

“REASONABLENESS” OF LATE PAYMENT AND “INSURABLE INTEREST”: THE COURT CLARIFIES A COUPLE OF BUGBEARS

The first reported judgment considering whether insurers are liable to pay damages for late payment of an indemnity was handed down recently. The case of *Quadra Commodities S.A. v XL Insurance and others* [2022] EWHC 431 (Comm) considered key issues relating to both insurable interest, and the application of S.13A Insurance Act 2015. The judgment provides some clarity on what constitutes a 'reasonable time' for insurers to pay a claim under S.13A(1), and considers when insurers can rely on S.13A(4) to negate their liability for delayed payment.

Facts

The background to this matter was the "Agroinvestgroup Fraud" which was uncovered in Ukraine in 2019. The details of the fraud are still coming to light, but essentially, the Agroinvestgroup sold the same parcels of the same grain many times over to multiple parties, including the claimant.

The claimant, a commodities trader, entered into various contracts with entities in the Agroinvestgroup for the purchase of grain. In accordance with the purchase contracts, warehouse receipts were provided to the claimant confirming that the relevant quantities of grain were held in common bulk in stipulated warehouses, or "Elevators". It transpired that many of the warehouse receipts were fraudulent as they were issued with respect to the same grain that had been sold to multiple buyers.

The fraud unravelled when buyers sought to execute physical deliveries against the fraudulent warehouse receipts, and it became apparent that there was insufficient grain to go around.

The claimant sought to recover its losses under its Marine Cargo policy. Insurers denied the claim on the basis that there had been no physical loss of grain, and that the claimant had, instead, suffered a purely financial loss on the basis of fraudulent warehouse receipts.

Insurable interest

Insurable interest is a key requirement of an insurance policy, the origin of which was to distinguish between insurance and what is in substance a wager.

Mr Justice Butcher confirmed that the burden of proving an insurable interest rests on the insured, but that the courts will be reluctant to find that, where insurance has been taken out and a premium accepted, that no such interest exists.

As a first hurdle, the claimant succeeded in showing that grain, which was the subject of its warehouse receipts, was physically present at the time the warehouse receipts were issued. Physical presence of the goods was demonstrated by, inter alia, warehouse receipts; inspection reports; and, the fact that physical collections of grain had been made by the claimant during the relevant period. The court's view was reinforced by the very nature of the fraud which necessitated the presence of grain in the warehouses. Were there no grain present and available for inspection by traders, the fraud would have unravelled at a very early stage.

As to whether the claimant had an insurable interest in the grain that was physically present, Mr Justice Butcher found that there was an insurable interest on the following bases:

- The claimant had made payment for goods under purchase contracts, and an insurable interest could therefore be established in unascertained goods of the relevant description in the Elevators. Payment for goods was valid grounds for establishing an insurable interest irrespective of whether there were competing interests in the

grain. By virtue of the payment, the claimant stood in a "legal or equitable relation" to the property, the court recognising that is a broad concept.

- The claimant had also shown on the balance of probabilities that it had an immediate right to possession of the grain and when this was coupled with an economic interest in the grain, it can give rise to an insurable interest.

Having determined that there was an insurable interest in grain that was physically present at the time warehouse receipts were issued, the judge found that the loss was covered by the Misappropriation Clause of the policy.

Claim for damages under s13A Insurance Act

S.13A of the Insurance Act 2015 implies a term into contracts of insurance to the effect that the insurer must pay any sums due in respect of the claim within a "reasonable time".

S.13A(2) allows insurers a reasonable time to investigate and assess the claim and what is reasonable will depend on factors such as: the type of insurance; the size and complexity of the claim; compliance with statutory or regulatory rules; and, factors outside the insurer's control.

S.13A(4) includes a carve out to the implied term to pay claims within a reasonable time. It provides that where an insurer shows that there were reasonable grounds for disputing the claim, the insurer does not breach the implied term merely by failing to pay the claim while the dispute is continuing (albeit the insurer's conduct in handling the disputed claim will still be a relevant factor in determining whether the requirement to pay claims within a reasonable time has been breached, S.13A(4)(b)).

The claimant contended that Insurers' conduct of the claim was "wholly unreasonable, and its investigations either unnecessary or unreasonably slow". Insurers denied this case and contended that a reasonable time amounted to a "considerable time" and that, in any event, there were reasonable grounds for disputing the claim.

Mr Justice Butcher confirmed that it is for the insured to show that the insurer has failed to pay a claim within a reasonable time. As to what could be considered a reasonable time, the relevant factors to be considered in these circumstances, and having regard to S.13A(2), included:

- The type of insurance was Marine Cargo – a type of property insurance. In the Court's view, property claims usually take less time to value than, as an example, business interruption claims.
- The Marine Cargo policy covered both transport and storage operations of different types and involving many different countries and locations. This gave rise to the fact that any one claim could involve various factual patterns and differing difficulties of investigation.
- The size of the claim (circa USD 5.1 million as pleaded) was substantial but not exceptional in the context of marine cargo insurance.
- The fraud, the uncertainty as to what had happened, the destruction of documents, existence of legal proceedings in Ukraine and the fact that the claimant elected to swap from French to English law during the investigation were all significant complicating factors.
- Relevant factors outside Insurers' control, included the destruction and unavailability of evidence and the legal proceedings in Ukraine.

Mr Justice Butcher's conclusion was that a reasonable time to investigate, evaluate and pay the claim was not more than about one year from the notice of loss (assuming that the investigation had indicated no reasonable grounds for disputing the claim).

Turning to whether there were any reasonable grounds for disputing the claim for the purposes of S.13A(4), the Court held that there were and the fact the Court had ultimately found against Insurers did not mean that their grounds for disputing the claim were not reasonable.

In addressing the final question raised by S.13A; namely, whether the conduct of the Insurers in handling their investigations was a relevant consideration for the purposes of S.13A(4)(b), the Court held that Insurers' conduct was not a relevant factor. Insurers' investigations were merely part of the reasonable grounds for disputing the claim. Whilst the Court considered that there was some force in the contention that Insurers had been too slow in handling the claim (the surveyor's report was delayed and it was considered that legal advice should have been taken sooner) these delays occurred within a reasonable time to pay the claim (one year in these circumstances), and, throughout the investigation of the claim, there were reasonable grounds to dispute coverage.

Therefore, the claim under S.13A failed.

Conclusion

Mr. Justice Butcher's judgment is helpful in setting out the approach that the courts will take to S.13A and, in particular, the comprehensive analysis it will undertake in relation to factors that are determinative as to whether the time passed for payment was 'reasonable'.

Whether expert or comparative analysis would have materially changed the outcome is uncertain, but it is apparent from this judgment that slow or delayed investigations do not equate to unreasonableness on the part of the insurer when there are reasonable grounds for disputing a claim (even if those grounds are unsuccessful at trial).

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