Business interruption, Late Payments, and Bad Faith

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1. Introduction

There is some debate as to when COVID-19 first arrived in the UK. The first death is believed to have occurred at a care home on 2 March 2020[1] and 14 days later, the UK Prime Minister recommended that people avoid pubs, clubs, and theatres. Inevitably, industry was hit hard as panic swept throughout the UK and people started working from home and avoiding shops and places of leisure.

Businesses were keen to persuade the Prime Minister to make it compulsory that businesses close; in effect, removing their option to continue to trade. It was believed[2] such a step would make it easier for businesses to make a claim on their insurance policies (in particular, business interruption policies) and alleviate, to some degree, the extent of the impact to businesses.[3] Sadly, this belief was to a large extent unfounded: enforced closure by the Government does not usually, in itself, trigger a business interruption policy claim. Even where it does, the outcome depends on the definition of "enforced closure" and whether this ever actually happened, a question of some complexity.

Eventually, the UK Parliament passed into law The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 which forced high risk establishments, such as pubs, clubs, and theatres, into closure on 23 March 2020.[4] Not long after, businesses were finding their business interruption claims were being declined by insurers for falling outside the policy terms. Hiscox was the first widely publicised declinature. Quite quickly, a group of more than 300 policyholders, spearheaded by the Hiscox Action Group and the Night Time Industries Association, joined forces to bring a claim against Hiscox. Many other insurance companies interpreted their policy wordings in the same, or similar, way and denied cover. COVID-19 and business interruption insurance has widely been discussed; however, as with most contracts, the devil is in the detail, and the detail is not universal. Construction of the contract of insurance is critical. In an attempt to expedite claims, and to assist smaller policyholders, the Financial Conduct Authority ('FCA') issued formal guidance on how it expects insurers, and insurance intermediaries, to handle claims and/or complaints.[5] It also appears that the FCA has accepted that those business interruption policies that afford cover which depends on physical damage to the business's property do

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[1] Severin Carrell, Caelainn Barr, and Simon Murphy, 'Coronavirus took hold in UK earlier than thought, data reveals' (*The Guardian*, 2 April 2020) <https://www.theguardian.com/world/2020/apr/02/coronavirus-took-hold-in-uk-earlier-than-thought-data-reveals> accessed 21 June 2020.

[2] L.S Howard, 'Hiscox Action Group Gears Up to Take Hiscox to Court over COVID-19 BI Exclusions' (*Insurance Journal,* 29 April 2020) <https://www.insurancejournal.com/news/international/2020/04/29/566749.htm> accessed 21 June 2020.

[3] Laura Hughes and Oliver Ralph, 'Johnson tells Britons to avoid pubs, office and travel' (*Financial Times*, 16 March 2020) <https://www.ft.com/content/396b673a-67a7-11ea-800d-da70cff6e4d3> accessed 21 June 2020.

[4] This was revoked 5 days later and replaced with The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. This gave government wider powers which also restricted individual freedoms. Note, the same powers were separately enacted by the devolved governments of Scotland, Northern Ireland, and Wales.

[5] Financial Conduct Authority, 'Business interruption insurance test case: Finalised Guidance for firms' (June 2020) <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-bi-test-case.pdf> accessed 5 July 2020.

not cover losses arising from COVID-19 related closures.[6] The FCA also commenced declaratory proceedings under the Financial Markets Test Case Scheme (Civil Procedure Rules, Practice Direction 51M) against eight insurers seeking a determination of a number of key issues relating to coverage and causation in relation to a set of business interruption policies that contain a non-physical damage cover extension.[7]

This article does not intend to critique the operation of business interruption insurance in any significant way. However, it is against the backdrop of business interruption claims in relation to the COVID-19 outbreak in which this article examines the relatively new cause of action afforded to policyholders under s.13A of the Insurance Act 2015 ('IA 2015') – a claim for 'Late Payment'.

COVID-19 is a global pandemic. Insurers are facing claims from all corners of the world. Other jurisdictions have their nuances. None more so than certain jurisdictions in the United States of America where California is credited with the genesis of 'bad faith' litigation.[8] In jurisdictions where a bad faith cause of action exists, it may feature alongside a claim for declaratory relief that a particular event/loss falls within scope of cover.[9] The case of *Big Onion Tavern Group LLC v Society Insurance Inc.*[10] was the first case in the US, more specifically the State of Illinois, to see a claim for declaratory relief coupled with a bad faith claim within the context of COVID-19 and business interruption insurance.[11] This article will touch on bad faith litigation in the US and how it may, or may not, be of relevance to English insurance law.

The regulation of insurance intertwines some of the concepts explored in this paper and indeed some of the language is almost identical;[12] however, this article will very much focus on potential civil actions brought by policyholders, as opposed to regulatory enforcement proceedings.

2. 'Late Payment' Claims

Historically, policyholders were unable to claim damages (arising out of a direct loss or otherwise) against insurers for the delay, or failure, to pay a claim under English law. At best, a policyholder could assert a claim for interest (with reference the sum properly due under a policy of insurance) if a delay in paying a claim was indeed caused by the insurer. This is owing to the legal fiction that insurers agreed to hold their policyholder harmless – in other words, the insurer's obligation is not categorised as an obligation to pay a claim, but to prevent a loss to a

[6] Financial Conduct Authority, 'Dear CEO Letter – Insuring SMEs: Business Interruption' (15 April 2020) <https://www.fca.org.uk/publication/correspondence/dear-ceo-insuring-sme-business-interruption-coronavirus.pdf> accessed 7 July 2020.
[7] *The Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* (Case No. FL-2020-000018).
[8] Victoria Myers, 'The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.' [1978] 13(3) Tulsa LJ 605.
[9] At the time of writing, there are 695 known law suits relating to COVID-19 coverage disputes filed in the US; 23.7% include allegations of bad faith - see Tom Baker, 'Covid Coverage Litigation Tracker' (*Insurance Law Analytics*) <https://cclt.law.upenn.edu/> accessed 19 July 2020.
[10] (case no. 1:20-cv-02005).
[11] See similar lawsuits filed, combining declaratory relief alongside allegations of bad faith, in other US states: *Mace Marine Inc. v. Tokio Marine Specialty Insurance Co.* (case no. 4:20-cv-10044) (Florida), *Chickasaw Nation Department of Commerce v. Lexington Ins. Co., et al.*, (case no. CV-2020-35 (Oklahoma), and *Barbara Lane Snowden DBA Hair Goals Club v. Twin City Fire Insurance Company* (case no. 2020-19538) (Texas).
[12] Such as Rule 8 of the Financial Conduct Authority, 'Financial Conduct Authority's Insurance: Code of Business Sourcebook' (13 July 2020) <https://www.handbook.fca.org.uk/handbook/ICOBS/8/?view=chapter> accessed 3 August 2020.

policyholder from happening in the first place. If, and when, an insured loss does occur, the insurer is said to immediately be in breach of contract. A policyholder's claim under a policy of insurance is, therefore, a claim for unliquidated damages arising out of the insurer's breach of contract[13] and, as such, it is not possible to claim damages (for late payment) on damages.[14]

The consequence of this interpretation of an insurer's obligation under a contract of insurance was acutely felt in the widely cited case of *Sprung v Royal Insurance (UK) Ltd.*[15] In that case, the policyholder's premises had been invaded by vandals who went on to damage machinery. The damage caused meant that the business was unable to operate unless remedial repairs were carried out which the policyholder was unable to fund upfront. The business made a claim on its insurance policy – which included business interruption cover – which it expected to responded to such a loss. Insurers initially declined the claim, but dropped their defence later down the line. Payment of the claim was made some three and half years later.

In the intervening period, the business was unable to repair the damage itself (to continue to trade) and the Claimant argued it had lost an opportunity to sell the business and the company folded.[16] The business brought an unsuccessful claim in damages for the consequences of the insurer's delay in paying its claim. In its judgment, the Court of Appeal left it open that parties to a contract of insurance could make provisions within the contract of insurance itself which places an obligation on insurer to pay a claim within a reasonable time.[17] Breach of such a term could provide the foundations of a damages claim for breach of that particular term. The possibility of inserting such an implied term is, now, perhaps academic since such a term is implied by statute.

The IA 2015 came into force on 12 August 2016. Several months later, s.13A was inserted into the IA 2015[18] creating a new implied term into all types of contracts of insurance incepted, or amended, on or after 4 May 2017.

The new implied term imposes a duty on insurers to pay "any sums due […] within a reasonable time".[19] Non-consumers may wish to contract out of these provisions[20] so long as the insurer does not act deliberately, or recklessly, in putting a policyholder in a worse position.[21] This qualification applies in addition to the usual transparency requirements.[22] Crucially, s.13A IA 2015 allows policyholders to commence an action against their insurer for damages caused by late payment of a claim (i.e. a 'Late Payment' claim).

Perhaps predictably, and sensibly, s.13A IA 2015 does not define what "reasonable time" is in any prescriptive manner; s.13A(3) IA 2015 goes on to explain that this is a fact specific exercise to be carried out by reference to a non-exhaustive list for parties to consider:

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[13] *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti; Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (London) Ltd, The Padre Island (No 2)* [1990] All ER 702, 717.
[14] *The President of India v Lips Maritime Corporation* [1988] AC 395.
[15] [1999] Lloyds Rep IR 111; [1997] CLC 70.
[16] ibid., 80.
[17] ibid., 76.
[18] as a result of Part 5 of the Enterprise Act 2016.
[19] Insurance Act 2015, s.13A.
[20] ibid., s.16.
[21] ibid., s.16A.
[22] ibid., s.17.

"**13A Implied term about payment of claims**

[…]

(3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account—

(a) the type of insurance,

(b) the size and complexity of the claim,

(c) compliance with any relevant statutory or regulatory rules or guidance,

(d) factors outside the insurer's control."

This allows for a wide discretion to be afforded to the court in determining what reasonable time is under s.13A IA 2015. This wide discretion makes commercial sense but, as usual, is at the expense of certainty. The courts have yet to interpret the meaning of reasonableness in the context of s.13A IA 2015, but guidance from analogous areas of law can be used to interpret what it might mean. For example, in *Falkonera Shipping Company v Arcadia Energy Pte Ltd,*[23] Clarke LJ held reasonableness is to be judged objectively according to what a reasonable person in the same circumstances would have decided even if the decision is, ultimately, incorrect. In that case, it was reiterated that the burden of proof is on the party alleging a decision was/is unreasonable. The court in *Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd*[24] considered what reasonable meant in a reasonable endeavours clause. The court framed it with reference to the following question, "what would a reasonable and prudent person acting properly in their own commercial interest and applying their minds to their contractual obligation have done?".[25]

With reference to the sub-sections of s.13A IA 2015, the Statutory Annotations[26] provide further illumination. For example, in terms of the type of insurance, they suggest business interruption claims tend to be more complicated than, say, property damage claims. This also feeds into the second criterion – business interruption insurance is inherently complex and, aside from the complexity surrounding liability in itself, depending on the precise business of the insured, can be significant in value. This is because an insurer is agreeing to indemnify a loss of profit, and/or additional expenses incurred over and above the usual operating expenses, caused by an insured event. In presenting its claim, a policyholder will have to establish, to the insurer's satisfaction, its trading position before an insured event takes place and evidence how the situation has changed as a result of the insured event having occurred.

[23] [2014] EWCA Civ 713.
[24] [2017] EWHC 1457.
[25] ibid., 255.
[26] Explanatory Notes to the Enterprise Act 2016, paras. 266-268.

Moreover, a policyholder, as a claimant, may have to comply with any contractual terms requiring the mitigation of loss, perhaps by adjusting the way in which it conducts its business. At common law, in non-marine insurance contracts, the insured has no duty to take care to avoid or prevent an insured loss.[27] However, property policy wordings often impose a general contractual obligation on the insured to take all reasonable precautions to prevent a loss. For example, could a restaurant be expected to operate a takeaway service as a method of mitigating its business interruption loss? Technically, although unpalatably, the answer may well be yes, although it depends on the circumstances and the terms of the policy. Some restaurants adapted and (more so, or for the first time) relied on food delivery platforms, or made even more significant changes by offering things like DIY meal kits.[28] Others closed their doors completely. It would be difficult to provide any hard and fast rule since each case will turn on its facts but businesses that did not avail themselves of alternative ways to generate income ought to be prepared to answer questions surrounding their apparent inaction.

The Statutory Annotations suggest s.13A(3)(c) might include compliance with ICOBS Rule 8[29] and it is likely to apply to the Financial Conduct Authority's recent guidance relating to the business interruption test case.[30]

The Statutory Annotations also suggest factors outside an insurer's control could arise where information, and/or evidence, is not delivered to insurers in a timely fashion by a policyholder and/or a third party. What might cause a bottleneck outside an insurer's control, is a situation where notifications are received by an insurer in quick succession across its full, or close to full, book of business interruption insurance. No doubt this will flood a claims department's capacity quite quickly which would not have, and could not have, been forecast by claims operations leaders. Neither would it be reasonable to expect such a forecast. For those claims that fall within the FCA's test case, it may also be reasonable to await the determination by the court on applicable issues of coverage and causation (see below).

3. Pursuing and Defending Late Payment Claims

As previously indicated, non-consumer policies may disapply s.13A IA 2015 by contracting out. Careful consideration, with reference to the strict requirements will be wise even in situations where, at first blush, a policy appears to meet the requirements. Another way in which a Late Payment Claim could be defeated is if the sums paid under the policy are said to be in "full and final settlement" especially if, to avoid any doubt, the clause includes specific reference to any Late Payment Claim.

[27] In *Yorkshire Water v Sun Alliance & London Insurance plc* [1997] 2 Lloyd's LR 21 (CA) 30, Stuart-Smith LJ declined to imply a general duty to mitigate into a contract of liability insurance on the grounds that such a duty is usually incorporated as an express term.
[28] Louise Whitbread, 'The DIY meal kits to buy from your favourite restaurants during lockdown' (*The Independent*, 22 May 2020) <https://www.independent.co.uk/extras/indybest/food-drink/diy-meal-kits-restaurant-food-online-delivery-honest-burger-pizza-pilgrims-a9478421.html> accessed 2 July 2020.
[29] Financial Conduct Authority, 'Financial Conduct Authority's Insurance: Code of Business Sourcebook' (13 July 2020) <https://www.handbook.fca.org.uk/handbook/ICOBS/8/?view=chapter> accessed 3 August 2020.
[30] Financial Conduct Authority, 'Business interruption insurance test case: Finalised Guidance for firms' (June 2020) <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-bi-test-case.pdf> accessed 5 July 2020.

Late Payment claims arise from a breach of a contractual term implied by statute. Therefore, it is easy to assume – wrongly – that the applicable limitation period is 6 years from when the cause of action accrued.[31] In fact, at law, a Late Payment claim has a very short limitation period of 1 year from the date an insurer has extinguished their liability to make a damages payment under the policy.[32]

In bringing a claim, the burden of proof is, of course, on the policyholder to set out its claim. In doing so, a policyholder must persuade a court that, on the balance of probability, the insurer has breached the term implied by s.13A(1) IA 2015 by failing to pay its claim within a reasonable time. Conversely, an insurer will want to persuade a court that the time it took to pay a claim was in fact reasonable. The time to pay a claim includes a reasonable time to investigate and assess the claim.[33] An insurer may wish to await the outcome of the Financial Conduct Authority's test case and, in doing so, will not face criticism as long as they comply with the FCA's Guidance.[34]

Section 13A(4) IA 2015 affords a further defence pertaining to the investigation and/or denial of a claim. If an insurer has "***reasonable grounds for disputing*** [a] claim ("[…] as to the amount of any sum payable, or as to whether anything at all is payable"),[35] it will not be in breach of its implied duty. Having reasonable grounds to bring or defend a claim is a relatively low threshold to meet.

CPR 3.4(2)(a) allows a court, via its inherent jurisdiction or by application, to strike out a statement of case which discloses ***no reasonable grounds*** for bringing or defending the claim. Similarly, CPR 24.2(a) allows summary judgment against a claimant/defendant if there is ***no real prospect*** of successfully bringing/defending the claim or issue. Lastly, CPR 52.6(1)(a) requires an appeal to ***have a real prospect of success*** for an application for permission to appeal to be successful.

A weak defence may still fall within the umbrella of "reasonable grounds for disputing" a claim in the context of CPR 3.4(2)(a).[36] It must be more than arguable and has to demonstrate a real, as opposed to a fanciful, chance of winning[37] but, importantly, the party resisting such an application does not need to show their argument will probably succeed. The High Court has very recently reiterated its caution in striking out a statement of case and/or granting summary judgment where the law being examined is described as "developing".[38] In *Balamoody v UKCC for Nursing, Midwifery and Health Visiting*,[39] Ward LJ suggested there is very little difference between the three expressions of reasonableness found at CPR 3.4(2)(a), 24.2(a), and 52.6(1)(a).[40]

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[31] Limitation Act 1980, s.5.
[32] ibid., s.5A.
[33] Insurance Act 2015, s.13A(2).
[34] Financial Conduct Authority, 'Business interruption insurance test case: Finalised Guidance for firms' (June 2020) <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-bi-test-case.pdf> accessed 5 July 2020, particularly under the heading "handling claims and complaints".
[35] Again, no definition is provided.
[36] See *Merelie v Newcastle Primary Care Trust* [2004] EWHC 2554; *Swain v Hillman* [1999] EWCA Civ 3053.
[37] *Swain v Hillman* [1999] EWCA Civ 3053.
[38] *Begum v Maran (UK) Ltd* [2020] EWHC 1846 (QB).
[39] [2001] EWCA Civ 2097.
[40] ibid., at 39. Note, at the time of judgment, CPR 52.6(1)(a) is referred as CPR 52.3(6)(a).

With that in mind, some insurance claims are inherently complex and will quite easily meet this criterion. This is especially so when construing the contract's coverage which requires a sophisticated ability to interpret technical and/or potentially ambiguous contract wording.

It is worth highlighting that business interruption insurers facing Late Payment claims will readily emphasise the widely reported uncertainty surrounding business interruption insurance policies and its applicability to claims arising from COVID-19. This is especially so in light of the Financial Conduct Authority's test case in which the High Court is being asked to interpret 17 representations (though non-exhaustive iterations) of business interruption policies that contain the non-physical damage cover extension.[41] Guidance as to interpretation of business interruption policies is welcomed by all parties, and onlookers, to the litigation but it must be borne in mind that whatever decision the High Court arrives at, it is unlikely to be a panacea which some policyholders might expect. It certainly will not automatically unlock further claims for Late Payment in relation to business interruption policies that were not part of the test case; it is likely that insurers with similar business interruption wordings would be able to demonstrate reasonable grounds for disputing a claim pursuant to s.13A(4) IA 2015 at least for the time whilst the test case was in progress.

Perhaps subtly, s.13A(4)(a) IA 2015 makes reference to an insurer not being in breach by failing to pay a claim, "***or the affected part of it***". The construction of s.13A(4)(a) has some practical importance. First, insurers should actively consider making an interim payment for any sum which is not in dispute. It is unattractive for insurers to sit idle and wait for a policyholder to request an interim payment, especially if an interim payment is likely to stem, or prevent, further losses occurring. The way s.13A IA 2015 is constructed puts the onus on insurers.[42] Therefore, even in circumstances where a policyholder does not request an interim payment for the sum which is not in dispute, an insurer could still be in breach of s.13A 2015 by failing to pay that sum within a reasonable time. Secondly, from an insurer's perspective, it will be wise to maintain clear and detailed claims handling notes justifying the steps it takes throughout the claims handling process. Note, however, that the conduct of an insurer in adjusting a claim is to be objectively assessed so additional extrinsic expert evidence may be needed to support any assertion that the insurer has acted reasonably.[43]

At the time of writing, there is much uncertainty as to how the courts might address a Late Payment claim under s.13A IA 2015. It is possible that COVID-19 claims under business interruption insurance policies and other types of insurances will catalyse the development of this new area of law over the coming months and years. This is especially so since the stakes are extremely high for businesses (and consumers in respect of other types of policies) who, rightly or wrongly, are relying on a payment from insurers to survive.

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[41] *The Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* (Case No. FL-2020-000018).
[42] See also Rule 8.1 Financial Conduct Authority, 'Financial Conduct Authority's Insurance: Code of Business Sourcebook' (13 July 2020) <https://www.handbook.fca.org.uk/handbook/ICOBS/8/?view=chapter> accessed 3 August 2020.
[43] See para. 269 of the Explanatory Notes to the Enterprise Act 2016.

4. The Duty of Utmost Good Faith and the term 'Bad Faith'

It is necessary to outline briefly the duty of utmost good faith before moving on to consider bad faith and how a bad faith claim might look. The duty applies equally to policyholders and insurers.[44] Although the courts have recently been inclined to consider good faith and fair dealings in relation to a wider class of contracts,[45] contracts of insurance remain the paramount example of contracts of utmost good faith.[46] The duty of good faith is extensively discussed both academically and in practice.[47] Broadly speaking, the duty of good faith places obligations on the parties to be honest, fair, open, and, in certain situations, requires disclosure of material information. Bad faith is therefore, the opposite behaviour (and therefore, a lack of good faith).

It is worth highlighting that the concept of utmost good faith within ordinary commercial contracts has developed away from the original concept of *caveat emptor*. Express good faith clauses are being inserted into commercial contracts and the courts appear to be open to enforcing them.[48] The definition of good faith within a commercial contract, and how it operates on the parties, very much depends on the construction of the particular contract in question.[49]

It is widely accepted that, in relation to contracts of insurance, the duty of utmost good faith applies during the presentation of a risk (i.e. the pre-contractual stage of a contract of insurance). The precise nature of that pre-contractual duty has recently seen substantial reform and it differs between consumer contracts and non-consumer contracts.[50] To what extent the duty of good faith continues during the life of the contract (i.e. the post-contractual stage), and how that looks, is more complicated and nuanced.[51]

So, what is bad faith, and why is it relevant? According to law in some US states,[52] an insurer can be said to have acted in bad faith if it is said to have acted unreasonably, or improperly, and in contravention of the duty to act in good faith.[53] The duty to act in good faith was initially implied into contract and, thus, a successful claim would attract contractual damages (i.e. those in contemplation of the parties at the time of contracting). The Californian

[44] *La Banque Financière* de la Cité SA v Westgate *Insurance* Co Ltd [1991] 2 AC 249 (HL).
[45] Braganza v BP Shipping Ltd & Anor [2015] UKSC 17, para. 18, and Socimer International Bank Ltd (in liquidation*) v Standard Bank London Ltd* [2008] Bus. L.R. 1304, para. 66.
[46] See *Carter v Boehm* (1766) 3 Burr 1905, *Walford v Miles* [1992] 2 AC 128, and Robert Merkin, 'Colinvaux's Law of Insurance' (12th edn., Sweet & Maxwell 2019), 6-001. Contrast with other jurisdictions that have adopted a wider duty of good faith into other contracts such as the US Uniform Commercial Code §1-204 (duty of good faith in performing contracts).
[47] See Peter MacDonald Eggers and Simon Picken, 'Good Faith and Insurance Contracts' (4th edn., Routledge 2017); "Some Reflections on Good Faith in Contract Law", Oxford University Obligations Group, February 2012, 1 referenced in Hadrian Tulk, 'The good faith doctrine in English and Canadian Law' (2019) 132 BILAJ.
[48] David Pliener and Sri Carmichael, 'Are English courts still hostile to a doctrine of good faith?' [2017] 1 JIBFL 19. See also *Braganza v BP Shipping Ltd & Anor* [2015] UKSC 17 and *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] Bus. L.R. 1304. Contrast with the US where a duty to act in good faith is implied into all contracts, The Restatement (Second), Contracts, § 205.
[49] John Lowry and Philip Rawlings, 'Insurers, Claims and the Boundaries of Good Faith ' (2005) 68 Mod L Rev 82, 84.
[50] See the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015.
[51] See Peter MacDonald Eggers and Simon Picken, 'Good Faith and Insurance Contracts' (4th edn., Routledge 2017), 61.
[52] Victoria Myers, 'The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.' [1978] 13(3) Tulsa LJ 605.
[53] Pursuant to The Restatement (Second), Contracts, § 205.

case of *Comunale v Traders & General Insurance Co*[54] is credited as the first judgment to sanction a cause of action for bad faith in tort against an insurer.[55] It recognised that contractual remedies may not be sufficient to cover a policyholder's loss occasioned by an insurer's bad faith conduct. By allowing a tortious claim for bad faith, the level of damages afforded to a policyholder was widened. In some US states, the court can also award punitive damages for a proven tortious claim.

In allowing a tortious cause of action, the Californian courts have emphasised that a policy of insurance is purchased to obtain peace of mind and security in return of a fiduciary duty owed by an insurer; this creates a 'special relationship' between policyholder and insurer.[56] The tort of bad faith can, therefore, be categorised as a breach of the aforementioned special relationship. It is important to note that the creation of a cause of action in tort did not, and does not, extinguish a cause of action in contract. Since potential damages for a successful claim in tort are wider, a claimant in California (or other US states in which the tort of bad faith has developed) would largely favour recovering damages in tort.

Strictly speaking, the US jurisprudence surrounding bad faith litigation is of no precedent value to the courts in the UK. However, there are striking similarities between the spirit of bad faith litigation in US states and any claim that might be brought pursuant to s.13A IA 2015 under English law. Both focus on the insurer's duty to act reasonably during the claims handling process and afford a cause of action in damages to a policyholder should an insurer breach its duty.

Section 14 of the IA 2015 abolishes the remedy of avoidance attached to a breach of good faith, but it retains the general duty of utmost good faith, "A contract of marine insurance is a contract based upon the utmost good faith".[57] The Law Commission suggests the duty of utmost good faith survives as a mere "interpretive principle" which informs the separate duties under specific sections of the IA 2015 (such as s.13A IA 2015).[58] However, on revisiting the construction of s.14 IA 2015, the Law Commission's view is not immovable. The way in which s.14 IA 2015 is drafted (in conjunction with s.17 Marine Insurance Act 1906) leaves open the possibility that a court could find a breach of utmost good faith independently from any specific duty arising out of the IA 2015.[59] It would not be too far a stretch for a court to award a remedy, perhaps in the form of declaratory relief and/or damages, that reflects in some way an insurer's wrong doing over and above, say, damages under s.13A IA 2015. In that sense, perhaps the development of bad faith litigation in the US states, by way of judicial intervention, is a blueprint for the widening of damages for breach of good faith under English law. The development of which is likely to hinge, perhaps, on the sufficiency of damages under s.13A IA 2015. We will no doubt see, in the coming

[54] (1958) 50 Cal.2d 654.
[55] H. Walter Croskey, 'Bad Faith in California: Its History, Development and Current Status' [1991] 26(3) Tort & InsLJ 561, 562; Victoria Myers, 'The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.' [1978] 13(3) Tulsa LJ 605, 608.
[56] H. Walter Croskey, 'Bad Faith in California: Its History, Development and Current Status' [1991] 26(3) Tort & InsLJ 561, 563.
[57] Marine Insurance Act 1906, s.17.
[58] See Explanatory Notes to the Insurance Act 2015, para 116; PT O'Neill and JW Woloniecki, 'The Law of Reinsurance in England and Bermuda (5th edn., Sweet & Maxwell 2019), para. 6-125.
[59] See also PT O'Neill and JW Woloniecki, 'The Law of Reinsurance in England and Bermuda (5th edn., Sweet & Maxwell 2019), para. 6-125.

months and years, the court's appetite in this regard as we see business interruption cases making its way before the courts.

5. Conclusion

We are told in many different scenarios that the world we live in, the 'new normal', will not be the same as it was pre-COVID-19. Businesses will fundamentally change the way in which they purchase insurance, and no doubt insurance brokers will adapt how they advise on insurance needs. Reciprocally, business interruption insurance is likely to change fundamentally[60] because it is uncertain to what extent pandemic losses are insurable at affordable premium levels.

It is inevitable that insurers will start to see s.13A IA 2015 Late Payment claims surfacing as a result of COVID-19 and business interruption claims. We will start to see how the courts interpret the various factors and the 'reasonable grounds for disputing' defence within s.13A IA 2015. There is a real possibility that damages under s.13A IA 2015 will also undergo some degree of stress testing as the contractual level of damages is applied. Lastly, perhaps the court will interpret s.14 IA 2015 as a stand-alone duty to act in good faith independently from any specific duty arising out of other duties contained within the IA 2015.

[60] Charlie Wood, 'COVID-19 will drive "significant changes" to BI policy wordings: market survey (Reinsurance News, 26 June 2020) <https://www.reinsurancene.ws/covid-19-will-drive-significant-changes-to-bi-policy-wordings-market-survey/> accessed 26 June 2020.