

# Late Payment of Insurance Claims: Kilduff v Tower Insurance Ltd

[2018] NZHC 704

This article reviews a recent decision regarding a property insurance dispute in New Zealand and considers the outcome in relation to English Law and the late payment of claims.



## Background

Until recent legislation, common law in England denied an Insured any recourse against an underwriter for damages for late payment of a claim, except to the extent that the Court exercised statutory power to award interest on sums adjudged to be due.

In order to address this position, the Law Commission proposed a draft section on late payment in its Insurance Bill. However, when the Insurance Bill was first taken up, the provisions on late payment were not incorporated. Accordingly, when the Insurance Bill became the Insurance Act 2015, the section on late payment was entirely omitted.

Amendment provisions to the Insurance Act, introducing damages for late payments, were subsequently inserted in the Enterprise Act 2016. Thus resulting in the introduction of Section 13A of the

Insurance Act 2015 and also Section 16A, which addresses supplementary provisions regarding contracting out.

The Enterprise Act 2016 also introduces a long-stop limitation period, preventing any claim for damages for late payment being brought more than one year after full payment, or settlement, of the amount due under the main claim.

The Enterprise Act 2016 provisions regarding damages for late payment of insurance claims became effective on the 4th May 2017.

## Kilduff v Tower Insurance Ltd

This insurance coverage dispute in New Zealand considered, amongst other things, whether an underwriter can be liable in damages for delay in making payment.

The claimants owned a residential property in Christchurch which was

seriously damaged by earthquakes in 2011. Whilst serious, the damage was repairable. The house was insured by Tower Insurance against sudden and unforeseen accidental physical damage.

In particular, the dispute centred on the scope of work in relation to the remedial action required and the reasonable cost of repairs. During the remedial action it became apparent that the claimants' experts and the underwriter's experts could not agree upon the scope of work and the reasonable expenditure required.

Accordingly, the claimants commenced proceedings during which they sought damages for an alleged breach of the insurance contract by Tower Insurance. The policyholders' claim for damages related to "*alleged breaches by Tower of the implied insurance term that it would act in good faith, make claim decisions promptly and fairly, and settle the plaintiffs' claim within a reasonable time*".

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Justice Gendall stated the general principle as follows:

*"In insurance contracts of the type at issue here there is an implied duty of good faith on the insurer. This requires, as a bare minimum, the insurer to: (a) 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 during and after the lodgement of a claim; (b) act reasonably, fairly and transparently, including but not limited to the initial formation of the contract, and during and after the lodgement of a claim; and (c) process the claim in a 'reasonable time.'"*

With regards to delay, Justice Gendall was satisfied that although there had been delay the delay was not exclusively the fault of Tower Insurance. Contributing factors were cited as some 25,000 other claims faced by Tower as a result of the earthquakes (and the resultant strain on the capacity of the pool of available experts) and the claimants' own delays.

Whilst Tower was deemed not entirely blameless, it was held that it had not been shown, on the balance of probabilities, that damages for late payment should be awarded.

This decision has particular relevance to English Law due to the provisions of Justice Gendall's stated general principle and the corresponding provisions of Section 13A of the English Insurance Act 2015. Specifically, Justice Gendall's general principle and Section 13A of the Act both impose an implied duty on insurers to pay claims within a "reasonable time".

In the case of *Kilduff v Tower Insurance Ltd* damages were not awarded by reason of the claimants' own conduct and by reason of the volume of claims against Tower Insurance. In particular, Section 13A of the English Insurance Act 2015 states that what is a "reasonable" period of time will depend on all the relevant

circumstances including "factors outside the insurer's control".

#### Comment

Clearly the merits of any case will be decided upon the facts surrounding the handling of the claim in question. Following the earthquakes, the volume of claims faced by Tower Insurance and their experts was undoubtedly onerous and had a significant bearing on the outcome of this case.

The case serves as a reminder that at English Law detailed statutory provisions now exist to provide policyholders with recourse for damages in the event of late payment of an insurance claim.

In the oil & gas industry, many high value assets overseas are covered by underwriters in London, either directly or via reinsurance arrangements. Traditionally, many overseas oil & gas policyholders have sought to have insurance and reinsurance policies made expressly subject to local domestic law & practice, rather than English Law.

However, English Law, via the body of historic case law, via the Marine Insurance Act 1906 and via the Insurance Act 2015, provides claimants with a clear, established and equitable basis upon which to progress their claims. Now that English Law has significantly improved a claimant's position, in relation to damages for late payment, perhaps overseas policyholders, seeking cover in London for assets of significant value, will carefully assess the merits of English Law when considering the Law & Practice clauses in the relevant policies.

#### Further Details

For full and further details regarding the provisions of Section 13A of the Insurance Act 2015 and the position relating to damages in respect of the late payment of insurance claims please do not hesitate to contact Trident.

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