

*The Chartered Institute
of Loss Adjusters*



The Enterprise Act 2016

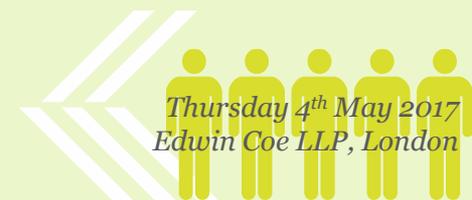
*to boldly go where no Act has gone before
by the CILA Claimant SIG*

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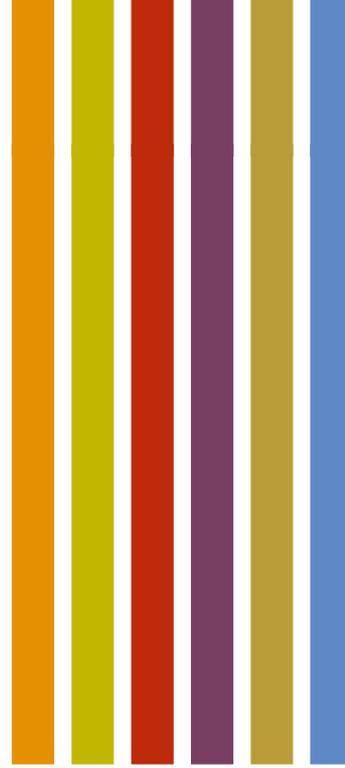
*Steve Taylor, Principal Consultant, Aon Risk Solutions
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Speaker:

Michael Whitton, Partner, Insurance Litigation, Edwin Coe LLP



*Thursday 4th May 2017
Edwin Coe LLP, London*



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The Enterprise Act 2016

4 May 2017



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The law until today



- General contract law and damages
 - Actual loss
 - Foreseeable at the time of the contract
 - Taking reasonable steps to mitigate the loss
- The “hold harmless” principle
 - The obligation under a contract of insurance
 - Payment under an insurance policy does not constitute a debt due under a contract but damages for breach of contract
 - English law allows damages for late payment of a debt but not for late payment of damages



The law until today *cont'd...*



- *Sprung v. Royal Insurance (UK) Limited*
 - What happened in Sprung
 - A separate contractual obligation
 - See *Tonkin v. UK Insurance Limited*
- Other remedies
 - Damages for breach of the duty of utmost good faith
 - Breach of statutory duty
 - Complaint to the FOS



The need for reform



- Common sense
- Lack of fairness
- Out of step with other jurisdictions
- Out of step with other developments in the law
- Anomalous even in the insurance context



Contrary arguments



- Extra costs
- Increased litigation
- Reinsurance requirements
- Uncertainty in calculating reserves
- Exposure to US style bad faith claims



Law Commission's conclusions



- A compelling case for reform
- The need for legislative intervention
- Breach should attract normal contract law damages



The new law



- Section 28 of The Enterprise Act 2016
- Section 13A(1)
 - Introduces an obligation on the insurer, when presented with a claim, to pay all sums due within a reasonable time
 - *“It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.”*
- There are four basic key elements:
 - The obligation takes effect as an implied contractual term not as a statutory duty
 - Only the insured can make a claim
 - “Sums due” – the underlying insurance claim has to be valid
 - Payment must be made within a reasonable time



What factors will determine a reasonable time?



- Section 13A(2)

“A reasonable time includes a reasonable time to investigate and assess the claim.”

- Section 13A(3) – gives some examples of what factors may determine what is reasonable

“What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account:

- *The type of insurance,*
- *The size and complexity of the claim,*
- *Compliance with any relevant statutory or regulatory rules or guidance,*
- *Factors outside the insurer’s control.”*



What factors will determine a reasonable time? *cont'd...*



- Section 13A(4) – a reasonable but wrong refusal to pay a claim

“If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable):

- *The insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but*
- *The conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.”*



Remedies



- Contractual
- In addition to any existing rights or remedies – Section 13A(5)
“Remedies (for example, damages) available for breach of the term implied by subsection (1) are in addition to and distinct from:
 - *Any right to enforce payment of the sums due, and*
 - *Any right to interest on those sums (whether under the contract, under another enactment, at the court’s discretion or otherwise).”*



Contracting out



- Consumers – Section 16A(1)

“A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Section 13A than the consumer would be in by virtue of the provisions of that section (so far as relating to consumer insurance contracts) is to that extent of no effect.”

- Non-consumers – Section 16A(2)

“A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects deliberate or reckless breaches of the term implied by Section 13(A) than the insured would be in by virtue of that section is to that extent of no effect.”



Contracting out *cont'd...*



- Transparency – Section 16A(4)

“A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Section 13(A) than the insured would be in by virtue of the provisions of that section (so far as relating to non-consumer insurance contracts) is to that extent of no effect unless the requirements of Section 17 have been satisfied in relation to the term.”

- Settlement agreements – Section 16A(6)

“This section does not apply in relation to a contract for the settlement of a claim arising under an insurance contract.”



Limitation



- Section 30 of The Enterprise Act 2016
- Section 5A of The Limitation Act 1980

“An action in respect of breach of the term implied into a contract of insurance by Section 13A of The Insurance Act 2015 (late payment of claims) may not be brought after the expiration of one year from the date on which the insurer has paid all the sums referred to in subsection (1) of that section.”



Practical considerations



- Identifying foreseeable losses
- Investigating/challenging the relevance of requested material
- Ensuring a prompt response
- Agreeing settlements
- Monitoring and updating losses and steps of mitigation
- Evidence gathering/retention



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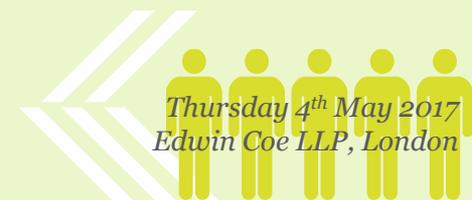
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