

Waiver by election: A High Court judgment provides useful guidance as to the application of the doctrine of waiver by election.

Kosmar Villa Holidays v The Trustees of Syndicate 1 2 4 3 [2007] EWHC 458 (Comm) involved a dispute between Kosmar Villa Holidays (the insured) and The Trustees (the insurer) over the payment of a £1m claim to a guest who had been severely injured in a swimming pool accident. In breach of a condition precedent of the contract, the insured had failed to provide the insurer with immediate notification of the accident. However, the insured claimed that the insurer was estopped from relying on this clause due to its payment of previous claims of which it had not been immediately notified. Gross J was not convinced by this argument and ruled that the insured had indeed breached the condition precedent. However, it was saved by the insurer's election to waive its right to rely on this clause. Upon receiving notice of the claim the insurer had initially agreed to handle it without reserving its rights. By the time it reserved its rights one month later, the Judge concluded that it had already accepted liability and subsequently allowed the insured's claim.

This case emphasises the importance of insurers reserving their rights. The claim would have failed but for this omission by the insurer. Insurers should be careful to reassess their procedures when replying to their insured in order to ensure that they take this ruling into account. By not successfully reserving their rights, insurers risk leaving themselves open to claims that would otherwise be dismissed.