

IN THE COURT OF APPEAL

GOODHEART LIMITED (in Receivership)

Appellant

- and -

HONOUR BRIGHT INSURANCE PLC

Respondent

SKELETON ARGUMENT OF THE APPELLANT
GOODHEART LIMITED

1. As the direct result of Honour Bright's failure to deal with Goodheart Limited's valid insurance claim until 3 ½ years after the fire Goodheart Limited has suffered a reduction in the value of its business of £25 million. This loss is recoverable as a matter of English law:
 - (1) As damages for breach of a term to be implied into the insurance contract requiring the payment of valid claims within a reasonable time; and
 - (2) As damages for breach of a term to be implied into the insurance contract requiring the insurer to investigate the claim and make a decision on coverage reasonably promptly; and
 - (3) As damages for the insurer's breach of the duty of utmost good faith.

Implied term requiring prompt payment of valid insurance claims

2. The learned Judge was wrong to hold that Honour Bright's obligation was a promise to prevent loss occurring and that Goodheart Limited's claim was an impermissible claim for damages for late payment of damages.
3. Ventouris v. Mountain (The "Italia Express" (No. 2)) [1992] 2 Lloyd's Rep. 281 wrongly applied to a contract of property insurance Lord Goff's dicta describing the nature of a contract of indemnity in Firma C-Trade SA v. Newcastle P&I Association (The "Fanti") [1991] 2 A.C. 1 at pp. 35-36, a case concerning a liability policy. Lord Goff had characterised the insurer's primary obligation as an obligation to prevent the indemnified person from suffering damage, failure to comply with which would give rise to a secondary obligation to pay damages.
4. The correct approach to a contract of property insurance is that of Judge Kershaw QC in Transthene v. Royal Insurance [1996] 1 Lloyd's Rep. 32 at p. 41:

"There may be contracts which as a matter of construction involve a promise by the insurer that certain contingencies will not occur. Here, however, the relevant words are –

In the event of the Property or any part of it described in the Appendix to this Section sustaining Damage during the Period of Insurance by fire the Insurers will indemnify the Insured by at their option repairing replacing or paying the amount of the Damage.

In my judgment the words themselves, in their ordinary and natural meaning, are inconsistent with such a construction and consistent only with a promise to indemnify – in a manner to be selected by the insurer after the event – if a fire occurs. In that context indemnity can only be against the consequences of the fire.

In my judgment the obvious wisdom of symmetry of jurisprudential concepts cannot of itself override the ordinary and natural meaning of the terms in which the parties have made a contract so as to lead to the conclusion that what Lord Goff of Chieveley said about indemnity contracts applies to any contract of property insurance.”

5. In property insurance the insurer’s promise, or primary obligation, is to compensate the insured or reinstate the property in the event that loss does occur; not a promise to prevent loss from occurring.¹ It follows that this is not a claim for damages for the late payment of damages.
6. There is an implied term obliging a property insurer to compensate the insured within a reasonable time after the insured has made a claim (in a form which satisfies any policy requirements as to notice and particulars).
 - (1) Such a term satisfies the business efficacy test. Insurers need time within which to investigate and evaluate a claim, but once a reasonable time has elapsed (the precise length of which will depend on the nature and complexity of the claim) they should be obliged make prompt payment of valid claims.
 - (2) The practice of the courts in awarding interest on insurance claims is to direct that interest should run from a date a reasonable period after the date of loss to allow for this investigation. This is consistent with the proposed implied term.
 - (3) The factual matrix against which insurance contracts are made includes recent regulatory requirements in relation to both consumer and business insurance contracts requiring prompt payment of insurance claims.²
 - (4) Goodheart Limited relies on the expert evidence of Mr Walter Merricks and Mr William McVisk.

¹ In support of this analysis see also Jabbour v. Custodian of Israeli Absentee Property [1954] 1 WLR 139 at p. 143; Castellain v. Preston (1883) 11 Q.B.D. 380 at pp. 387, 393; Dane v. Mortgage Insurance Co Ltd [1894] 1 Q.B. 54 at pp. 60-61; Prudential Insurance Co v. Commissioner of Inland Revenue [1904] 2 K.B. 658 at pp. 663, 664 and the descriptions of the primary obligation of a property insurer given in the leading textbooks.

² See Rules 7.3 1 and 7.5.17 to 7.5.18 of the Insurance Conduct of Business component of the FSA Handbook of Rules and Guidance made pursuant to the Financial Services and Markets Act 2000.

7. There is no doctrinal reason why an assured should not be entitled to claim for consequential losses as part of his claim for damages for breach of a primary obligation. Provided the ordinary contractual requirements of causation, remoteness and mitigation are satisfied, the English courts will award damages for non-payment or late payment of money. See Wadsworth v. Lyall [1982] WLR 598, approved by the House of Lords in President of India v. La Pintada (The "La Pintada") [1985] AC 104.
8. It is particularly appropriate to award such damages in the case of failure to pay promptly monies due under an insurance contract. Insurance contracts are taken out for peace of mind (and often advertised on this basis). They therefore fall within the category of contracts described by Bingham L.J in Watts v. Morrow [1991] 1 WLR 1421 at p. 1445:

"A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective."

This principle is not derived from Victorian contract cases but results from evolutionary developments in the case law since the 1970s.³ It is apt that it should now be applied to insurance cases, given recent changes in regulatory policy to require insurers to treat customers fairly.

Implied term obliging insurers to deal promptly with insurance claims

9. Alternatively a term ought to be implied obliging insurers to deal with claims and indicate whether or not they propose to dispute coverage within a reasonable time.

- (1) Evans LJ was willing to find such a term in Sprung v. Royal Insurance (UK) Ltd [1999] 1 Lloyd's Rep. I & R 111 at p. 117:

"If the question is asked, "Is there any obligation on the Defendants in addition to their obligation to pay the promised indemnity?", I would say unhesitatingly, " Yes"I would be prepared to hold, therefore, without confining myself to any precise terms, that there was some obligation on the Defendants to respond promptly to a request from the Plaintiff that the damage should be inspected and the question of repairs considered forthwith."

- (2) It would be consistent with the regulatory requirements upon insurance companies to make coverage decisions promptly.⁴

³ Farley v. Skinner [2001] 3 WLR 899 at p. 907.

⁴ See the FSA's ICOB Rules 7.3 and 7.5. The latter states that insurers of business insurances should ordinarily make coverage decisions within 5 days.

- (3) Insurers' obligation pursuant to the term would take effect once the assured had complied with any policy terms requiring claims to be presented in a particular way as a condition precedent to liability.
10. Goodheart Limited submits that its impecuniosity is no bar to recovery of its losses for breach of this implied term. The principle that impecuniosity is too remote a factor to be taken into consideration (The "Liesbosch" [1933] AC 449) has been disapproved by the House of Lords in Lagden v. O'Connor [2004] 1 AC 1067.

"The law does not assess damages payable to an innocent Plaintiff on the basis that he is expected to perform the impossible. The common law prides itself on being sensible and reasonable. It has regard to practical realities."(Lord Nicholls at p. 1072)

Damages for breach of the duty of utmost good faith

11. If Honour Bright's loss adjuster was indeed instructed to "take up the drains" to find defences to this claim because there was a chance that Goodheart Limited might not survive to fight its corner, that is the clearest possible breach by Honour Bright of the duty of utmost good faith.
12. The Court should decline to follow previous decisions⁵ holding that the only remedy for breach of the utmost good faith is avoidance. Such a remedy is of no value to an assured where the insurer breaches the duty of good faith in wrongfully repudiating a valid insurance claim, as recognised by the Master of the Rolls in Cox v. Bankside [1995] 2 Lloyd's Rep. 437 at p. 462:

*"The assured's protection is in my view to be found in the very clear duty which the law imposes on an insurer to exercise his power to control the defence in good faith having regard to the interests of the assured as well as to its own interests. I cannot for an instant accept Mr Gruder's suggestion that a breach of this duty by an insurers, once a policy is in force, gives the assured no right other than rescission."*⁶

If this is true for insurers' control of defences in liability policies, it is difficult to see why the same logic should not apply to a bad faith refusal to meet a valid claim in first party insurance where the remedy of avoidance would be equally useless.

29th June 2005

WILLIAM WOOD QC
SIOBÁN HEALY

⁵ Banque Financiere v Westgate [1990] QB 665, The "Good Luck" [1990] 1 QB 818.

⁶ Cited with approval by Aikens J. and Longmore LJ in The "Mercandian Continent" [2000] 2 Lloyd's Rep. 357 at p. 374 and [2001] 2 Lloyd's Rep. 563 at p. 572.