

The insurance position

21. In addition to the financial collapse of both Bryn Alyn Community Limited (in March 1997) and Bryn Alyn Community (Holdings) Ltd (in December 1998), a further complicating factor was the question of the nature and extent of the insurance cover that was available to meet any liability of Bryn Alyn entities. That question was to be the subject of later proceedings which culminated in a judgment of the Court of Appeal, as explained below.
22. The question of insurance cover arose in the context of a claim by a former Bryn Alyn resident which was issued in late 1996 against Bryn Alyn Community (Holdings) Ltd and two other childcare organisations. That claim was entirely separate from the group litigation described below. In his Statement of Claim (dated 25 March 1997), that former resident initial redacted alleged that he had been sexually abused by Mr Allen.
23. RSA identified an exclusion clause in the policy wording which applied to the company's public liability insurance, which read as follows:

'The Insurers shall not be liable in respect of.....Injury Damage or Financial Loss which results from any deliberate act or omission of the Insured his partners directors or managerial Employees and which could reasonably have been expected having regard to the nature and circumstances of such act or omission'.
24. RSA concluded that this clause prevented the policy applying to cover the company in respect of deliberate sexual abuse by Mr Allen.
25. On behalf of RSA, HD wrote to the company and its liquidator in June/July 1997 explaining that it was unlikely that the company would be entitled to an indemnity for this claim, arising as it did from allegations of abuse by Mr Allen, who at the material time was the chief executive and a director the company and owned virtually all of its shares. HD also made clear that it would be necessary for RSA to make an application to be joined to the claim as a separate defendant in order to protect its own position. This is commonplace in cases where an insurer disputes its liability to provide cover under a liability policy but wants to ensure that the damages claim is competently addressed.
26. In September 1997 Marron Dodds solicitors gave notice of their intention to commence a number of claims on behalf of former Bryn Alyn residents alleging CSA. On 13 January 1998 nine claims were issued by way of a composite writ against Bryn Alyn Community

(Holdings) Ltd, the holding company to which the assets and liabilities of the trading company, Bryn Alyn Community Ltd, had been transferred in 1996. Two of those claims were withdrawn soon afterwards, leaving seven on the original writ.

27. Owing to the ongoing insurance issues, the proceedings and supporting documentation were served on Bryn Alyn Community (Holdings) Ltd, rather than to HD. Unfortunately, owing to a misunderstanding on the part of the former company secretary of the company, a statement of claim which had been served on behalf of the seven remaining claimants on the writ towards the end of May 1998 did not reach HD until the end of June 1998. That statement of claim included detailed allegations of assault against Mr Allen. Again, this raised the same issue of insurance coverage that had arisen in the [redacted] claim, and which had caused RSA to be joined as an additional defendant.
28. HD explained the insurance issues to Marron Dodds in an open letter dated 16 July 1998. Although initially there was some disagreement between HD and Marron Dodds as to the correct way to proceed, eventually the parties agreed that RSA should be joined as a separate defendant.
29. One final point to note in relation to insurance issues that should be mentioned at this stage concerns the period of when RSA was providing insurance for Bryn Alyn entities. At the time that the issues to which I have referred were being considered in 1997-98, RSA was under the impression that it had insured Bryn Alyn entities for public liability risks from around 1975 until the companies ceased trading in the late 1990s. In the absence of any evidence to the contrary, it was assumed (even though there was no record to confirm the position) that RSA had in fact been the relevant insurer from the commencement of trading of Bryn Alyn Community Ltd on 1 July 1973.
30. Although that was a reasonable assumption to be made on the available material, it later proved to have been incorrect. Further searches in 2004, at the outset of the insurance proceedings, revealed that in fact public liability cover had been provided by RSA from 22 August 1976 (i.e. a later start date than previously believed). I shall explain further below how that came to be discovered.
31. After the parties had decided how to proceed, insurance coverage issues were put to one side while the damages claims were litigated. As I shall explain later in this statement, the insurance issues were further examined several years later (after the main damages claims had been concluded).