ICNZ law and regulation seminar

1 November 2017

Agenda

9.15-10.15	Professor Rob Merkin QC – insurance law update
10.15-10.35	Morning tea
10.35-11.05	Rebecca Sellers – insurance regulation update
11.05-12.00	Audience Q&A session with panel

INSURANCE COUNCIL OF NEW ZEALAND INSURANCE UPDATE

Professor Rob Merkin QC

Wednesday, 1 November 2017

Late Payment : The UK Legislation

Insurance Act 2015, section 13A

- Implied term for payment within a reasonable time
- What is reasonable depends upon the circumstances
- Defences include matters beyond insurer's control
- Breach gives rise to damages for foreseeable loss
- No policy limit cap on liability
- Contracting out possibilities
- Are reinsurers liable for: late payment damages; damages awarded against an insurer; damages for refusing to consent

Late Payment and Good Faith

Young v Tower Insurance [2016] NZHC 2965

(1) The common law recognised an implied term based on the duty of utmost good faith to: "disclose all material information that the insurer knows or ought to have known, including, but not limited to the initial formation of the contract [and] act reasonably, fairly and transparently, including but not limited to the initial formation of the contract." (2) Implied term that insurer will "disclose all material information that the insurer knows or ought to have known, including, but not limited to … during and after the lodgement of a claim"; "act reasonably, fairly and transparently, including but not limited to … during and after the lodgement of a claim"; and "process the claim in a reasonable time." (3) Insurer had failed to disclose report showing that rebuilding was required, so breach of implied term. $5000 damages awarded. (4) Insurer could not insist upon repairs using new method, as policy required "building materials and construction methods in common use at the time of repair or rebuilding". (5) Cash offer not made by insurer, but in any event not accepted and so could be withdrawn

More on Good Faith

Sadat v Tower Insurance Ltd [2017] NZHC 1550

No damages for late payment by: (a) reasonable even if mistaken reliance on a defence; and (b) delays the fault of the assured.

Sharma v Insurance Australia [2017] NSWSC 55

Assured's building was damaged in a storm. Loss adjusters deny cover on basis of poor condition of building. Assured attempted to repair the damage himself and fell off a ladder. Claimed damages for foreseeable loss by reason of late payment. Held: insurers had not themselves rejected the claim so no breach of duty, but in any event (1) loss not foreseeable within *Hadley v Baxendale* and (2) this was an old injury anyway.

Hellessey v MetLife Insurance Ltd [2017] NSWSC 1284

Where an insurer has a discretion, it has to be exercised in good faith with the interests of both parties in mind: discretion for costs; refusal to settle at policy limits

Presentation of the Risk

Dalecroft Properties Ltd v Underwriters [2017] EWHC 1263 (Comm)

Factual issue as to whether there had been non-disclosure and misrepresentation as to a building in Margate. Insurers entitled to avoid liability for: misrepresentation as to the state of the building and the incidence of vandalism; non-disclosure of Emergency Prohibition Order closing building to residents, materiality being absence of risk management and control. Inducement shown

Higherdelta Ltd v Covea Insurance Plc [2017] ScotCS CSOH_84

No right to avoid policy on restaurant. (1) Failure by director to disclose refusals to insure personal property portfolio not material, as risk rating was entirely different. There was no moral hazard involved, purely physical hazard. (2) Although there had been a previous refusal to cover, the assured's answer was honestly given and on the true construction of the question it applied only to the assured and not to its directors. (3) There was no suggestion that the director had been connected with the earlier incidents of arson, and there was no suggestion that there was any grudge against him.

Liability Insurance Cover I

Fund Managers Canterbury v AIG Insurance NZ [2017] NZCA 325

D&O policy excluding liability "arising out of performance of professional services". Directors faced claims from a Trust for certifying that there were no matters adversely affecting investors. Held: claims were not excluded. Policy covered liability incurred as director, and the services provided were merely certifying past performance and not providing advice for a fee as to the future

Impact Funding Solutions v AIG Europe Insurance Ltd [2017] UKSC 57

Solicitors entered into agreement with Impact for the provision of litigation funding to clients. Insurance excluded "breach of the terms of any contract for the supply to, or use by, any insured of goods or services in the course of the Practice." Solicitors found liable to Impact for negligence in applying funding agreement. SC held that policy did not respond. Purpose of the policy was to protect clients, not third party suppliers. The agreement was for the supply of services to solicitors, and Impact's claim arose out of its breach. This was a trading liability only.

Liability Insurance Cover II

Crowden v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm)

PI policy for financial adviser "excludes and does not cover any claims, liability, loss, costs or expenses: rising out of or relating directly or indirectly to the insolvency or bankruptcy of the Insured or of any company whom the Insured has arranged directly or indirectly any insurances, investments or deposits …" The Court held that the claim against QBE fell within the exclusion: it was not limited to non-negligent acts; it was not limited to investments arranged by Target itself; and it was not limited to formal insolvency procedures. Important comments on interpretation.

Amlin Corporate v Baby Basics Ltd [2017] EWHC 2047 (Comm)

"Bodily injury" defined as "Death, injury, illness, disease, or nervous shock" did not cover liability for "negative feelings" and "loss of autonomy"

Property Cover

Guastalegname v AAMI [2017] VSC 420

Exclusion for "soil movement or settlement, subsidence or landslide" covers heave as well as subsidence.

Body Corporate 74246 v QBE Insurance [2017] NZHC 1473

September 2009, QBE insured premises in Christchurch from "4 September 2009 at 4pm to 4 September 2010 at 4pm". Assured renewed with Allianz "Effective date: 04/09/2010" and "Expiry date: 4pm on 04/09/2011". Earthquake occurred at 4.35am on 4 September. QBE paid and sought contribution from Allianz. Held: Allianz policy incepted at 4pm: the parties intended seamless rather than overlapping cover.

Aggregation Clauses

AIG Europe Ltd v Woodman [2017] UKSC 18

Policy aggregate of £3 million for all claims "arising from similar acts or omissions in a series of related matters or transactions". Solicitors administered two trust deeds holding funds from investors for purchase of developments on two sites. Money released to developers before security provided, so all lost. Held: the claims of each group of investors arose from acts or omissions in a series of related transactions. The relevant transactions were not the payment of money out of the account but the wider investment transaction entered into by each investor. Each had a common objective, and were legally connected by trust. However, each trust deed gave rise to separate claims, so there were two claims.

Spire Healthcare v Royal & Sun Alliance [2016] EWHC 3278 (Comm)

Policy found to contain aggregation clause

Causation Clauses

AMI v Legg [2017] NZCA 321

Fire from rubbish heap caused damage to surrounding buildings. Policy covered farming operation but excluded "legal liability arising out of or in connection with any retail shop." Rubbish from both on heap. NZCA applied *Wayne Tank* and held that exclusion prevailed.

Wastell v Woodward 28 February 2017

Assured crossing road to reach hamburger van after posting and advertising sign – injury caused by him to driver arising out of use of van

UK Insurance v Pilling [2017] EWCA Civ 259

Car being repaired and catching fire – damage to property arising out of use of car

Measure of Indemnity

Xu v IAG New Zealand Ltd [2017] NZHC 1964

Policy providing that: "Where a contract of sale and purchase of your Home has been entered into the purchaser shall be entitled to the benefit of this Section." Held that clause applied only to situation between contract and conveyance of house, and not position after sale of damaged property.

Sadat v Tower Insurance Ltd [2017] NZHC 1550

If there was pre-existing damage to a house, there could not be recovery for the same loss if there was an insured peril.

Annex Developments Ltd v IAG New Zealand Ltd [2017] NZHC 706

"After we have paid a claim under this policy, we will reinstate your sum insured. We may ask you to pay an additional premium for this." Held to require actual payment by insurers, and not merely that sums ought to have been paid: in any event, no obligation to pay until assured had quantified loss and incurred expenditure.

Co-Insurance Clauses

Gard Marine v China National Chartering CO [2017] UKSC 35

Charters vessel to DC on terms that it is to be used only in safe ports. DC obliged to insure in joint names. DC sub-charters to SC1, and SC1 sub-charters to SC2, both containing safe port warranties. Vessel lost. Insurers pay DC and take assignment of DC's rights against SC1/SC2. Held, 5:0 that port was safe, but if that was wrong then 3:2 that insurers had no claim. Majority view, effect of insuring obligation was that DC was immune from suit against O, and if DC was immune then it had suffered no loss recoverable from SC1/SC2. Minority view, DC faced liability to O: liability was discharged by payment, but SC1/SC2 could not rely upon insurance.

The Marco Polo [2017] EWHC 843 (Comm)

Agent unable to recover under liability policy for sums paid voluntarily to passengers on cancelled cruise. Policy covered only liability of carrier, and it was irrelevant that agent was co-assured.

Duties of Assured

Grace Electrical Engineering v EQ Insurance Co Ltd [2016] SGHC 233

Assured recovered under liability policy for fire spreading to neighbouring buildings. (1) Security obligations were conditions precedent by virtue of "general" clause. (2) Reasonable care clause broken - assured had been reckless in, following warnings, failing to prevent workers cooking on premises. (3) Pleading guilty to criminal offences was not an "admission" of liability for civil law purposes, as offences were strict liability.

Zurich Australian Insurance Ltd v Withers [2016] NZCA 618

Exclusion for liability "*arising out of or connected with any actual or alleged dishonest act*". Held that test is both objective and subjective. It was necessary to measure the assured's actual conduct and knowledge against an objective moral standard of what constituted honest conduct by a person having that knowledge,

Rahim v Arch Insurance Co (Europe) Ltd [2016] EWHC 2967 (Comm)

Solicitor "condoned" partner's criminal acts by being aware of earlier frauds but not stopping partner's future dealings

Accidents

Leeds Beckett University v Travelers Insurance [2017] EWHC 558 (TCC)

Buildings collapsed by reason of foundations being installed without drainage. Insurers held not to be liable. (1) No accidental damage, collapse was inevitable. (2) Exclusion for gradual deterioration applied.

Quek Kwee Kee v American International Assurance [2017] SGCA 10

Personal injury policy covering death or personal injury as result of accident. Assured died of prescription drug overdose. Insurers held liable. (1) There was an accident where the assured neither intended nor expected to suffer the injury, a subjective test. Reject English view that there is no accident if death was the probable consequence - it had to be intended. (2) There were three possible explanations: (a) overdose with intention of expectation of causing death or injury; (b) overdose without such intention; or (c) medication taken in accordance with prescription, with no intention or expectation of suffering injury or death. Both (b) and (c) qualified as accidents. (3) No evidence of any intention on the part of Q to take drugs with the intention or expectation of causing injury or death.

Defective Design and Workmanship

Manitowoq Platinum Pty Ltd v WFI Insurance Ltd [2017] WADC 32

Plumbing work in Perth restaurant defective, leading to closure. Held: (a) No breach of reasonable care clause. (b) No defence for defective products – problem was workmanship. (c) No defence for defective workmanship – did not extend to consequential loss.

Leeds Beckett University v Travelers Insurance [2017] EWHC 558 (TCC)

Exclusion for faulty or defective design applied irrespective of negligence.

Mobis Parts Australia Pty Ltd v XL Insurance [2017] NSWSC 1321

Faulty Design Exclusion. (1) If there is a statutory standard, compliance means design is not faulty. (2) If no statutory standard, compliance a design was defective if: (a) it did not work because at the time of designing insufficient was known about the problems involved and their solution to achieve a successful outcome; (b) it was not up to the required standard; or (c) it was not as adequate for the purpose for which it was designed as art or skill could make it.

Notice Clauses

Zurich Insurance Plc v Maccaferri Ltd [2016] EWCA Civ 1302

Obligation to give notice in writing as soon as possible after occurrence of event likely to give rise to a claim. Assured giving notice more than two years after injury, unaware until that point of possible claim. Held: can't give notice until knows of claim, so not out of time.

Denso Manufacturing v Great Lakes [2017] EWHC 391 (Comm)

Claim dismissed under ATE policy. (1) All conditions were converted into conditions precedent. (2) No breach of duty to co-operate, as it required a prior request from insurers. (3) Obligation to convey information without delay infringed by series of failures. (4) Right to recover under the policy arose on the quantification of costs on 3 September 2015 and not on the making of the costs order on 5 September 2014, so that the breaches of the conditions precedent occurred before insurers' liability had arisen. (5) No right to rely upon non-payment of premium. Time not of the essence and no demand made.

Defence Costs

Weir Services Australia v AXA Corporate Solutions [2017] NSWSC 259

Claims against assured for disintegration of welding. Arbitration commenced for US$68 million. Before arbitration concluded, parties entered into a "cap and collar" agreement under which claimant agreed that if it won it would cap claim at US$10.75 million and assured agreed to pay US$2 million irrespective of outcome. Held that assured could not recover the US$2m paid nor defence costs of $US7.6 million. (1) Liability under the collar was assumed, not incurred as a matter of law. (2) Defence costs payable only if there was a claim under the policy, but there had not been an occurrence leading to loss, only disintegration of defective weld.

Reinsurance

MetLife Insurance v RGA Reinsurance Company [2017] NSWCA 56

No back to back cover where insurance covered police in post on or after 1 July 2005 but reinsurance applied only where initial event giving rise to injury occurred on or after I July 2005.

Intermediaries

RR Securities v Towergate Underwriting [2016] EWHC 2653 (QB)

Policy on gaming machines contained minimum security requirements and reasonable care. Broker failed to draw clause to assured's attention, and requirements not complied with. Claim against brokers. (1) Brokers' duty included drawing clause to the attention of the assured. (2) If they had, assured would have complied. (3) The insurers would not have had an alternative defence based on breach of the reasonable precautions clause, under recklessness test.

SKM Recycling Pty Ltd v Australian Reliance Pty Ltd [2017] VSC 159

Brokers liable for shortfall in settlement under a business interruption policy insofar as they failed to follow instructions as to increasing gross profit. But no liability for failing to query how gross profit had been calculated.

DLA PIPER

ICNZ Insurance Council of New Zealand

Morning tea

Reconvene at 10.35

ICNZ insurance law and regulation - the year in review and the year ahead

Rebecca Sellers | Director

Melior
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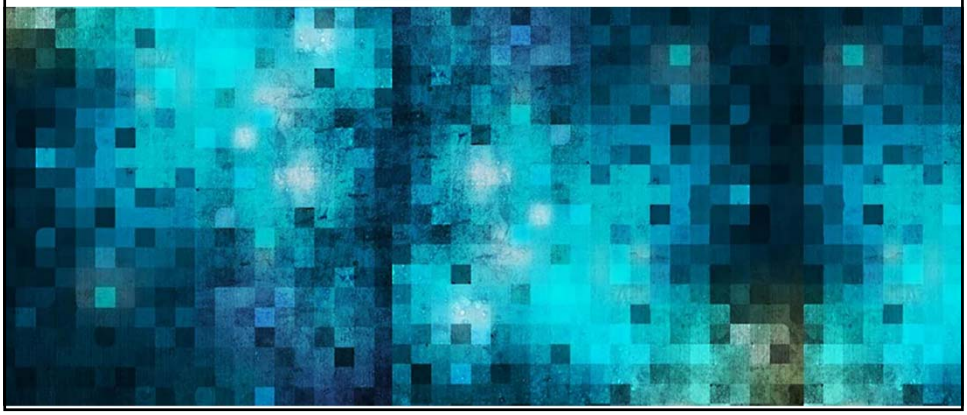

Regulation: official rule or the act of controlling something

Prudence: how can we be sure insurers will be able to pay claims?

How should insurers distribute products?

Keep on your radar

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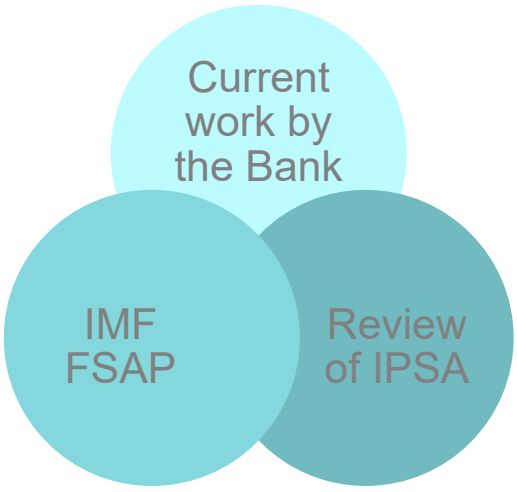
Prudence: how can we be sure insurers will be able to pay claims?



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"The first virtue of an insurance company is its solvency."

- Insurance (Prudential Supervision) Act 2010
- Purposes:
  - Promote the maintenance of a sound and efficient insurance sector; and
  - Promote public confidence in the insurance sector
- Those purposes are achieved by-
  - Establishing a system for licensing insurers; and
  - Imposing prudential requirements on insurers; and
  - Providing for the supervision by the Reserve Bank of New Zealand of compliance with those requirements; and
  - Conferring certain powers on the Bank to act in respect of insurers in financial distress or other difficulties

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What is the regulator working on?

- Thematic review on compliance with financial strength rating and solvency disclosure requirements - 53% of participants assessed as complying at a low or poor level – **"generally disappointing and needs to markedly improve"**
- Insurer Data Collection - **"significant concerns about the quality of some of the data received"**
- Publication of statistics
- Insurance Industry Updates
- Consultation Paper relating to a possible strengthening of audit requirements for financial year end insurer data return

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"The RBNZ seeks to limit as far as possible the moral hazard associated with regulation"

- Financial Sector Assessment Program - IMF recommendations, May 2017:
  - Increase regulatory resources
  - Proactive regulator - increase supervision
  - Market understands what regulator expects - set standards for corporate governance, risk management and internal controls
  - Flexible and responsive enforcement and distress management
  - Overseas insurers
  - Conduct - claims and policy terms

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What do insurers think of the current regime?

- Overseas insurers:
  - Too heavily regulated – branches have better access to capital, better regulated overseas, mutual recognition of foreign prudential regimes.
  - Too lightly regulated – policyholders are exposed to an unacceptable risk - statutory funds, assets in NZ; local incorporation, deposits(?)
  - Treat reinsurers separately?
- Disclosure of financial strength ratings - costly and of questionable benefit
- Statutory funds - redundant, costly and not appropriate for general insurance
- "Carrying on insurance business in NZ" - InsureTech
- Exemption powers, disproportionate penalties, more flexible enforcement
- Review should be carried out by an independent agency

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Phase 2 - how the Reserve Bank sees the review progressing

- To April 2018:
  - Entities required to be licensed
  - Treatment of overseas branch operations
  - General disclosure and financial strength ratings
- To September 2018:
  - Enforcement regime and distress management
  - Role of key officers
  - Statutory funds
- To April 2019:
  - Solvency framework and supervisory processes
- Mid-2019 final options paper

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Distribution – conduct of business

- NZ FSAP - consider all aspects of insurance product life cycle
- UK FCA "More than £27bn has already been paid back to people who complained about the sale of PPI"
- Great British Pensions cash-in - concern growing over high-pressure sales tactics, scaremongering and mis-selling. FCA review - 17% of advice "unsuitable"
- Canberra - September 2017 inquiry into the life insurance industry - ASIC seeking law reform:
  - Insurance contracts subject to unfair contract terms provisions;
  - "Claims handling" a "financial service"
  - Review ASIC's powers around utmost good faith

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Future of financial advice

- Review of Financial Advisers Act 2008
- Financial Markets Conduct Act 2013
- Simplified regime
- Code of conduct

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FMCA Licensing

- Anyone providing financial advice to a retail client must be engaged by a licensed financial advice provider
- 7 Duties
  - Meet standards competence, knowledge and skill – retail
  - Client understands nature and scope of advice – retail
  - Give priority to client's interests – wholesale or retail clients
  - Care, diligence and skill – wholesale or retail clients
  - Code of Conduct – retail clients
  - Contravening product – wholesale or retail client
  - Disclosure – wholesale or retail clients
- Liability and enforcement

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Keep on your radar

- Agenda of new Government – EQC, Christchurch, consumer lending, insurance law reform?
- FMA exemption to facilitate robo-advice
- Fintech – Privacy law – General Data Protection Regulation
- Class actions and litigation funding
- Unfair contract terms

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Audience Q&A session with panel