Our note in March 2018 on the 1st instance decision suggested “that an Insured must actually be aware of circumstances before they can be the subject matter of a notification”.

We concluded that Moulder J had taken “a restrictive approach to the principles set out in Kajima”. The Court of Appeal has concluded that Moulder J’s approach was wrong, particularly when assessing the requisite knowledge required of an insured when notifying a circumstance. The question of whether a claim arises from a notified circumstance cannot simply be a subjective one.

The facts

Euro Pools specialised in the installation of swimming pools. It entered into two materially identical professional indemnity policies with RSA for the periods 2006-07 and 2007-08. A notification was made under each policy relating to defects discovered in the operation of pool machinery.

Euro Pools identified defects in the operation of pool equipment at various locations, which it notified to RSA in 2006-07. Although Euro Pools had been optimistic that the problems could be remedied by several low cost schemes, it transpired that a more costly remedial scheme was required. With RSA’s approval, Euro Pools undertook the remedial work, by way of mitigation of potential third party claim. These works exhausted the limit of indemnity under the 2006-07 policy. RSA argued that the remedial work arose from the circumstance notified in the 2006-07 policy period, such that Euro Pool was not entitled to a further indemnity. Euro Pools argued that the need for more extensive remedial works was not known at the time of the 2006-07 notification and the costs of those works therefore fell to circumstance notified under the 2007-08 policy period (giving Euro Pools another limit of indemnity).

At first instance, Moulder J found that:

a. the defects had not arisen at the relevant time for the notification of a circumstance under the 2006-07 policy year;

b. Euro Pools did not have the requisite knowledge to notify a broader circumstance when it initially notified under the 2006-07 policy; and

c. Euro Pools was therefore entitled to a further £5,000,000 indemnity under the 2007-08 policy year.

RSA appealed on the basis that (among other grounds) Moulder J was wrong in finding that there was no causal link between the remedial works required and the circumstances notified under the 2006-07 policy.

The Court of Appeal found that it was not necessary to consider whether Euro Pools could have been aware of the fundamental flaw in 2007. Euro Pools faced potential claims from numerous third parties arising from problems
notified under the 2006-07 policy. It was not appropriate to "over-analyse the problem by dissecting every potential cause of the problem as a different notifiable circumstance". The parties had "lost sight" of the correct analysis; "the issue was not whether the mitigatory work, or the decision to undertake mitigatory work, arose from the circumstances notified" but whether the potential claims from third parties 'must arise' from the circumstances notified. The former is subjective, whereas the latter "addresses the objective question whether the circumstances giving rise to a potential claim 'arose from' the circumstances notified". The technical reason for the problem would not have mattered to the third party claimants and there was therefore no need for the Court to assess the technical aspects as to the cause of the problem or whether it was known to the parties at the time of the notification.

The Court then considered a potential causal link. Unusually, Euro Pools, as the Insured, sought to establish that there was no causal connection between the circumstance and the claim. Given the characterisation of the third party claims however a causal connection was clear and Kajima did not assist Euro Pools.

The Court of Appeal found that the entirety of the remedial works fell within the scope of the circumstance notified under the 2006-07 policy. RSA had acted reasonably in the circumstances in rejecting the claim for an indemnity under the 2007-08 Policy.

Comment
This decision is a useful lap of the authorities. It reaffirmed the Court of Appeal's stance towards both deeming provisions ("integral to the structure of claims made policies") and the test of whether a notification 'may give rise to a claim' ("deliberately undemanding"). It also suggests a continued judicial reluctance to rule out 'Can of Worms' or 'Hornet's Nest' notifications in circumstances where an insured notifies in general terms "without fully appreciating its cause or its potential consequences" and insurers should continue to treat these with caution, even when nebulous or clearly lacking.

The Court of Appeal has taken a step back from the technical and more subjective approach taken at first instance, and confirmed that legal analysis on an Insured's awareness of the technical aspects of a circumstance will not be required when considering the subject and scope of a notification. The Court of Appeal favoured "stripping the claim to its bare essentials" over prolix analysis of technical details. This is sensible and insurers will be relieved given its potential to turn coverage disputes into a forum for the introduction of numerous expert witnesses and lengthy discussion of complex and technical minutia.

The positive comments in respect of 'Can of Worms' and 'Hornet's Nest' style notifications will no doubt come with their own separate concerns, despite the much repeated judicial statement that each analysis will necessarily be fact specific.

It is unclear whether the Supreme Court will consider the issue on Appeal. In our view, the Court of Appeal's finding is logical and sensible. However, with Euro Pools in administration, and having already spent many years pursuing this matter, it may be reluctant to accept those sums expended as 'sunk costs'.