

Not playing ball

What happens when an insured does not co-operate with its insurers over a claim?

An insured usually has an obligation under the policy to co-operate with an insurance company's investigation of a claim. But insurers are put in a difficult position when an insured does not co-operate as fully as they would like - or even does not cooperate at all.

Most insureds are, of course, keen to co-operate with insurers and get the claim resolved as quickly and painlessly as possible. However, sometimes an insured will make a claim but then fail to provide the further information requested by the insurance company. This makes life tricky for insurers, as they have been notified of a claim but may well have no real idea of its value or merit. To make things worse, they do not know when - or indeed if - the insured will ultimately provide the further facts required.

What then is a reasonable timeframe for the insured to respond to the insurers' inquiries? Can insurers refuse to meet a claim where an insured fails to provide information when requested, or must they just keep on endlessly requesting the information, despite the insured's silence?

This issue has come before the court in recent years. Intriguingly, a different decision has been delivered on each occasion. This article looks at these different conclusions and the effect they have on an insurer whose insured fails to co-operate with the claims process.

The *Shinedean* case

In the Court of Appeal case of *Shinedean v Alldown Demolition* [2006] EWCA Civ 939, Axa (the appellant insurance company) appealed against a finding by the trial judge that the insured's failure to provide claim-related documentation within a reasonable time had not materially prejudiced Axa.

The facts were these. Shinedean had employed Alldown to carry out demolition and excavation work. Alldown's work caused the partial collapse of a wall on a neighbouring property. Alldown had a public liability all-risks insurance policy with Axa and told Axa about the damage. Under the terms of policy, Alldown had to supply Axa with all documentation and information in relation to any claims. Virtually no documentation was provided, however, despite many requests by Axa's loss adjusters.

Shinedean paid the owner of the damaged property a substantial sum in settlement of his claim for damages and subsequently obtained a default judgment against Alldown for damages to be assessed. Axa refused to indemnify Alldown, as it had failed to provide the documentation required and, consequently, had not complied with the claims control clause in the insurance policy. Before the assessment

hearing, Axa was added as a party to the proceedings and Shinedean claimed against Axa for an indemnity.

The trial judge ruled that it was an implied condition of the policy that documentation should be provided by the insured within a reasonable time. However, while Alldown had failed to give Axa the required information for two years prior to the litigation, the insurer had not been prejudiced in any material way by this failure. Consequently, it could not refuse to indemnify Shinedean.

Axa appealed, arguing that whether or not it had been prejudiced by Alldown's failure to supply the information was irrelevant in law. Shinedean countered by saying that what constitutes a reasonable period of time depends on the circumstances, and prejudice to the insurer is one of those circumstances.

While being careful to stress that each case turns on its own facts, the Court of Appeal agreed with Axa. There is, said the court, no legal principle to the effect that an insured will breach its obligation to provide information only if the insurer suffers material prejudice as a result of the insured's failure to give such information. What is a reasonable period of time is inextricably linked to the purpose of a claims control provision, which is to enable an insurer to investigate claims as soon as possible. An insurer is entitled to know where it stands.

In this instance, the court ruled, Alldown's failure to produce readily-available documentation for two years (and then only in the course of litigation) was unreasonably late. Consequently, it had plainly breached the conditions of the policy. Whether Axa had, in fact, been prejudiced by Alldown's failure to provide the documents was irrelevant. Until it possessed that information, Axa could not make a decision about how it ought to proceed. Consequently, it was entitled to avoid liability in this instance.

Porter v Zurich

The recent English High Court case of *Porter v Zurich* [2009] EWHC 376 (QB) looked in detail at an insured's obligation to provide further information about a claim made to its insurers.

The key part of the case related to three separate thefts in 2001 from Mr Porter's fire damaged and empty property. In the first theft, the wrought-iron gates at the front entrance of the property were stolen. In the second and third thefts, various other items were stolen from the house, including the whole of the fitted kitchen.

The insurers were concerned because there appeared to be some duplication between the items stolen and property included in a previous claim made by the insured following a fire at the property but for which the insurers had refused cover. If the items stolen had already been damaged by the blaze - as they must have been to warrant their inclusion in the claim relating to fire damage - then there could be no claim for the theft unless it could be shown that the items

involved had retained some residual value despite their damaged state. Obviously, without further investigation, this could not be established.

The insurers (via their loss adjustors) tried to contact Mr Porter and his solicitors in order to obtain more information regarding the thefts. The loss adjustors wished to conduct a site visit as well as instigate further inquiries regarding the stolen items. They also wanted an additional statement from Mr Porter. Numerous attempts were made by the loss adjustors to arrange a meeting with Mr Porter. They tried to contact him and his solicitors repeatedly from July 2001 until December 2001, but received no response. Sometime in 2002, the insurers closed their file. In 2007, shortly before the expiry of the limitation period, Mr Porter started legal proceedings against the insurers, incorporating a claim for payment under the three theft claims.

The insurers' main response to the theft claims was that, in breach of the policy, Mr Porter had not made it possible for their loss adjustors to investigate the circumstances of the case. However, the insurers did not argue that compliance with the relevant part of the policy was a condition precedent to liability. Instead, they claimed damages for breach of contract.

The court was satisfied that Mr Porter had breached the policy. But it rejected the insurers' claim that the breach had caused them a loss that was equivalent to the sums claimed under the policy.

The insurers' central concern was the duplication in the theft claims of items previously included in the rejected fire claim. They argued that if Mr Porter had co-operated and enabled them to investigate the thefts, then it would have become apparent that many of the stolen items had been previously damaged by fire and were consequently worthless.

The court ruled that for the insurers to show that Mr Porter's breach of the policy had caused them loss, they would need to demonstrate that, on a balance of probabilities, investigations into the theft claims would have led to zero recovery for the claimant. The lack of contemporaneous investigations did not automatically give rise to any loss at all, let alone a loss equivalent to the full sum claimed. In fact, although there had clearly been a breach of contract by Mr Porter, there was no evidence that the breach had actually caused any loss at all.

The court concluded that the theft claims should not be dismissed at this stage but should be dealt with instead at a court hearing dealing specifically with damages. At that hearing, the insurers would have the opportunity to demonstrate, if they could, that the claimant's lack of co-operation had caused them loss.

Of course, this is not particularly helpful to insurers who are battling with an uncooperative insured. The decision suggests that a court will not look favourably on an attempt by insurers to refuse to make a payment on the grounds of the insured's failure to co-operate with investigations - even when the failure is as lengthy as it

was in this instance - except perhaps in a case where investigations into the claim would result in zero recovery for the insured.

Conclusion

The decisions in *Porter v Zurich* and *Shinedean v Alldown Demolition* are not easy to reconcile. It may be that the different conclusions stem from the fact that the insurers in *Porter* did not say that compliance with the policy was a condition precedent to liability, claiming damages for breach of contract instead, while the insurer's argument in *Shinedean* hinged on the fact that the provision of the requested information was a condition precedent. In addition, in *Shinedean* the information was only finally supplied during the course of the litigation, and the court thought it would be particularly unreasonable if such a gross delay stopped the insurers from refusing to cover the claim.

Nevertheless, the split in legal reasoning between the two cases is still curious. In *Shinedean* in 2006, the Court of Appeal ruled that - in circumstances where the delay in providing documents (before the insured became insolvent) was only a matter of months - there was no absolute principle, one way or the other, as to whether an insurance company's being prejudiced should, or should not be, included when assessing the matter of reasonable time. By comparison, in *Porter* in 2009, the court decided that the insurer could not refuse to meet the claim because of the insured's six-year delay in providing the requested information. It is also strange that *Shinedean* was not cited in *Porter*, as the facts seem sufficiently similar to merit at least a reference or, better still, an explanation as to why the decisions are so different. It is particularly odd given the scarcity of authority relating to an insured's duty to co-operate with the handling of a claim.

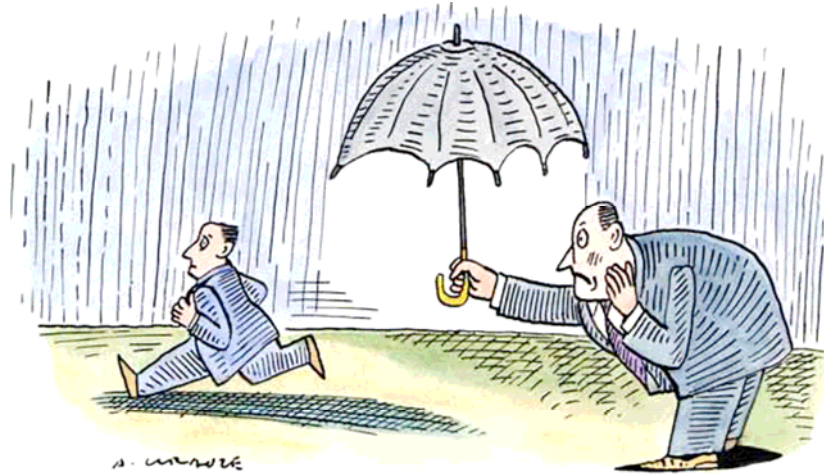
While *Porter* is the more recent decision, as it is a High Court case it does not overrule the Court of Appeal's decision in *Shinedean*. So there is no reason why insurers could not rely on *Shinedean* (at least, to some degree) when considering the reasonableness of eventually declining cover to an insured because he or she has not provided the requested information. Although a court today would probably pay more regard to the more recent (and less favourable) case, in the absence of a House of Lords ruling on the matter, *Shinedean* is still good law. So while it is important not to ignore the court's explicit warning in *Shinedean* that each case will turn on its own facts, insurers can still draw some comfort from *Shinedean* when faced with an intransigent insured who does not co-operate with them.

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