

Spring has *Sprung*: A New Remedy for Late Payment of Insurance Claims

On 4 May 2016, the Enterprise Act 2016 received royal assent. The Enterprise Act amends the Insurance Act 2015 by introducing section 13A, which creates an implied term in every insurance contract that an Insurer pays any sums due to its Insured within a 'reasonable time'. This means that Insureds will be able to claim damages if Insurers unreasonably delay paying claims.

When section 13A of the Insurance Act comes into effect (on 4 May 2017), if an Insurer breaches the implied term, the Insured may seek damages for the losses suffered because of the Insurer's failure to pay out on time *in addition* to enforcing payment of the claim (and recovering interest on the unpaid claim). In contrast, the current position is that if the Insurer fails to pay a claim in a "reasonable time", there is no remedy for the delay. All that the Insured can seek to recover is the insured amount and interest. This is the case even where an Insured has suffered loss as a result of being out of pocket while its Insurer considers the claim. The Enterprise Act is welcome news for Insureds; the expectation is that Insurers will handle claims with efficiency and expediency so as to not fall short of the obligation to pay within a "reasonable time".

The Current Position

The Law Commission has previously described the current law that does not permit Insured parties to recover damages when the Insurer wrongly refuses payment, or delays payment in face of a valid insurance claim, as 'unfair, unprincipled and uncommercial'. The current position arises out of the legal principle that the Insurer's obligation is to 'hold the insured harmless' (i.e. to protect the Insured from loss). So when an insured event arises, the Insurer is in immediate breach of that obligation to hold harmless, and the damages that the Insurer is obligated to pay is the claim and any interest. English law does not permit 'damages on

damages' (*Sprung v Royal Insurance (UK) Ltd*), including damages consequent to an Insurer's late payment of damages (*The Lips*). Even where policies have expressly stated that Insurers pay a claim promptly, the courts have not provided any remedy for delay and instead simply applied the 'no damages on damages' rule (*Tonkin v UK*). The Insured is limited to attempting to oblige the Insurer to pay the claim, recovering only the unpaid sum and simple interest thereon.

Delay in paying an insurance claim can cause real loss to an Insured, particularly in commercial insurance where the subject matter of the insurance may be the means by which an insured generates profits. So a business whose premises are destroyed, or a tradesperson whose tools are stolen, may be unable to carry on business until a claim is paid.

The Law Commission's previous proposals to require Insurers to pay within a reasonable time, breach of which would entitle the Insured to claim damages to the extent of loss suffered, were not included in the Insurance Act due to resistance in the consultation process. However, the Law Commission's recommendations have now been implemented in the Enterprise Act which will amend the Insurance Act from 4 May 2017 to include section 13A (n.b. The other sections of the Insurance Act will come into force on 12 August 2016).

Insurers' New Obligation

All insurance contracts will contain an implied term that Insurers must pay any sums due in respect of a claim under a policy within a 'reasonable time'. What is reasonable is not defined but will depend on all of the relevant circumstances, including: the type of insurance; the size

and complexity of the claim; compliance with any relevant statutory or regulatory rules or guidance; and the factors that are outside the Insurer's control. The courts may expand on these factors with a range of standards developing, mirroring the diversity of the insurance industry.

In order to make out a claim for damages the Insured will have to demonstrate causation of the loss and establish the quantum claimed. Further, a claim for breach of the implied term must be brought no later than 12 months from the date on which the Insurer has paid a claim.

Contracting Out

A further new section to the Insurance Act (section 16A) introduced by the Enterprise Act will allow commercial parties to contract out of the implied term, but the Insurer must satisfy the "transparency rules" contained in the Insurance Act, directing the Insured's attention towards the disadvantageous term prior to signing and ensuring the term is 'clear and unambiguous as to its effect'. It remains to be seen how many Insurers will seek to contract out and how the industry will respond to section 16A and the implied term. However, the Insurance Act will prohibit an Insurer from "contracting out" of section 13A in all consumer contracts and in commercial insurance contracts where the Insurer 'deliberately or recklessly' fails to pay out in a reasonable time. For example, if the Insurer knows that it is not paying in a reasonable time under the policy or if it does not care that it has not done so.

Reasonable Delay?

Section 13A of the Insurance Act will give the Insurer a "reasonable time" to investigate and assess a claim. The Insurer has a defence if it can show that genuine grounds exist for disputing a claim or its quantum; the court will

determine what constitutes reasonable grounds for disputing a claim. Provided the Insurer is taking "reasonable time" to handle the claim, the Insurer will not have breached its implied duty if payment is withheld until the claim is determined or agreed to be valid and its amount established.

What will be reasonable will depend on the circumstances of the case. However, the Enterprise Act shifts the onus on Insurers to show that they have taken a reasonable amount of time to assess a claim. This may result in Insurers carefully examining their claims procedures and processes. It is possible that Insurers could consider making interim payments in valid claims where the loss cannot be quantified quickly. Further, Insurers could put procedures in place to make sure that claims are dealt with expeditiously and have a dialogue with the Insured so that they can accurately assess any linked damage (to the Insured) if payment is not made quickly. These are all steps that will assist the Insured.

Commentary

The Enterprise Act is welcome news for insured parties; it will incentivise Insurers to ensure the timely payment of claims and gives Insureds a remedy if they do not. This is key for an insured party who needs the insurance payment to put right any damage/loss incurred. Further, somewhat belatedly, the new implied term may avoid the type of unfair situation that occurred in the *Sprung* case where the insured was forced to sell his business as he could not afford to carry on without the insurance money. It remains to be seen how the courts will interpret what constitutes a 'reasonable time' and what steps Insurers will take to ensure that they comply with the new rules.

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