QBE European Operations

Technical claims brief

Monthly update | October 2013

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Taylor Review Report – Scottish civil legal reform

The precursor to long-awaited Scottish civil legal reform has been passed to Scottish Ministers for consideration, in the form of a report from Sheriff Principal Taylor — The Taylor review into the funding and expenses of civil litigation in Scotland.

The key aim is to decide how best to improve and facilitate access to justice in a meaningful way, with an onus on justice being affordable for the man-in-the-street, but also with a wider focus on the entire civil legal system. A secondary issue is recoverability and predictability of expenses.

On affordability the report recommends:

1. The extension of damages based agreements (DBAs) whereby a pursuer pays an agreed percentage of their damages if the case is successful, but nothing if unsuccessful. Presently, the courts have held that they can be enforced by a claims management company (CMC), yet the Law of Scotland does not allow them to be enforced by a solicitor. Neither the agreement nor CMCs are currently regulated.

   It is recommended that the Law of Scotland should allow solicitors to enforce DBAs, not only in personal injury cases but in all litigation. The agreements should be regulated as to the maximum percentage which can be taken out of the damages recovered: for personal injury cases the first £100,000 = 20%, £100,001 to £500,000 = 10% and over £500,000 = 2.5%. Different maximums for other types of litigation will be clarified in the full report.

2. The introduction of qualified one way costs shifting (QOCS) in personal injury cases. This would mean that if the pursuer (claimant) is successful their costs are met by the defender, but if the defender is successful their costs are not met by the pursuer. A number of exceptions or safeguards should be included: QOCS would not apply where a court finds the pursuer guilty of fraud and would be diluted where a pursuer fails to beat a judicial tender (akin to a Part 36 offer in England).

Sheriff Principal Taylor's recommendations are intended to increase the funding options available, whilst legal aid and conventional payment would still be an option for a pursuer. He hopes the recommendations will reduce the stress and fear of litigation by removing barriers which purportedly deny access to justice.

On recoverability and predictability of expenses he recommends:

1. The court be given the power to award expenses on the basis of hourly rates paid by a commercial litigant to its solicitor. A successful litigant should not fear recovering significantly less than the cost of funding a commercial litigation and thus be denied access to justice where it does not make economic sense to pursue its legal rights.

2. Increased judicial management of the expenses of the court process. A system of cost budgets should be introduced as a pilot in commercial courts to help solicitors advise clients on the opposing party's costs. The court should also fix the amount of any additional fee at the outset of the proceedings with the percentage being kept under review.

3. A pilot of summary assessment of expenses following straightforward hearings in commercial cases. If the pilot is successful, summary assessment may well be rolled-out in other cases.

Separately, part of the Scottish Government's legislative programme announced this month includes a Damages Bill which could include provision to increase personal injury limitation to five years and introduce Periodic Payment Orders. The latter is not a surprise but the former would be most unwelcome.

> *The Taylor proposals mirror those recently introduced in England, albeit with a distinctive Scottish twist, and Sheriff Principal Taylor says he is confident that his recommendations will go a long way to breaking down many of the barriers to access to justice. The introduction of DBAs and QOCS may result in an increase in the number of claims that proceed to litigation and will inevitably mean at least a slight increase in the average cost of claims for defenders. The Taylor report, coupled with the changes to be brought about by the Courts Reform (Scotland) Bill when it is introduced to the Scottish parliament next year, is likely to change the face of the Scottish civil justice system substantially.*

Discount Rate Review – MoJ 'research' of limited value

Following two government consultations on the methodology and legal parameters for setting the discount rate (concluded in October 2012 and May 2013 respectively) the Ministry of Justice has now released a research report titled Personal Injury Discount Rate (published 10 September 2013). The research focuses on the use and profile of the discount rate, whilst exploring how changes in the rate may affect the size of claimant's awards and their investment consumption behaviour.

Unfortunately, the report is deeply flawed in its methodology and somewhat partial in its conclusions. The quantitative findings were based upon broad assumptions applied to very high level data on the number of settled claims, rather than actual claim settlements and the qualitative findings are based upon interviews with just nine claimants, six of whom received their settlements prior to 2001, well before the current rate of 2.5% was set.

It is not clear what use the MoJ proposes to make of the report but the evidence gaps should lead the government to pause and consider very carefully before moving forwards with any decision to change the discount rate; a decision that could have a significant impact on the finances of public bodies and liability insurers.

Third Parties (Rights Against Insurers) Act 2010

You might recall that this Act received Royal Assent in 2010, but is still to be implemented. On 25 April 2013 Government announced its intention to amend the 2010 Act to include; i) a number of specific insolvency situations and ii) a power for the Secretary of State to add further insolvency situations to the 2010 Act by order should the need arise. The intention remains to bring the Act into force as soon as reasonably possible once these amendments have been made and legislation to effect the necessary amendments will be introduced when parliamentary time permits but this is now unlikely to be until 2014.

When implemented, the Act will replace the Third Parties (Rights against Insurers) Act 1930 (the 1930 Act). Under the 1930 Act, a third party cannot issue proceedings against an insurer without first establishing the existence and amount of the insured's liability. The new Act removes the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer and resolves all issues (including the insured's liability) within those proceedings.

Under the 1930 Act, where a corporate insured had been struck off the register of companies, the third party had to take proceedings to restore it to the register before litigation. By removing the need for the third party to sue the insured, the new Act also removes the need for such restoration. The new Act also improves the third party's access to information about the insurance policy, allowing the third party to obtain information about the rights transferred at an early stage in order to enable an informed decision to be taken about whether or not to commence or continue litigation.

> *By streamlining the process for pursuing an insurer there is the potential for the number of claims under the Act to increase. The duty of disclosure that will be imposed on an insurer pre-action is likely to increase costs, but should reduce litigation where indemnity has been properly declined.*

Case Law

I predict a riot – but what is that exactly?

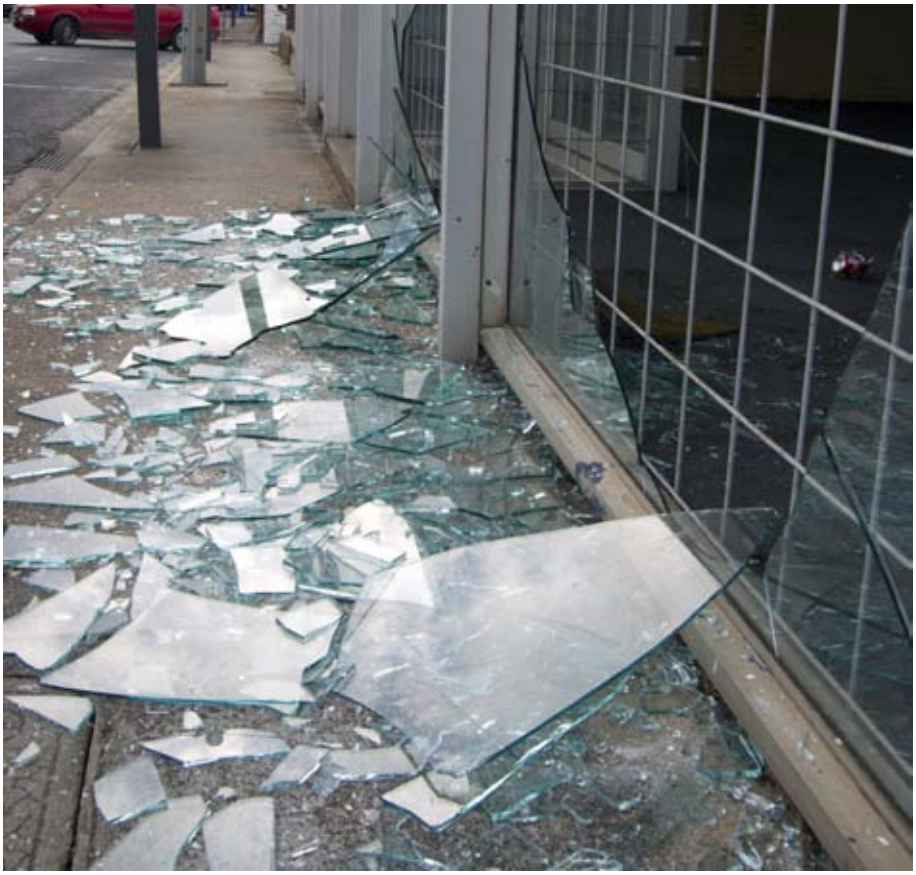
The meaning of 'riot' and consequential losses was recently considered and revisited by the Commercial Court in the case of Mitsui Sumitomo Insurance Co (Europe) Ltd, Royal & Sun Alliance Insurance Plc and others v The Mayor's Office for Policing and Crime [12.09.2013].

The case followed the attack and looting of the Sony warehouse (Enfield) during the August 2011 riots. The Mayor's Office for Policing Crime (MOPC) declined to compensate claimants under the 1886 Act for property damage and business interruption losses. The claim included £60 million indemnified losses by insurers and £4 million uninsured losses suffered by the owners. The Court determined two main issues:

1. Whether the attack fell within the scope of the 1886 Act
2. Whether consequential losses are recoverable.

The Court took the opportunity to set out the key factors for a valid compensation claim under the 1886 Act; i) there must be a riot within the meaning of s.1 of the Public Order Act 1986; ii) the rioters have to be 'tumultuously assembled' – acting in an agitated, excited, volatile manner, making a noise and considered to create a perceived or palpable threat; iii) the rioters must engage in wanton damage to property rather than simply looting in order to steal.

There was no doubt that the elements of the statutory offence were satisfied. The Court rejected the MOPC's primary contention that the attack was a premeditated crime merely using the civil disorder as a cover.



On the second issue the Court held that compensation payable is limited to physical damage and does not extend to consequential losses. It was not the intention of the 1886 Act to provide for a broader scope of compensation.

The Court made two further comments; neither Court of Appeal decision relating to the Yarl's Wood incident in 2002 determined that liability under the 1886 Act was equivalent to a liability in tort and that the compensation scheme under the 1886 Act was rather analogous to a form of statutory insurance and that most insurance policies did not cover consequential losses without express provision.

"The recognition that the attack on the warehouse constituted a riot has been welcomed by the insurers involved. The disappointment that consequential losses are not recoverable can perhaps be addressed by the price and extent that riot insurance cover provides where losses are expected.

A further development is on the horizon with the announcement of a Riot Damages Act 1886 (Amendment) Bill. The government have set up an independent review of the 1886 Act, which is expected to conclude shortly and will be followed by a public consultation. The review will examine when compensation is payable under the 1886 Act, the definition of a riot, who should be liable and what level of entitlement should be afforded.

The ABI has been lobbying for reform of the operation of the Act to include an extension of the time window for claims and the standardisation of the claims procedures. Further submissions will be made during the public consultation.

Honesty is best for your policy – Bate v Aviva Insurance UK Ltd (2013)

Following a fire at one of the properties on his estate, the claimant sought an indemnity against the defendant who provided cover for the dwelling. Insurers avoided the policy for non-disclosure and breach of condition precedent. The Commercial Court held that there had been material non-disclosure and breach of condition precedent and insurers were not in breach of the standards set out in the Insurance Conduct of Business Sourcebook (ICOB).

The claimant had considerable knowledge and experience of insurance matters through his work as a loss assessor and surveyor and knew that he should have disclosed substantial building work for which there was a condition precedent requiring prior notification, and the fact that he was conducting business on the estate. He had also been actively dishonest in misrepresenting that an earlier fire on the premises had occurred at a previous address. The claimant argued that each of the many alleged grounds were not material in isolation. The Court disagreed and said it was the overall 'flavour' of the claim that was his downfall.

Evidentially, the defendant was able to establish it had relied upon some of the misrepresentations, non-disclosures and breaches of conditions. Further, on the facts the claimant had no valid basis for relying on waiver or estoppel. The claimant had knowingly and wittingly made two misleading statements about a previous claim and had been actively dishonest in the presentation of aspects of this claim.

The Court held it would be neither apt nor fair to characterise the defendant's rejection of the claim as unreasonable or to find that, given the claimant's knowledge of the matters in question, it should not have refused to meet that claim. Further, there was no evidence of there being an unequivocal and unambiguous election by the defendant with the relevant knowledge that the defendant would not rely on its right to avoid either of the policies from inception or a relevant renewal. The claim failed.

> *Whilst there is nothing new in the Court's application of the law, the judgment supports an insurer who has correctly enforced the policy wording and underlines an insured's duty to give full disclosure and fair presentation of risk. Correctly, the Court gave a clear message that there is no room for deceit or untruthful evidence.*

Completed28 September 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Jonathan Coatman (contact no: 0113 2906713, e-mail: jonathan.coatman@uk.qbe.com).

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