To boldly go ….

Insurers by contract agree on terms to indemnify their insured in respect of losses, such that any outstanding reimbursement puts them in breach from the very moment of the event. But immediate suit is virtually unheard of and most claims are paid after sometimes lengthy investigation, relegating this obscure principle to near folklore, and sustaining the fiction that insurers maximise delay, largely untroubled by the rare compensatory interest payments or punitive costs awards which are currently an insured's only remedies.

Part 5 of the Enterprise Act 2016 will soon alter that by adding section 13A to the Insurance Act 2015. This breaks wholly new ground with a statutory cause of action for culpable delay in payment. Ancillary to his contractual rights under the policy, an insured will be able to commence completely separate proceedings for sometimes unlimited damages.

Policies governed by UK law and made or varied on or after 4 May 2017 will include an implied term that if the insured makes a claim, insurers must pay any sums due within a reasonable time. It may one day be significant that the emphasis seems to be on what proves *due*, rather than what specifically is *claimed.*

Insurers' allowance includes a reasonable time to investigate and assess the precise measure depending on all relevant circumstances, including (as examples) the type of insurance, the claim's size and complexity, compliance - by either party - with relevant statutes or similar provisions, and factors outside insurers' control.

Insurers do not breach the implied term in not paying, wholly or partly, while reasonable grounds for challenge are being contested, but they must show what is reasonable, here. Their claims-handling conduct - for example speed of response, reaction to developments, and overall approach - may be taken into account, and breach perhaps established on later determination that liability should have been conceded earlier, or quantum agreed sooner. Insurers might be benchmarked as for defending a summary judgment application, and Part 36 offers and similar may increase in significance. Many rightly anticipate much contest here, and perhaps in some cases early offers will be made and proceedings issued, tactically, to exert pressure.

The limitation period for this new action for damages is one year from when insurers have paid all the sums "due in respect of the claim". This time-bar structure could be troublesome, for example either proving irrelevant or inviting further proceedings, depending on the outcome of a primary contest on liability or quantum.

With consumers, insurers cannot exclude or limit this implied term, so damages are indeed at large. It is the same for business lines if insurers are shown deliberate or reckless in breach, so the validity of an attempted fetter on the implied term might depend on how they had behaved. Otherwise, for business lines, exclusion or limitation can be valid if it meets the transparency provisions of section 17 of the 2015 Act.

There is no doubt that these changes are causing insurers to look closely at their claims management and mechanisms, and further to hone procedures and ensure that all steps are recorded and where appropriate explained, so that hindsight challenge could be more readily resisted. Response protocols are being tightened, and expected, protective, increased use of interim payments - where liability is clear but the claim may prove hard to quantify - will require prompt focus by loss adjusters and perhaps other external advisers. Poor performance by any such, in that and other respects, could mean later having to answer for a successful claim made on insurers.

In the wider arena, similar issues might arise under a following market's agreement to be bound, or when a reinsurer invokes a claims control clause. Many will be looking to amend or create related wording, including contracting out where possible, all of which will need close consideration and careful drafting.

Some will relish testing these new provisions, viewing them as long overdue redress of a major imbalance, and plainly they mean further unwelcome extra cost for the insurance industry. However, we are not likely to see a great many large damages awards. As well as establishing a valid claim, and culpable delay in paying at least part of it, for a major recovery an insured would also have to scale the usual fences of showing that the delay had occasioned a loss which is neither too remote (normal causation and *Hadley v Baxendale* principles would apply) nor due to failure to mitigate.

The new section 13A will create a brand new action for damages, but with new hurdles, and the familiar ones intact. Insurers and their advisers will anticipate and prepare for a type of claim which is wholly novel, but whose success will still largely depend on established rules.

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