Mr Justice Field decided there was no cover under the policy without accidental damage to the works. However, his ruling was overturned by the Court of Appeal.

Background facts

The claimant subcontractor agreed to design and install a series of “punched” windows. When the installed windows were tested for water penetration, though, they leaked. Consequently, stone cladding and internal finishes had to be opened

up to allow access for remedial works to the windows.

The CAR policy

The policy provided that “contractors and/or subcontractors” were covered “in respect of any works... lost or damaged due to a defect in design plan or specifications materials or workmanship” to the extent provided for by memorandum 18(2) and (3).

Memorandum 18(2) excluded “the cost necessary to replace repair or rectify (a) insured property... which is in defective condition due to a defect in design plan specification materials or workmanship... .” There was a saving provision which said: “[memorandum 18(2)(a)] shall not apply to other insured property which is free of the defective condition but which is unintentionally damaged in consequence thereof... .” Memorandum 18(2) corresponds to a standard defects exclusion clause known in the construction insurance market as DE3 or limited defective condition exclusion.

Memorandum 18(3) read: “The insurers will additionally indemnify the insured in respect of intentional damage necessarily caused to the insured property... to enable the replacement, repair or rectification of insured

property... which is in a defective condition...” This indemnity was subject to a deductible for the first £10,000 “of the cost of each and every occurrence or series of occurrences arising out of any one event”.

The issues

The main issue was whether memorandum 18(3) operated as a free-standing additional item of cover, or whether it was conditional upon memorandum 18(2), which required some accidental loss or damage. Could the claimant recover for damage intentionally caused to the stone cladding and internal finishes in order to allow access to replace the windows?

A second issue was whether the retained liability limit applied to the deficiencies in respect of each individual window (as the insurer contended), or whether there was a single deductible (as the claimant contended).

The Court of Appeal decision

It was held, by a majority, that memorandum 18(3) was a standalone indemnity and not subject to the operation of the rest of the clause. Therefore, even without any accidental damage, an assured was covered for damage deliberately caused to the works to gain access to remedy defects.

However, a separate deductible applied to each defective window. It could not be said that the repeated instances of poor workmanship arose “out of a single event”. This was an important finding: multiple deductibles in respect of the numerous windows could substantially reduce the value of the claim.

Discussion

It is widely assumed that there needs to be some form of accidental damage to the works before a CAR policy will apply. Yet, here, a subcontractor was able to recover certain costs even though the defects had not yet produced any damage. This result alarmed underwriters.

However, the case was decided largely on the particular wording of the policy. Importantly, the Court of Appeal confirmed that the claimant would not have been able to claim under memorandum 18(2) (a standard DE3 clause). As far as the defective windows were concerned, memorandum 18(2) would not have applied because the faulty sealing had yet to cause damage to any other part

of the works. Lord Justice Moore-Bick rejected the claimant’s argument that pinholes in the sealing membrane constituted “damage”: this was “part and parcel of inherently faulty workmanship”.

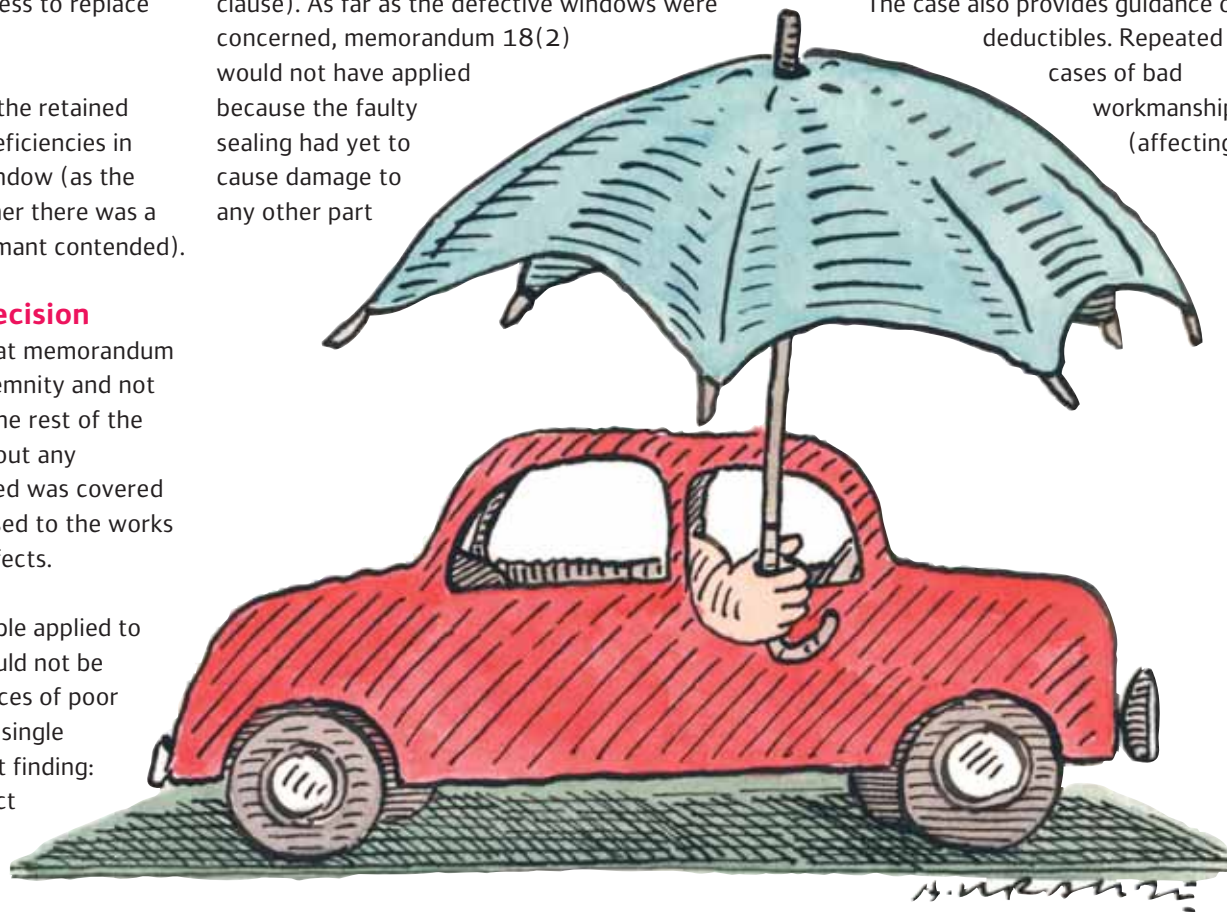
The decision confirms that it is paramount that the policy wording is clear about what is – and what is not – covered. If the intention in *Seele Austria* was to make the indemnity for access damage conditional on damage to which memorandum 18(2) applied, an error was plainly made in the numbering of the clause.

The case also provides guidance on deductibles. Repeated cases of bad workmanship (affecting,

for instance, all the electrics or the windows) do happen. The decision establishes that a series of mistakes does not necessarily

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constitute “one event” under a standard retained liability clause. The result would have been different, however, had the mistakes been attributable to a single event “such as giving the workmen wrong instructions... conscientiously followed so as to produce a series of similar defects”.



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Victims of Success

It is a popular urban myth that lawyers encourage disputes and what became known as the “Claims Culture” was fuelled by lawyers’ attempts to seduce the unwary down a road that led to litigation. A variant of the same myth suggested that nothing of the sort existed in the Middle East and that wiser counsel prevailed.

It is an attractive theory betrayed by inconvenient facts. We are all capable of getting ourselves into trouble without help from lawyers. What is more the UAE appears to have created a new species of dispute all of its own.

It arises in this way; a great deal of development in the region is funded by off-plan selling. This is far more prevalent than debt or equity funding. In a couple of well known instances unscrupulous developers have absconded with purchasers’ funds. However the more common problem – paradoxically – comes where the development is successful. From the purchasers’ point of view between contract and completion, massive profits can be secured through sale at completion or shortly after. For the developer there comes a sense that he may have sold at an under-value. This has led to attempts on the part of developers to renegotiate the terms on which they are

selling the site, or in some cases seek to rescind the contract.

Naturally at this point the arguments start. While Articles 125-129 of the UAE Civil Transactions Code provide guidance as to the elements required for a contract to come about, a concern is that the forms used by



major developers are vague and open ended to an unacceptable degree. Vital elements can be

left open ended. The exact issue of who does what is sometimes utterly confused.

Article 272 of the Civil Transactions code provides that if a party fails to do, as he is obliged, the other party can either compel him or cancel the contract. There is no requirement that the non-performance should

be of any particular degree of seriousness. Some help comes from Article 273(1) of the Civil Transactions Code which provides

for a contract to be terminated on grounds of Force Majeure – a term which is not defined. There is nothing to stop a party arguing that Force Majeure extends to the fact that the contract has become inconvenient or uneconomic to perform.

Assuming that the purchaser refuses to accept his fate, without an argument, a number of issues arise. Key among these is understanding what he has actually lost. Obviously his first reaction will be to demand that the contract be put back in place. However if the developer has already sold the project to someone else, it is unlikely that a court or arbitrator will do such a thing, so what is the measure of damages? In the case of a residential property this is a relatively easy calculation, based on the difference between purchase price at the time of the sale and the realizable price at the date when the contract was terminated. However in the case of commercial premises the issue becomes more complex. For example, in the case of office premises, what assumptions can be made about levels of rent realizable over years to come?

If the premises were intended to be operated as a hotel; what should be claimed in relation to room rates or occupancy levels? what assumptions can be made about staffing costs? and over what period can damages actually be claimed? In each case data is

available and inevitably the claims, which result, are for very significant sums.

There is anecdotal evidence that a number of such claims are being pursued through arbitration although obviously such claims are private. It is not known whether comparable claims have been brought in Dubai courts; here we are handicapped by the lack of an effective system of law reporting and the absence of any doctrine of precedent.

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The UAE is perceived as a paradigm example of capitalism in action where businessmen from across the globe can trade in an environment which supports enterprise. Unfortunately an unduly casual attitude to contractual obligations creates a risk that the bubble will burst simply due to lack of confidence.

The issue has not gone unnoticed. The Dubai Land Department's efforts have, for example, led to the passing of By-Law no. 85 regulating the dealing of Real Estate Brokers and the establishment of the Real Estate Regulatory Authority, which will have its own dispute resolution facility with jurisdiction over real estate disputes; thus avoiding the need for parties to have dealings with Dubai Courts.

However, and to state the obvious, the issue comes down to clarity in expressing the obligations of the parties. It is not difficult to state clearly what is going to be built, when and to what standard. Neither is it difficult to explain what happens if particular obligations are not met. Still less is there any mystery about providing for market adjustments to be reflected in the eventual price.

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Resolving higher value cases

A new pilot scheme is to be launched shortly.

Discussions between the Forum of Insurance Lawyers, the Association of Personal Injury Lawyers, the Motor Insurers' Bureau, the Royal Bank of Scotland Insurance, AXA, Zurich and Norwich Union have culminated in an agreement on a new code of behaviour that will work in parallel with the Civil Procedure Rules.

The code is aimed at dealing with personal injury cases (excluding clinical negligence and asbestos-related disease cases) valued at over £250,000. It encourages co-operative

behaviour and gives helpful guidelines setting out a standard that will generally be expected of the parties. The intention is that

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claimant's needs. Early notification will also allow claims to be reserved and valued (as appropriate) at the outset of a claim.

Both claimant and defendant lawyers hope that this will encourage a climate of trust and transparency, enabling claims to be dealt with quickly and economically.

Key objectives

The key objectives are as follows:

- early notification of claims to insurers/defendants
- prompt dialogue to investigate liability
- admissions binding except in cases of fraud
- discussions to agree rehabilitation and funding
- resolve liability by agreement or at trial within six months
- willingness to make early interim payments

Are there any downsides?

There are naturally some concerns within the insurance camp. The six-month deadline for resolving liability – running from receipt of a detailed letter of notification (the “trigger” date) – is one of them. This deadline may be too ambitious in circumstances where accident reconstruction experts are needed

- no Part 36 offers until parties have tried to agree an issue through negotiations
- appointment of an independent clinical case manager by claimant
- prompt disclosure of relevant information
- obtaining evidence in such a way as to avoid duplication of effort and cost
- challenges to enforceability of retainer to be made within 28 days of letter of claim
- early interim payment of disbursements and base costs relating to liability.

or where criminal proceedings are pending. While the guidelines recognise that it may not be possible to complete liability inquiries in such situations, insurers are advised not to regard any outstanding criminal prosecutions as a bar to making a decision about liability. A culture of never admitting anything is no longer acceptable.

The restriction on making any Part 36 offers until all lines of negotiation have been exhausted may result in claimants' costs increasing while their solicitors carry on investigating the claim. There is therefore a risk of losing the opportunity of making a protective Part 36 offer early on, and

reducing the value of such an offer to an insurer. However, the longer the shelf-life of a claim, the more expensive it becomes. Early settlements will ultimately provide costs savings which should balance out any front-loaded costs.

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Will extra work be required?

The six-month timetable is arguably tight and will require specialised teams to handle such claims efficiently. Many insurers already have dedicated large loss teams in place. However, those that do not have such resources will struggle to cope with dealing with claims. Claimants' costs arrangements will also need to be looked at promptly. Failure to challenge the enforceability of a retainer within 28 days of the trigger date will mean that it is presumed enforceable – there will be no other opportunity to challenge it. Claims handlers may therefore require training in this area or, alternatively, consideration should be given to retaining a costs draftsman.

There is no doubt that this initiative is a step in the right direction, despite some valid concerns mentioned above. The main focus of the code is to achieve a cost-proportionate, claimant-centred claim resolution, and to move away from adversarial behaviour and scoring points. We are actually being encouraged to talk to each other.

So far, approximately 25 claimant firms have signed up to the pilot scheme. Only time will

tell if the sector as a whole is ready for a shift in attitude towards the collaborative approach that is now being recommended.

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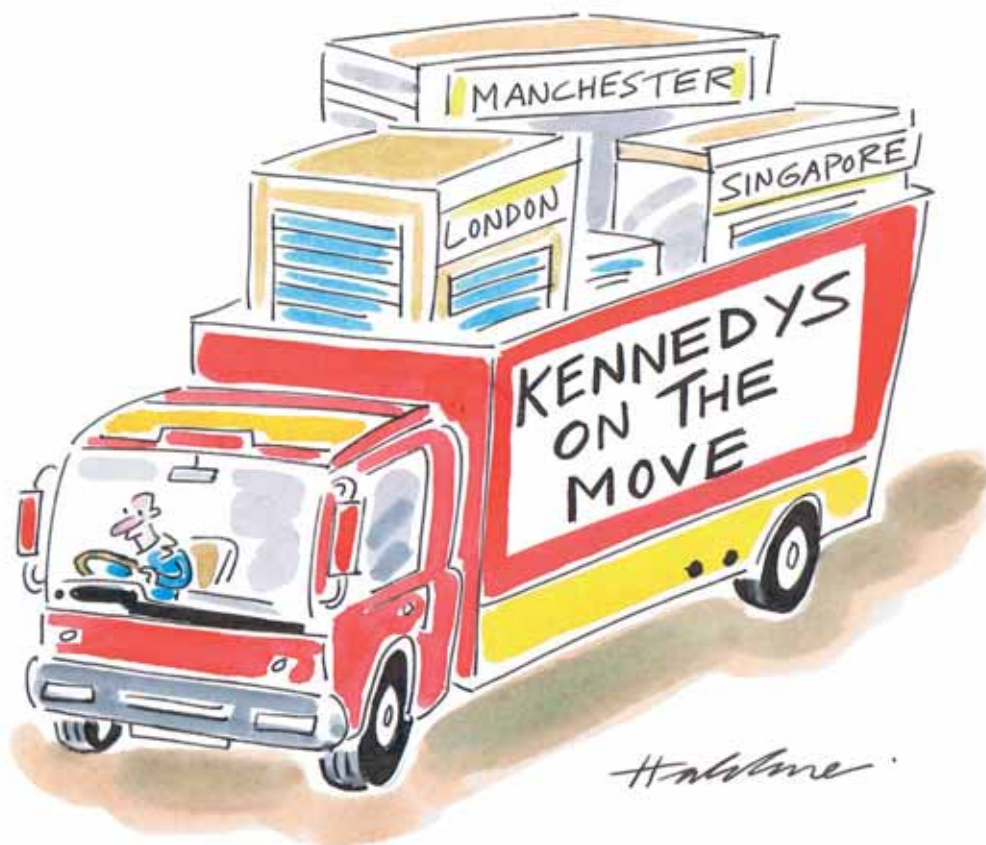
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Mapping process

Once a claim has been notified, the parties must agree a case-specific route map. Ideally, the parties should meet to agree the route planning. However, this can be done over the telephone or through correspondence. This mapping process includes establishing regular case review dates, for which there should be a predetermined agenda, as well as a mechanism for resolving disputes over the case planning. The agreed timetable of case reviews should provide frequent opportunities for stocktaking and looking at the steps required to progress the claim. In addition, there will be regular exchanges of correspondence to record the agreed steps and issues involved.



London

We are very pleased, and very excited, to say that after months of planning we will be moving into our new home at:

25 Fenchurch Avenue

London

EC3M 5AD

The move will be conducted in stages commencing on 18 July and concluding on 28 July.

Manchester

At the same time our Manchester office will be moving into new premises:

44 Peter Street

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Singapore

On 1 July our new office in Singapore will open:

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