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Damages for late payment of insurance claims – *Summary*

On 9 March Toby Rogers of Clyde & Co and Damian Glynn of Vericlaim presented a joint talk on some of the potential issues concerning damages for late payment of insurance claims under the provisions brought in by the Enterprise Act 2016.

Toby Rogers gave a brief overview of the provisions:

- The Enterprise Act inserted a new section 13A into the Insurance Act 2015 which implies into all policies a term that any sums due will be paid within a reasonable time of the claim being made.
- These provisions come into effect for policies incepting or renewing on or after 4 May 2017.
- There is a defence if the Insurer had reasonable grounds to dispute the claim.
- A one year time limit applies to any claim for damages, with time starting to run from the date when all sums due under the policy have finally been paid.

Damian Glynn said that it will be important, for the purposes of section 13A, to know when "a claim" has been made as this is the earliest point when the clock starts to tick on the obligation to pay within a reasonable time. This is not a term which is typically defined in current market wordings. The process of making a claim as a continuum that starts with the incident or occurrence itself, leading on to the initial notification, confirmation of an intention to seek indemnity, acceptance of policy coverage, and the process of evidencing and adjusting the quantum. This would then culminate in interim payments and final settlement.

Damian went on to question whose responsibility it was to move this process forward – could insurers sit back and wait until the moment when the Insured had put everything together that was required to constitute "a claim" or should the process require insurers and loss adjusters to be more proactive in extracting the relevant information from the insured and their advisers in a timely fashion? The potential for the process to break down and end in an acrimonious dispute about who should produce what and when, is well illustrated by the recent case of *Ted Baker v AXA Insurance* (2014) in which Damian was involved as an expert.

Toby discussed the scope of the defence of reasonable grounds to dispute the claim. He pointed out that insurers were always likely to be on the back foot when relying upon this defence because it would only, logically, arise in a situation where the claim had been found to be properly payable and so the grounds for disputing it had been found not to be valid. It remained for the Courts to work out in what circumstances grounds for dispute which subsequently proved to be invalid could nevertheless be considered reasonable. A further complication here was that under section 13A Insurers would lose the right to rely upon the defence if their conduct was not considered acceptable.

Clearly, communication and transparency as to timescales would be more important than ever and delays on the part of an Insurer's advisers would not constitute a defence. A further difficulty was that an amendment to the Enterprise Act which would have allowed Insurers to disclose and rely upon legal advice they had obtained during the investigation of the claim without a broader waiver of privilege had been rejected. Accordingly, insurers would have to show that the grounds for disputing the claim were objectively reasonable rather than simply showing that they reasonably relied upon independent professional advice. This was a higher standard.

Toby and Damian considered some of the issues that might affect specific classes of insurance:

- In property and BI policies, it was likely the loss assessors would push for ever earlier interim payments. Damian believed this might herald a return to the practice of demanding

payment on the indemnity basis on a buildings claim immediately after the loss with the Insured then submitting a "top up" claim on the reinstatement basis as and when works were done. Toby pointed out that the wording of the reinstatement memorandum in most policies would leave Insurers vulnerable to such an approach.

– The potential impact of section 13A in liability insurance is less clear. The obligation to pay within a reasonable time is only triggered when sums became "due" in relation to the claim. In the context of liability insurance, on the wording of most policies the indemnity does not become due until liability has been established – such as by a Court decision or a binding settlement. Damian pointed out that this could lead to tension in extreme cases where an Insured was heavily reliant upon the goodwill of a particular customer who was making a claim and Insurers were taken an excessively tough stance in resisting the claim.

– One of the more difficult areas is likely to be fraud. Insurers will be faced with some very difficult decisions as to how they would support the defence that they had reasonable grounds to dispute the claim. For example, disclosing fraud indicators or details received from confidential "tip-offs" could have broader undesirable implications. Fraud claims inevitably tend to run on for longer and the type of transparency regarding the investigation that is desirable in order to set up a defence of "reasonable grounds to dispute" would often be counter-productive during a fraud investigation.

Damian looked at some of the scenarios that might arise when considering claims for damages for breach of the section 13A implied term. The most obvious claim would be for interest. However, it is possible to envisage claims for avoidable gross profit losses either in excess of the limit of indemnity or beyond the maximum indemnity period, if such losses could have been avoided had earlier payment been. In an extreme situation, the delay might even give rise to the failure of the company and open up the possibility of a claim by the shareholders for loss of value. Particular complications are likely to arise where there is significant underinsurance as this will give rise to arguments as to whether a particular lost opportunity was the result of the underinsurance or a late payment. In such cases Damian said that insurers might be well advised simply to pay all sums due early on and walk away.

Damian drew attention to one particular area in the context of business interruption where a change in approach might be required, namely in dealing with increased cost of working (ICW) claims. There is sometimes a tendency of adjusters to tell an Insured that the adjusters would not be able to validate an ICW claim until they can see, several months down the line, whether the amounts spent have yielded an equivalent or greater saving in the gross profit loss. This type of retrospective verification is clearly unhelpful and section 13A might provide the impetus needed to take a more realistic approach. An obvious course of action would be to require (perhaps as a term of the policy wording) the submission of a business plan which the adjuster could then approve or not and the sums incurred in accordance with the plan would then be payable regardless of the ultimate success of the mitigation endeavour.

Finally, Damian and Toby considered some possible changes to the policy wording that might prove beneficial.

Firstly, it was difficult to see that the payment on account clause contained in some policy wordings would serve any useful purpose.

Secondly, it might be sensible for policies to include a much clearer definition of what constitutes a claim and in particular the supporting evidence that an Insured is required to present before any sums are "due" in respect of the claim within the meaning of section 13A.

Thirdly, it might be sensible to re-draft the reinstatement memorandum to be clearer as to whether an insured can make an immediate claim for payment on the indemnity basis and then a later "top-up" claim on the reinstatement basis. The reality is that assessment of the claim on the indemnity basis is often fraught with difficulties, which of course could mean significant delay and exposure to a damages claim. Accordingly, part of this process might involve greater clarity as to what settlement on the "indemnity basis" actually means.

Further information

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