QBE European Operations

Technical claims brief

Monthly update | August 2013

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News

Action Jackson – The reforms finally arrive!

As outlined in numerous previous editions of these bulletins the world of personal injury litigation is currently undergoing its biggest shake up in over 10 years. 31 July saw the culmination of this process with the commencement of the Low Value Personal Injury Protocol for Employers' Liability and Public Liability claims and the launch of the online portal through which it will take effect. With a few minor exceptions all personal injury claims arising from accidents in England and Wales on or after 31 July and valued at between £1,000 and £25,000 will now be subject to the terms of the new protocol and be conducted via the online portal.

> *The protocol brings challenging timescales for the making of liability decisions and the negotiation of quantum but also the prospect of lower, fixed costs for those claims settled within the process. QBE has been heavily involved in the development of both the protocol and the portal and is well placed to make the most of the opportunities they provide for all defendants. It will be some time before the first claims are presented under the protocol but the numbers will steadily increase over the next six months. For news on how the system is bedding down and whether it is achieving its laudable aim of providing an efficient and cost-effective claims process, watch this space!*

Tackling whiplash – practical change on the way?

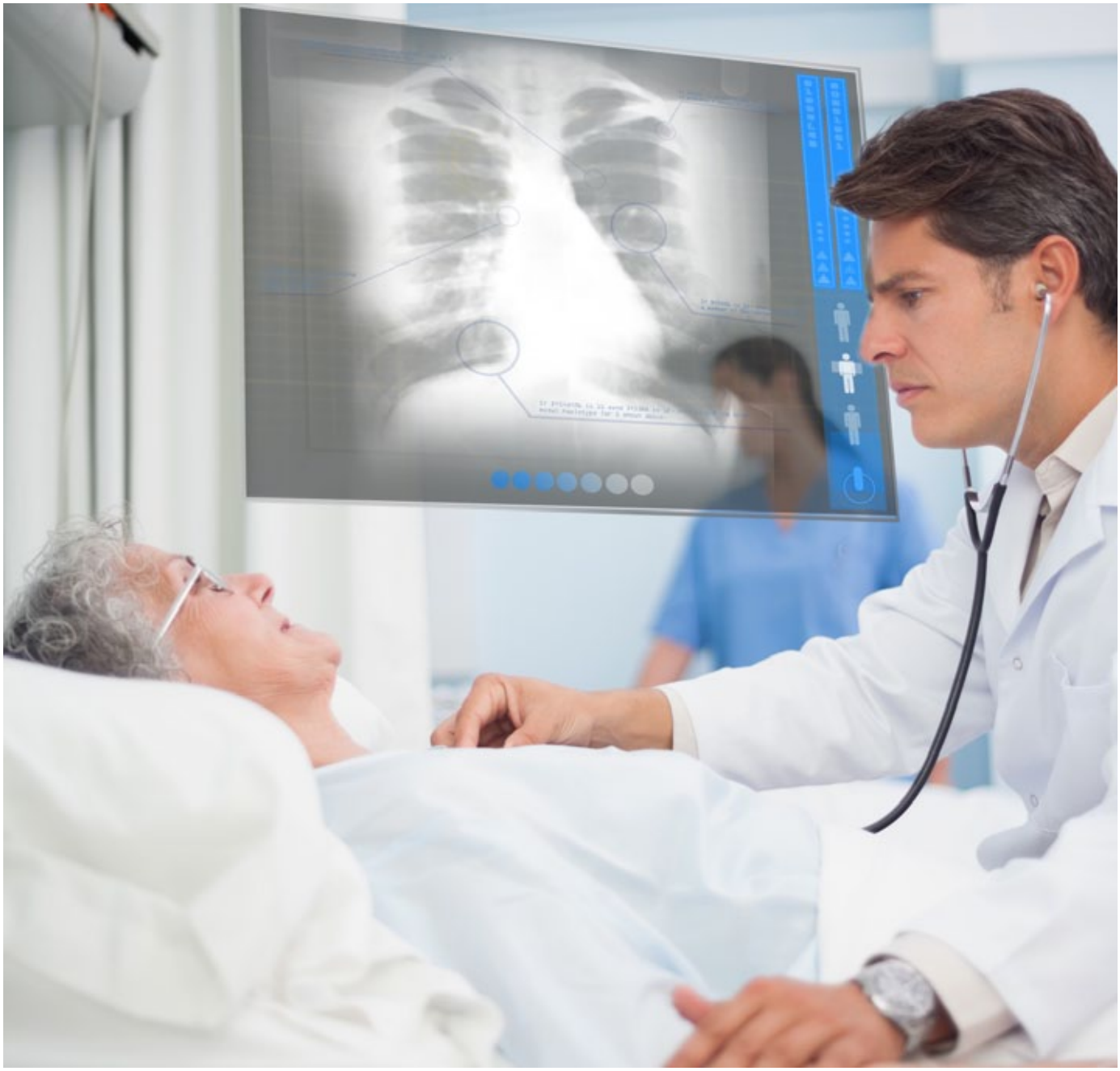
The House of Commons Transport Select Committee (TSC) published its report on whiplash claims last week, having taken written and oral evidence from industry figures and experts in the preceding months. The Committee was 'looking at ways of reducing the number and costs of whiplash claims, following up its recent inquiries into the cost of motor insurance.' and has produced a number of recommendations for change.

The key recommendations are:

- The TSC supports the proposal for specific accreditation for medical practitioners who provide reports in whiplash claims. They also believe it is essential that the practitioners instructed should be provided with more detailed information regarding the accident along with the claimant's medical records
- The Committee heard evidence that a full recovery was made within 12 months of the accident in the vast majority of cases. As such they recommended that the Government explain the rationale for the three year limitation period that is allowed to bring a claim and that they also bring forward recommendations for reducing it
- The Committee believe there are good arguments for and against raising the small claims track limit from £1,000, but are not supportive of any increase at this time. Access to justice is cited as the biggest concern, as claimants will not be able to readily engage the services of a solicitor and the court process is seen to be too daunting for the claimant in person. They have recommended that the MOJ analyse the impact of the RTA Portal and associated costs before any consideration is given to raising the small track limit.

The Ministry of Justice are expected to respond to the Committee's report, having deliberately delayed setting out the way forward following its own whiplash consultation (which ran from December 2012 to March 2013) to enable the Select Committee to complete its inquiry.

> *The recommendations in respect of the accreditation of medical experts and the re-assessment of the appropriate limitation period for claims are to be welcomed and the Ministry of Justice's response, now expected in the early autumn, is likely to resolve the debate about whether or not the small claims limit for injury cases is to be raised. Watch this space for news of further updates.*



Mesothelioma – The Ministry of Justice proposes an online scheme for asbestos victims

The Ministry of Justice has launched its long-awaited consultation Reforming Mesothelioma Claims.

Victims of asbestos-related disease would be offered a process for out-of-court compensation along the lines of the RTA portal, under proposals to support mesothelioma sufferers. The proposals would be backed by an online case management system funded by the insurance industry.

Under MOJ plans, victims will be able to settle uncontested claims with the insurers of the employers responsible for exposing them to asbestos. Courts minister Helen Grant said: "The improved out-of-court process will help to ensure they can access any compensation they are due as quickly as possible."

The prospect of faster settlements and a scheme, funded by the insurance industry, for tracing historic insurers, should be welcomed by campaigners for victims of mesothelioma. They hope the consultation will result in a 'fairer' system and will put the needs of terminally ill people first. But the government has also said in its impact assessment that the benefit will also be felt by insurers, who would gain from a reduction in claimant solicitor costs and their own reduced costs.

For claimant lawyers, 'no particular benefits' are identified. The impact assessment added: 'In aggregate claimant lawyers would devote less resource to settling mesothelioma claims, i.e. would undertake less mesothelioma business. This would free up claimant lawyer resource to be devoted to other profitable activities.'

The consultation closes on 2 October 2013.

> *Along with the Mesothelioma Bill, there seems to be inevitable reform and change on the horizon. Whilst it is hoped that reform will result in the quicker and lower cost resolution of claims, the full financial impact for insurers is far from certain at present.*

Major overhaul of coroner services in England and Wales

The needs of bereaved families will be put at the heart of a reformed coroner system by a new national code, Justice Minister Helen Grant has announced. The new legal framework will ensure all 96 coroners in England and Wales will work to the same standards, in the hope of ending inconsistencies and long waits for inquests.

Coroner services will now be overseen by the first Chief Coroner of England and Wales, His Honour Judge Peter Thornton QC, and will be locally delivered within national standards designed to lead to a more efficient system of investigations and inquests. The new laws came into force on 25 July and include requirements that:

- Inquests are completed within six months of the date on which the coroner is made aware of the death, unless there are good reasons not to
- Coroners report any cases that last more than a year to the Chief Coroner, and give reasons for any delays
- The coroner service provide greater access to documents and evidence, such as post-mortem reports, before the inquest takes place, to enable bereaved families to prepare for the hearing.

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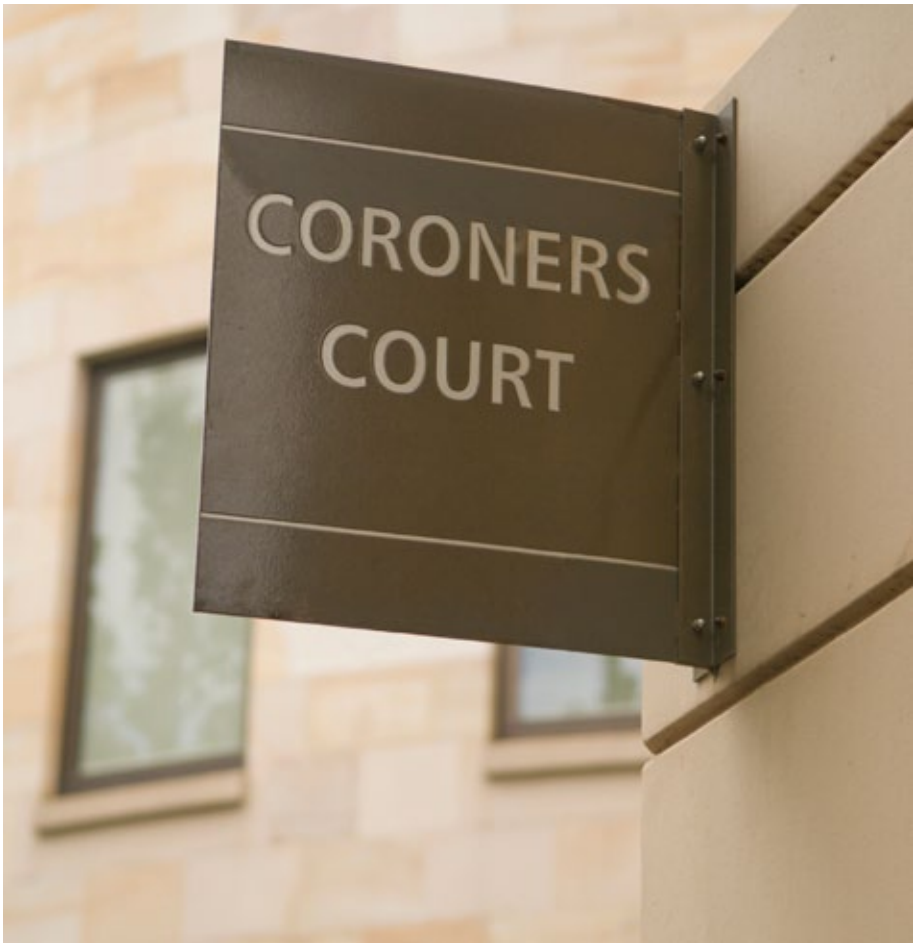
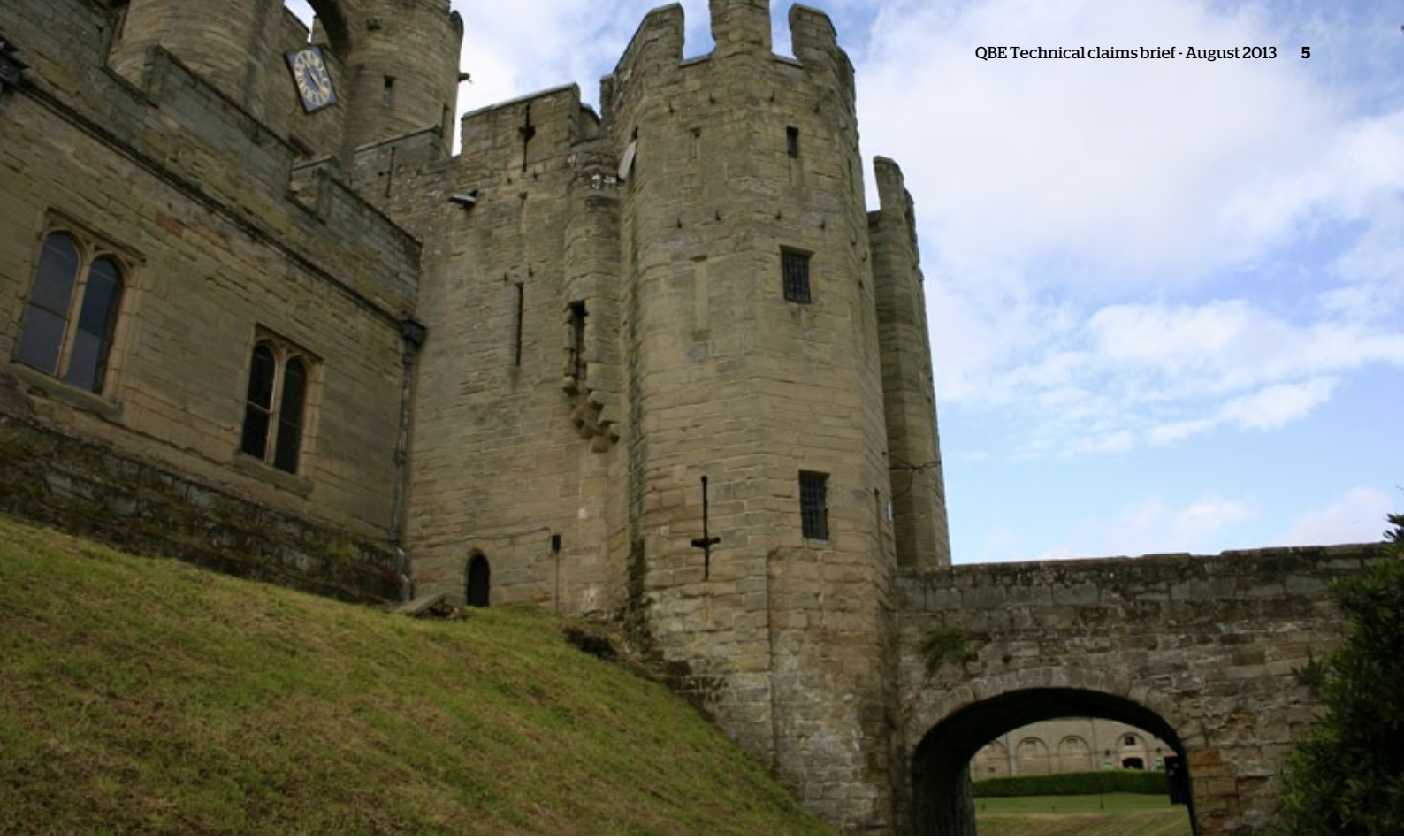


Following a workplace fatality, it is commonplace for the CPS and/or HSE investigation to significantly delay the coroner's inquest, to the detriment of the deceased's family. The delay is also a concern for a potential defendant and can leave a prosecution hanging over their head for years. It is hoped that a more efficient and consistent coroner service will apply some pressure to the CPS and/or HSE to complete their investigation in a more timely fashion. This would be to the benefit of all concerned.



Costs/Fines

The Court of Appeal in *R. v. Merlin Attractions (Operations) Limited* confirmed emphatically that the purpose of a fine imposed for safety offences is punitive and should be painful for the defendant.

In December 2007 a visitor to Warwick Castle tripped over a parapet wall of the Bear and Clarence Bridge falling into a dry moat below. Tragically the individual died from his injuries.

Following a seven day trial, the owner of the Castle, Merlin Attractions (Operations) Limited, was fined £350,015 and ordered to pay costs of £145,000. The company was found to have failed to protect non-employees and, in particular, the company had failed to give effect to appropriate safety arrangements i.e. the erection of safety barriers to prevent a fall from the bridge in breach of section 3 of Health and Safety at Work etc Act 1974 and Regulation 5 of the Management of Health and Safety at Work Regulations 1999.

This was a case that involved an isolated but systemic breach in an otherwise positive health and safety culture, yet the fine with costs totalled **£495,015**.

Merlin Attractions felt that the total sum of the fine and costs was particularly severe and put their argument to the Court of Appeal. Merlin Attractions' argument was that the overall sentence '*did not fairly reflect, and was disproportionate to, the seriousness of the offences*'.

After hearing the arguments, the Court of Appeal accepted that Merlin Attractions generally took its health and safety responsibilities very seriously; its failure in relation to the bridge was an 'uncharacteristic blind spot'. In addition, Merlin Attractions had taken swift steps to remedy the failure after the incident. Further, the Court found that the breach did not go further than failings by the on-site line manager of the Health & Safety Officer; no breach was found at director level.

While millions of people had used the bridge without incident (including local authority and health and safety inspectors) the Court still concluded that there had been an 'obvious danger' at the Bear and Clarence Bridge.

The Court concluded that if there had been a proper risk assessment of the bridge by Merlin Attractions then that assessment would have resulted in barriers being erected on the bridge. An aggravating feature of the case was that a report by health and safety consultants in 2003 had suggested that barriers on the bridge might be necessary, yet by the time the accident took place these had still not been erected.

The Court of Appeal considered the sentencing guidelines on health and safety offences causing death. Those sentencing guidelines make clear that 'where the offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more'.

The Court of Appeal concluded that a fine of '£350,015 [plus £145,000 costs] was within the appropriate range (albeit towards the top end of it) for these particular offences committed by this particular appellant'. In coming to that conclusion the Court of Appeal openly reminded defendants in health and safety cases that two purposes of fines were deterrence and punishment.

> *This is further evidence that the court will impose significant fines. The intention of 'painful' financial punishments is to hit 'not only those who manage [the company] but also its shareholders' as the Court of Appeal confirmed a number of years ago in the case of R. v F. Howe and Son (Engineers) Ltd. The intention being of course that the shareholders are then incentivised to demand improved safety management within the business to prevent reoccurrence.*
>
> *Arguably, by imposing a larger fine the very funds needed to improve safety are being diverted elsewhere and many businesses unfortunate enough to have experienced a serious workplace accident find that the moral and reputational impact of the accident is sufficient to motivate real and effective change in safety management.*

Liability

Pleading fraud and the repercussions of getting it wrong

Comments made by Lord Justice Davis in the case of Hussain v Amin & Charters Insurance Ltd reinforce the necessity for clear and unequivocal pleading of defences in fraud cases. However, in those cases where there are insufficient grounds to plead fraud it may be appropriate to put the claimant to proof in an initial 'holding' defence.

The claim arose out of a road traffic accident. Liability was disputed and the second defendant's defence put the claimant to proof and expressed a 'number of significant concerns in relation to the parties and the claim intimated'. The defence was conducted on the basis that the accident had been staged in order to generate an insurance claim. Having reviewed the evidence, the judge found the claimant a credible witness, accepted his account and awarded him damages. The discussion as to costs was mainly taken up with the issue of what the judge had described as 'sloppy preparation' by the claimant's solicitors and whether that should be reflected in the costs order – he declined and merely ordered that the second defendant should pay the claimant's costs to be assessed. The second defendant appealed the order for costs in favour of the claimant.

In dismissing the appeal, Lord Justice Davis gave it short shrift and concluded that there was no substance to the second defendant's submissions. Pleading of the type submitted by the second defendant would not be sanctioned by the court.

> *It has always been the case that a party should fully and properly plead their position, based on the information and evidence available to them at the time. Deliberate omissions and tactical pleading should be avoided.*
>
> *The case also underlines the value of regular review, and where necessary, amendments to pleadings when new evidence becomes available or there is a material change to your case. Failure to do so could result in defeat at trial, the striking-out of a defence, as well as significant cost sanctions imposed by the court.*

Welding insurer awarded costs after breach of warranty row

United Marine Aggregates employed GM Welding to carry out maintenance works at its processing plant near Greenwich. Part of this work involved cutting metalwork using an oxyacetylene torch. Two of GM's employees undertook this task; one doing the cutting and spraying the hot works and one keeping watch. The area would be hosed down before, during and after any such work was carried out.

A fire developed 75 minutes after work finished due to molten steel escaping through a gap in the metalwork. The judge held that GM had done its work properly and carefully and had taken the agreed precautions against fire. To the extent that it might have departed from those agreed precautions, that departure was not causative of the fire. He found that the fire had been caused by a 'spatter' of molten steel and had broken out in a manner and in circumstances which were not reasonably foreseeable, and which would not have been detected by a dedicated fire watcher, however diligent. The judge also found that GM was not in breach of any contractual requirement. UMA's claim failed and it appealed.

The Court of Appeal upheld the judge's findings and dismissed UMA's claim. The Court of Appeal agreed with the trial judge that although the fire could have been prevented, that would have involved GM taking steps not required by the contract and that it had discharged its obligations to UMA by what it did. The very rare occurrence was not reasonably foreseeable.

Alongside the issue of liability Novae, GM's insurer, had refused indemnity under the policy because of breach of a warranty (to ensure that all combustible materials in the vicinity of the hot works were covered and protected during the hot works). In the event, GM did not need an indemnity under the policy but the judge held that if he had to decide the point, he would have found in Novae's favour. Novae's were awarded their costs in full.

UMA's case was based on the flawed submission that the very occurrence of the fire showed that steps to avoid the loss had not been taken, which ignored the unforeseeable nature of the development of the fire. The decision demonstrates that there is a limit to the steps to be taken to avoid a loss even if the same limits do not apply to the requirements of an insurance policy. The effect of a warranty is absolute; the obligation to take reasonable care is not.

Civil procedure/Expert evidence

Dass v Dass [9/07/2013] illustrates the need to serve expert evidence in accordance with an order for directions or risk losing the right to rely on that evidence. It also confirms how difficult it is to successfully appeal a case management decision.

The claimant/respondent had been a passenger in the appellant/defendant's car when it crashed. The defendant admitted liability, and directions were given in November 2010 for the parties to exchange medical evidence in May 2011 in relation to quantum. The defendant's insurers did not provide their medical evidence until May 2013, nearly two years after they were supposed to. At a case management conference on the following day, the master concluded that the defendant's insurers had been sitting on their evidence for some time and had deliberately and tactically decided not to comply with the directions for disclosure. She ruled that the delay had been prejudicial to the claimant and decided to exclude the defendant's evidence. The issue was whether the master's decision fell outside the ambit of discretion afforded to her.

Rejecting the defendant's appeal, the High Court judge held that it was well established that case management decisions could only be appealed against in limited circumstances. In the present case, a timetable for the disclosure of medical evidence had been set in November 2010. Nonetheless, the defendant's insurers had chosen to ignore it, apparently for tactical reasons in order to give them more time to carry out surveillance of the claimant and to provide the results of that surveillance to their medical experts. The fact that the claimant had not pressed very hard for compliance with the directions long before the master's order was of some relevance. However, the master was fully entitled to take a dim view of the insurers' conduct. It was ultimately for the court to decide how to exercise its case management powers to ensure that cases were properly progressed and that court orders were complied with. The master had regard to the overriding interest of justice, including maintaining the integrity of the court system by ensuring that court orders were complied with.

> *There is usually a balancing act between properly preparing a defence and complying with directions as to disclosure and service of evidence. Whilst judges have recently been instructed to apply a stricter compliance with case management directions it is impossible to say whether the decisions would have been any different pre-Jackson and the test for granting relief from sanctions will usually favour a claimant in any event.*

Completed 31 July 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Jonathan Coatman (contact no: 0113 2906713, e-mail: jonathan.coatman@uk.qbe.com).

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