

LATE PAYMENT OF INSURANCE MONEY

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Abstract

The question of damages for failure to pay sums due came before the House of Lords in 2007 in the *Sempra* case. Although not the main ground of the decision, the House stated that a claimant would succeed, if the claimant satisfied the usual tests of ‘remoteness’ of loss. The article shows how difficult and thus expensive it is to reach what to most is an obvious result, underlining the importance of particular judges, and that counsel need to ‘know’ the judges before whom they argue a case. People might well conclude that the *Sempra* ruling covers failure by insurers to pay insurance money on time. The article explains why it does not, with reference to leading cases, including those supporting a bizarre rule of English insurance contract law concerning the nature of insurance cover. The article then considers the likely response to the issue in other countries of common law, and how it might be seen in Europe. The article concludes that English law needs reform – not new precedent, but new legislation, and the chance that through current work at the Law Commission, this will occur.

Keywords: contract; failure to pay money on time; failure to pay insurance money on time; nature of insurance cover; doctrine of precedent.

1 Late Payment at Large

The question of damages under the general law (damages payable for failure to pay money) has been an issue in some countries, notably in England, for some time. This issue came before the House of Lords in 2007 in *Sempra*.¹ The House of Lords (Judicial Committee) was the highest court of law in England until it was replaced in that role on 1 October 2009 by the United Kingdom Supreme Court. The leading judgment on this point in *Sempra*, one of several judgments, began: ‘with the broad proposition of English law that as a general rule a claimant *can* recover damages for losses caused by a breach of contract or a tort which satisfy the usual remoteness tests’ (emphasis added), but continued: this ‘broad common law principle is subject to an anomalous, that is, unprincipled, exception regarding ... claims for interest losses by way of damages for breach of a contract to pay a debt’.²

Readers in other parts of Europe might be astonished that such a fundamental point should still be an expensively litigious issue at all. Moreover, they may well be surprised that five of the most senior judges in England should (be obliged to) reconsider cases decided over a century ago to reach such an obvious conclusion. Be that as it may, in *Sempra* the House of Lords reviewed the history of the ‘anomaly’,³ and concluded (according to the leading judgment of Lord Nicholls) that they should now ‘erase the remains of this blot on English common law jurisprudence’, and that those who ‘default on a contractual obligation to pay money are not possessed of some special immunity

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¹ *Sempra Metals v Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561. *Sempra* (its parent company is resident in Germany) traded in metals listed on the London Metal Exchange. The main issue in the case concerned advance corporation tax and the EC Treaty. The case was a test claim under a group litigation order made to manage the numerous claims brought against the Inland Revenue as a result of the decision in *Hoechst AG v Inland Revenue Commissioners* (case 410/98) [2001] Ch 620.

² At 74. For the ‘usual remoteness test’ in the event of breach of contract, English lawyers still cite a test originating in the ‘rule’ in *Hadley v Baxendale* (1854) 9 Exch 341.

³ Especially the decisions of the House of Lords in *London, Chatham and Dover Ry Co v SE Ry Co* [1893] AC 429 (which concerned the issue of whether interest was recoverable under an Act of 1833) and *President of India v La Pintada Cia Nav SA* [1985] AC 104 (which concerned a claim to recover exchange currency losses as damages for late payment of demurrage). However, the review of Lord Nicholls started with the judgment of the Court of King’s Bench in *Page v Newman* (1829) 9 B & C 378, and also included two twentieth century decisions of the Court of Appeal.

in respect of losses caused thereby'. However, the House of Lords confirmed that, to be recoverable, 'the losses suffered by a claimant must satisfy the usual . . . tests. The losses must have been reasonably foreseeable at the time of the contract as liable to result from the breach'.⁴

2 Late Payment of Insurance Money

This welcome reform of the general law did not, however, directly address failure to pay insurance money. If a claimant urgently needs the insurance money due, for example, in order to buy another van for his or her business to replace the one which was stolen, or to repair the factory essential to the business, the law *should* surely be the same. It is precisely in such circumstances that the effect of the theft or fire on the business has an impact on credit, and makes it difficult or expensive for the insured to raise money pending payment by the insurer. However, the law does not share this view. In England⁵ in 2012, if the insurer pays late, however extensive and predictable the damage to the insured's business, the latter is not compensated for the damage; the balance of precedent in the reported insurance cases (the relevant source of law given that there is no relevant statute) is against the insured who seeks full compensation as damages from the insurer in breach.⁶

The search for relevant precedent starts not in the nineteenth century, but in 1987, with the *Gemstones* case.⁷ In this decision of the Court of Appeal, it was settled that, for a breach of the duty of good faith, a duty central to all insurance and which might have had implications for payment, no damages could be awarded. In any event, the judicial establishment in England seems to regard any such a duty of good faith with suspicion, and as a concept too vague to be useful.⁸ Be that as it may, the Court did not consider the precise possibility of awarding damages in a claim for late payment of debt.

Following this is the controversial decision of Hirst J in the *Italia Express*.⁹ The ship of that name was undergoing repairs near Piraeus, Greece, when she exploded and sank. The cause was unusual and unexpected – the detonation of explosives strapped to the hull! In these circumstances the subsequent hull insurance claim was 'robustly' defended; in court, and therefore in public, the owner was subjected to eight days of cross-examination by counsel, an interrogation which carried the inevitable implication of fraud. Undoubtedly, fraud was and still is a major problem for insurers, and sometimes they are justifiably slow to pay while suspicious; however, if their suspicion cannot

⁴ [At 92]; and these losses 'will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth' [at 94]. Broadly speaking, other members of the House, such as Lord Hope (a Scots judge) agreed with Lord Nicholls. Note that the formula 'reasonably foreseeable' is that used in the law of tort, whereas the law of contract usually refers to what is in the 'reasonable contemplation' of the parties.

⁵ Unless otherwise indicated, England refers to the United Kingdom of England, Wales, Scotland and Northern Ireland.

⁶ Notably *Sprung v Royal Ins Co (UK) Ltd* [1999] 1 Lloyd's Rep IR 111 (CA) which is considered further below.

⁷ *Banque Financière de la Cité v Westgate Ins Co* [1990] QB 665 (CA), affirmed mainly on other grounds: [1991] 2 AC 249. The Court of Appeal reversed a decision of Steyn J (as he then was): [1987] 1 Lloyd's Rep 69.

⁸ See for example the opinion of a current member of the Supreme Court, Lord Mance 'The 1906 Act, Common Law and Contract Clauses – All in Harmony?', *Lloyd's Maritime and Commercial Law Quarterly* 3, at 352 (2011). Orthodoxy maintains that there is no general duty of good faith in English contract law: see G.H. Treitel, *The Law of Contract* (2007) at 7-102. However, in *Socimer v Standard Bank London* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 [at 116], concerning a contract to value assets, Rix LJ referred to a general 'requirement of good faith and rationality' and stated: 'Commercial contracts assume such good faith, which is why express language requiring it is so rare.' A similar view has been expressed in Australia by: E. Peden 'Implicit Good Faith – or Do We Still Need an Implied Term of Good Faith?' 25 *Journal of Contract Law* 1, at 50-61 (2009); and by J. Allsop, 85 *Australian Law Journal Reports* 6, at 341-361 (2011). Cf. Aikens LJ, BILA Journal No 119 at 12, (June 2010) that there is a universal principle that insurance policyholders 'must not act in bad faith'. Clearly, English law on good faith is not clear, but to English lawyers the same appears true of comparable law in France and Germany!

⁹ *Ventouris v Mountain (No 2)* [1992] 2 Lloyd's Rep 281.

be proved they must pay – sooner or later.¹⁰ The angry owner of the *Italia Express* countered with an action for damages for non-payment.¹¹ Hirst J rejected his action on two grounds. One concerned the Marine Insurance Act 1906¹² and the other, the point of present concern, was that the common law also led to the same conclusion: no damages could be awarded for non-payment. His decision rested on an earlier case in the House of Lords, *The Fanti*.¹³

3 Clouding the Issue

A premise of *The Fanti* was that under contracts of insurance, the obligation of insurers, in the event of insured loss, was to ensure that policy holders be ‘held harmless’.¹⁴ Commonly cited for such a rule is the statement in the House of Lords by Lord Goff, a highly respected judge both then and now, that the promise of insurance indemnity is ‘a promise to hold the indemnified person harmless against a specified loss or expense’.¹⁵ Doubtless ‘hold harmless’ meant something to Lord Goff and to insurance lawyers of that era but policyholders today would probably scratch their heads and wonder. Indeed even judges of that era, even Lord Goff perhaps, might well scratch their heads at the latest interpretation of the phrase in the Supreme Court, albeit not in an insurance case and thus of no immediate concern.¹⁶

Lord Mance, a senior judge of today, recently referred to ‘the fiction that the insurer contracts to hold the insured harmless’,¹⁷ and went on to say that in reality ‘the insurer may be in no position to prevent the specified peril materialising – take, for example, the explosives attached to the vessel in Piraeus’ (in the *Italia Express*). To most people today the phrase is, to say the least, unhelpful. Indeed, importantly, it is a fiction that is contrary to the reasonable expectations of contracting parties, whatever the kind of contract.¹⁸ Much more in line with what reasonable men and women might expect, Lord Mance concluded that ‘both parties to an insurance case would probably see the real obligation of an insurer as the paying of a valid claim after a reasonable period for investigation’.¹⁹ Indeed, the Law Commission is currently considering, and likely to recommend, statute law that requires insurers to pay insurance money within a

¹⁰ Apparently on the ground that of the fact that evidence of fraud (surreptitious tape recordings) was inadmissible.

¹¹ Including damages for mental distress. Generally such damages are not available for non-payment of insurance money; however, this rule is currently being reconsidered by the Law Commission.

¹² Sections 67 and 68.

¹³ *Firma SA v Newcastle P & I Association (The Fanti)* [1991] 2 AC 1.

¹⁴ An interpretation by Hirst J in *Ventouris v Mountain (No 2)* that some commentators claim to have been taken too far out of its context. In those terms, the basic premise of insurance is indeed controversial.

¹⁵ *The Fanti*, at 35 (emphasis added). In other words, the instant that insured loss such as fire occurs the insurer is in breach of contract and liable pay damages. The rule in Scotland, however, is not bizarre but ‘normal’; see *Scott Lithgow Ltd v Secretary of State for Defence* (1989) 45 BLR 1, at 8: a decision of the House of Lords sitting as the final court of appeal (not for England but) for Scotland.

In this connection, see *New Cap Re v Grant* [2008] NSWSC 1015, (2008) 221 FLR 164 [at 87 ff.], which contains extensive and erudite discussion of Australian cases and of (mostly early) English cases. The court concluded [at 109 ff.] that in the case of *reinsurance*, at least the insurer’s obligation was *not* to pay damages, but one of debt.

¹⁶ In *Farstad Supply v Enviroco* [2010] UKSC 18 (Sc), [2010] 2 Lloyd’s Rep 387, an oil rig supply vessel was chartered by the owner to a hirer under a contract that obliged the owner to ‘hold harmless’ the hirer against certain claims and liabilities; on this see W. Courtney, ‘Indemnities, Exclusions and Contribution’, *Lloyd’s Maritime and Commercial Law Quarterly* 3, at 339, (2011).

¹⁷ Mance, above n. 8, at 349 (emphasis added).

¹⁸ A ‘theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract’: Steyn LJ in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194, 196 (CA); and as regards expectations (of some eminently reasonable judges) in insurance cases see Lord Lloyd in *Cook v Financial Ins Co Ltd* [1998] 1 WLR 1765, 1768 (HL); and Lord Bingham in *The Starsin, Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12; [2004] 1 AC 715, [at 12].

¹⁹ Mance, above n. 8, at 349. The fact, which he acknowledged, that the law ‘currently allows the situation where an insurer may delay dealing with a claim to his own financial benefit, at least in cash-flow terms,

reasonable time.²⁰ This is obviously important, but the decision in *The Fanti* clouded the issue in the sense of colouring insurance law payment as special and different from contract law in general.

4 Sprung

The next and most notorious case on the issue of damages for late payment of insurance money is *Sprung*.²¹ It was decided in 1995, but not reported until 1999, and judicially described as ‘notorious’ in 2010.²² In *Sprung*, a senior judge, one who is still active and respected in the world of commercial litigation today,²³ gave the leading judgment. He acknowledged that the Court had not heard full or detailed argument on the point,²⁴ but had nonetheless ‘no hesitation’ in holding that ‘there is no cause of action in damages for late payment of what may be held due as damages’.²⁵ The relevance of this dictum concerning what is ‘due as damages’ lies in the bizarre rule of English insurance law (referred to above) that payment of insurance money is not payment of a debt (in respect of an insured loss), but payment of damages (compensation) for failure to perform ‘a promise to hold the [insured] harmless against a specified loss or expense’.

Senior and respected as he may be, the judge in *Sprung* was, in my view and that of other commentators, mistaken.²⁶ The mistake rested partly on his view of precedent, of the correctness of a *dictum* of another judge in a different context, that there is ‘no such thing as a cause of action in damages for late payment of damages’.²⁷ Today, after *Sempre*, it is at least open to debate that *Sprung* should be disregarded, and that another ‘blot on English common law’ be erased. It could be argued that the law in England should be restored in line with the wider common law fold: as we shall see, damages for late payment by insurers have been awarded in other common law jurisdictions.

Other cases, relevant perhaps, are technically distinguishable according to the English doctrine of precedent.²⁸ If a man employs an intermediary, such as an insurance broker, to obtain insurance for him, the intermediary is liable in England for failure to do so and insurance money which would have been recoverable from the insurer is recoverable from the intermediary.²⁹ Damages recoverable will include any loss through not having had the money in time when the insurer should have paid, provided the intermediary had arranged a proper policy. This was decided by a lower court, the Leeds District Registry Mercantile Court, in a decision³⁰ accepted as correct by at least one member

and to the detriment of the insured, potentially putting him under financial pressure to settle, and possibly even out of business’ [at 349-50] was evidently something that gave him no satisfaction.

²⁰ See Joint Consultation Paper LCCP 201/SLCDP 152.

²¹ *Sprung v Royal Ins Co (UK) Ltd* [1999] 1 Lloyd’s Rep IR 111 (CA).

²² By the Supreme Court judge Lord Mance: above n. 8, at 349. Evidently he agreed with commentators that the rule that emerged from *Sprung* was ‘anomalous’.

²³ Sir Anthony Evans.

²⁴ Because the appellant (claimant) was not represented by a barrister, but had argued the case himself.

²⁵ At 116.

²⁶ See e.g. J. Lowry and P. Rawlings, ‘Insurers, Claims and the Boundaries of Good Faith’, 68 *Modern Law Journal* 1, at 82-110 (2005), and J. Al-Asady, ‘Damages, Late Payment and Indemnity Insurance’, *Journal of Business Law*, [2006] 396-407. The mistake was partly that earlier decisions of the House could not be distinguished, decisions which have now been distinguished by the House itself in *Sempre*.

²⁷ Lord Brandon in *The Lips, President of India v Lips Maritime Corp* [1988] AC 395, at 424; a dictum pointedly attacked at the time by F.A. Mann, ‘Spycatcher in the High Court of Australia’, 104 *Law Quarterly Review* 3 (1988) to which Lord Nicholls in *Sempre* referred (at 75) with evident approval.

²⁸ *Cf.*, however, the power of the court in England to award costs not on the standard basis but on indemnity basis when a party behaves in litigation in a way that could be properly categorised as disgraceful or deserving of moral condemnation: according to Newman J in a PHI case, this might include an insurer which fails to investigate a claim in accordance with proper principles: *Wailes v Stapleton Construction and Commercial Services Ltd and Unum Ltd* [1997] 2 Lloyd’s Rep 112, at 117.

²⁹ *Osman v Moss Ltd* [1970] 1 Lloyd’s Rep 313 (CA); *Cherry Ltd v Allied Ins Brokers Ltd* [1978] 1 Lloyd’s Rep 274; *McNealy v Pennine Ins Co Ltd* [1978] 2 Lloyd’s Rep 18 (CA); *Dunbar v A & B Painters Ltd* [1986] 2 Lloyd’s Rep 38 (CA); *Ramwade Ltd v Emson & Co Ltd* [1987] RTR 72 (CA). M. Clarke, *The Law of Insurance Contracts* (2009), at 9-6A.

³⁰ *Arbory v West Craven* [2007] Lloyd’s Rep IR 491.

of the Supreme Court in London.³¹ This is law in England, and prima facie decisions reached in England, whether in London, Liverpool or Leeds, apply also in Scotland. However, in Scotland, *Sprung* has not been applied: courts there have applied ordinary contract principles.³² In this and other respects, Scotland is a different country, although not altogether independent, like Australia, Canada and the United States.

5 The View from Abroad: Common Law

Already in 1967, the Supreme Court of California took a very different view of the *Sprung* issue. It said³³ that when:

the owner of a heavily mortgaged motel or other business property suffers a substantial fire loss, the owner may be placed in financial distress, may be unable to meet his mortgage payments, and may be in jeopardy of losing his property and becoming a bankrupt. A major, if not the main, reason why a businessman purchases fire insurance is to guard against such eventualities if his property is damaged by fire. Certainly, the property owner who purchases fire insurance may reasonably expect that if a fire occurs, the insurance proceeds will be promptly available to protect him from those eventualities. The business of the fire insurer is to provide such protection. Insurers are, of course, chargeable with knowledge of the basic reasons why fire insurance is purchased, and of the likelihood that an improper delay in payment may result in the very injuries for which the insured sought protection by purchasing the policies.

California is a long way from England – in many respects; but the immediate point is that California is part of the common law world. From an English perspective, Australia is even more part of the common law world. Decisions in Australia, especially, but not only, those of the High Court, are often cited with respect (though not necessarily applied) in England. The same is broadly true of the Federal Court of Australia; for example, when a business interruption insurer was late in payment, the insured managed to recover the cost of borrowing from a bank in order to keep his business going until the insurer paid.³⁴ In Australia such a rule is now well established.³⁵

In Canada, a duty of good faith (possibly one for contracts in general which has filtered across the border from the USA)³⁶ has been applied to insurance contracts. In Canada ‘there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith’.³⁷ There are two aspects to the duty thus conceived. The first ‘obliges the insurer to act with reasonable promptness during

³¹ Mance, above n. 8, at 350.

³² *Sirachan v Scottish Boatowners' Mutual Ins Association* [2001] ScotCS 138 (Ct Sn: OH). See also Lord Hoffmann in *Caledonia North Sea Ltd v British Telecommunications Plc (The Piper Alpha)* [2002] UKHL 4, [2002] 1 Lloyd's Rep 553, [at 100], a case on appeal from Scotland in which therefore Scots law applied. The decision concerned a ‘contractor’s indemnity’ promised by a firm employed to maintain part of an oil rig which was approached by Lord Hoffmann in the House of Lords as if it were an insurance claim subject to ordinary contract principles.

³³ *Reichert v General Ins Co* 428 P 2D 860, 864 (1967). In this and other cases in the United States, the insured recovered damages in respect of consequential damage to his business (e.g. *Royal College Shop Inc v Northern Ins Co*, 895 F 2d 670 (10 Cir, 1990)) when this was such as might reasonably have been expected to result.

³⁴ *Tropicus Orchids v Territory Ins Office* (1998) 148 FLR 441 (NT).

³⁵ See D. Derrington and R. Ashton, *The Law of Liability Insurance* (2005), at 13–362; C. Ying ‘Damages for Late Payment of Insurance Claims’, 122 *Law Quarterly Review*, at 205–210 (2006); see also R. Andrew, ‘Exceeding the Limits of Indemnity: Consequential Damages and Repudiation of Insurance Policies’, 16 *Insurance Law Journal* 109 (2005); and S. Drummond, ‘Damages for Consequential Loss when the Insurer Fails to Pay’, 16 *Insurance Law Journal* 128 (2005). As regards the courts, see *Hungerfords v Walker* 1989 HCA 8, (1990) 171 CLR 125, [at 22] per Mason CJ. As regards *neighbouring* New Zealand, see *New Zealand Ins Co Ltd v Harris* [1990] 1 NZLR 10 (CA); also P. Tully, ‘Repudiation of Insurance Contracts — How are Damages Assessed?’, 13 *Insurance Law Journal* 250 (2002) and cases cited.

³⁶ See the Restatement (2d) Contracts, section 205.

³⁷ *702535 Ontario v Lloyd's of London* (2000) 184 DLR (4th) 687 (Ont) [at 27]; applied in *Fowler v*

each step of the claims process' because the insured 'will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation'.³⁸ The second aspect is that the insurer must 'deal with its insured's claim fairly'. The insurer 'must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement'.³⁹ Thus, for common law countries at large, there is hope.

6 The View from Abroad: Europe

Outside the world of common law countries, the eyes of English lawyers turn (with some hesitation perhaps) to Europe and the study, *Principles of European Insurance Contract Law (PEICL)*,⁴⁰ which was published in 2009. This is not a statement of current law, but in the language of law in the USA, a *restatement* of what a group of European scholars thinks the law *should* be (inevitably a compromise). The enquirer will find that, where the rule that should apply is not a particular rule of insurance contract law, the applicable rule will be found in the *Principles of European Contract Law (PECL)*.⁴¹ The right to damages found here is a general one, of the kind applied in the common law to all contracts.

7 The View from the Sea

Concerning damages for late payment, Lord Mance, the current member of the Supreme Court quoted above, said in 2010 that one response to the criticism of current law might be that 'the essence of an insurance contract is that it provides only a defined amount of cover and that to allow open-ended damages is inimical to this'. However, he went on 'it is difficult to see why defining one's liability in respect of certain obligations ... should preclude liability in respect of breach of another, albeit ancillary obligation, i.e. to pay in a reasonable time'.⁴² He continued: 'A better response, perhaps, is one *specific to the world of marine insurance*. Marine insurance is contracted between parties who are usually better placed to look after themselves than is the case with, for example, consumer or small business insurance'.⁴³ Indeed so, but except perhaps in the case of yachts consumers do not roam the world of marine insurance and (in my words, not his) the marine tail of today should not be allowed to wag the non-marine dog in the street, where consumers should be able to sniff something that meets their reasonable expectations. The undoubted and justifiable importance of marine insurance in London in times past is harder to justify in 2012.⁴⁴

In any event, even in the marine context, the International Hull Clauses 2003 require a decision on whether to pay a claim within 28 days of the receipt of sufficient (specified) documentation,⁴⁵ and there is little doubt that, whether the case be marine or non-marine, a clear contract clause on the matter will be applied.⁴⁶

Maritime Life Ass Co (2002) 217 DLR (4th) 473 (Nfld) [at 45]. See also to this effect in the Canadian Supreme Court *Whiten v Pilot Ins Co* (2002) 209 DLR (4th) 257 [at 82].

³⁸ 702535 *Ontario*, at 28.

³⁹ *Id.*, at 29.

⁴⁰ J. Basedow et al. (eds.) *Principles of European Insurance Contract Law (PEICL)* (2009); and <http://www.restatement.info>; the writer must confess an *interest* as he played a small part in the production of this work. An erudite study of general principles in civil law can be seen in G.H. Treitel, *Remedies for Breach of Contract, A Comparative Account* (1988), at 129 ff.

⁴¹ See PEICL Article 1:105 (2).

⁴² Mance, above n. 8, at 350.

⁴³ *Id.* (emphasis added).

⁴⁴ Indeed as Lord Mance observed (*id.*), these have not so far been factors to persuade the Law Commission to exclude marine insurance from the reforms currently proposed (Law Commission and Scottish Law Commission, *Issues Paper 6: Damages for Late Payment and the Insurer's Duty of Good Faith* (2010)).

⁴⁵ However, earlier but still current forms, such as the 1977 American Institute Hull Clauses, do not.

⁴⁶ See e.g. *Tonkin v UK Ins* [2006] EWHC 1120, [2007] Lloyd's Rep IR 283 to 341: the lengthy judgment

8 Conclusion

Judges are important everywhere, but readers may well wonder whether it is in England, where they are at the top of a league table of significance, that they matter most. When a potential litigant goes to a firm of solicitors, which advises him or her to litigate, the case is likely to be sent to counsel, a barrister. One of the reasons for this lies in the skill of the barrister, not only in argumentation before the court, but also in deciding whether and when to start proceedings, and later, to argue the case. That decision turns not on the weather or the bus route, but largely on the judge likely to hear argument on the chosen date and, in particular, on the barrister's knowledge of the judge and the judge's attitudes – his (or her) *legal personality*. Such information is crucial and is found mostly among members of the Bar.⁴⁷ Ultimately, the client must trust the barrister – not only the barrister's powers of argument, but also his or her powers of psychoanalysis!⁴⁸ Another reason for sending cases to barristers lies in their skill in cutting a path through the jungle of precedent, a feature of the legal landscape that does little credit to the common law world, especially, as I have sought to show, in England.

With regard to the rules of law on late payment by insurers, one fear in the insurance industry, apparently, is that claims for damages are relatively easy to advance, but time-consuming and expensive to investigate, and that such claims might become standard practice. Time-consuming and expensive to investigate they may be, but only *relatively* easy to advance. The number of consumers, who have not been promptly paid, but are angry and dogged enough to pursue a dilatory insurer via a solicitor and barrister to the commercial courts, is surely small.⁴⁹

Be that as it may, a comparative survey of England, France and Germany, as well as related EU Directives, concluded in early 2011 that 'the least principled set of rules is to be found in England'.⁵⁰ France and Germany have legislation.⁵¹ England does not and, surely, it is indefensible that in an area of law in which people seek reassurance, to *know where they stand*, the law cannot tell them.

English law needs reform – not new precedent, but new legislation. For this, there must be time in Parliament. Parliamentary time is hard to get. New law that is politically non-controversial can be accorded a fast track. This is what happened to the Consumer Insurance (Disclosure and Representations) Bill, which was before the upper chamber in October 2010, and became legislation in March 2012; it is expected to come into force in March or April 2013. The new legislation was supported by the Association of British Insurers (ABI). Whether the ABI would support reform of the law concerning late payment is open to considerable doubt! However, late payment of insurance money is one of the issues considered by the Law Commissions,⁵² which have urged Parliament to reform the current law. Let us hope that Parliament responds!

of HHJ Peter Coulson, QC, in the Technology and Construction Court (TCC).

⁴⁷ Cf., the USA where such information is no less significant but has been published: A. Broscheid 'Comparing Circuits: Are Some US Courts of Appeals More Liberal or Conservative than Others?' 45 *Law & Society Review* 1, at 171-194 (2011).

⁴⁸ Perhaps trusting experts – of all kinds notably medical advisers – face to face rather than by phone, Facebook, Twitter or Skype is a fundamental feature of modern life.

⁴⁹ Consumers are much more likely to use the *small claim* jurisdiction of the lower courts or to bring a complaint to the Financial Ombudsman Service, but the outcome is not reported in sufficient detail to constitute precedent and thus count as *law*.

⁵⁰ W.H. van Boom, 'Do Insurers Have to Pay for Bad Behaviour in Settling Claims? Legal Aspects of Insurers Wrongful Claims Handling', 2 *Journal of European Tort Law* 1, at 101 (2011).

⁵¹ In France see L113-5 Code des Assurances; in Germany see VVG Art. 14.

⁵² Law Commission and Scottish Law Commission, above n. 44.

