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DAMAGES FOR LATE PAYMENT OF INDEMNITY INSURANCE CLAIMS: A DEAD DUCK?

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ABSTRACT. *Section 13A of the Insurance Act 2015 implies a term into every insurance contract that if the assured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a "reasonable time". It provides contractual remedies, such as damages, in the event of breach. To date, a breach of section 13A has been pleaded in two cases which have resulted in judgments – Quadra Commodities S.A. v XL Insurance Co. S.E. and others [2022] EWHC 431 (Comm) and Delos Shipholding S.A. and others v Allianz Global Corporate and Specialty S.E. and others ("Win Win") [2024] EWHC 719 (Comm) – and in each case the section 13A claim failed. Informed by the understanding of section 13A adopted in these two cases, this paper suggests that section 13A largely is symbolic. To this end, it considers three points and argues that two of these hinder the efficacy of section 13A.*

KEYWORDS: *insurance*, *late payment*, *indemnity insurance*, *insurance claims*.

I. INTRODUCTION

The regime regarding damages for the late payment of indemnity insurance claims[1] has traditionally presented an unfavourable impression of English insurance law.

Historically, damages have been unavailable due to the technical classification of insurance claim monies at common law. First, the rule that a defendant could not be liable to compensate for the late payment of damages due by her applied to unliquidated *and* liquidated damages where payment at a particular time was stipulated in the contract.[2] While *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v Inland Revenue Commissioners*[3] was a step in the right direction, holding, albeit obiter, that late payment of a debt (or other form of contractual breach) could sound in damages, this was in respect of *primary* payment obligations:[4]

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[1] The majority of insurance policies are indemnity policies save for accident and life.

[2] *President of India v Lips Maritime Corp* ("*The Lips*") [1988] A.C. 395; see also *Mandrake Holdings Ltd. v Countrywide Assured Group Plc* [2005] EWCA Civ 840.

[3] [2007] UKHL 34, [2008] 1 A.C. 561.

[4] *Sempra Metals v IRC* [2007] UKHL 34 at [100] (Lord Mance).

English law does not permit damages to be claimed for the late payment of damages.[5] Second, the indemnity insurers' duty to pay was interpreted not as a *primary* promise to indemnify the assured for the amount of their loss, but as a *secondary* liability to "hold the indemnified person harmless against a specified loss or expense".[6] In other words, the insurers' primary obligation is to pay upon the happening of the risk insured by an insured peril(s).[7] It followed that a claim for damages for late payment made by an assured who was covered under a fire policy against fire damage and loss of profits pending actual reinstatement of their premises failed.[8] The same analysis applied where an insurer had promised expressly to "act quickly" when dealing with the claim but failed to do so.[9]

At common law, therefore, if an insurer paid an assured's claim late, the only remedy available was simple interest on the indemnity owed.[10] It is easy to see why this was inadequate and *Sprung v Royal Insurance (UK) Ltd.* illustrates the problem.[11] Here, an insurer paid the assured's claim some three-and-a-half-years late. At this point, his losses had spiralled such that he was unable to carry on his business, and he had lost the opportunity to sell it. The late indemnity, together with simple interest, did not compensate his loss. Rix L.J. later suggested that the decision might not hold water if ever it were subject to review by the House of Lords;[12] but, of course, small and medium-sized enterprise (SME) assureds affected by late payment lack the financial means to litigate through the appellate courts.[13] Indeed, *Sprung* reached the Court of Appeal because the assured appeared as a litigant in person. In the absence of appellate review, the industry found ways to mitigate the harshness of the common law,[14] although these lacked cohesion.

Section 13A of the Insurance Act was enacted by section 28(1) of the Enterprise Act 2016. It came into force on the 4 May 2017. It is

[5] *The Lips* [1988] A.C. 395, 425 (Lord Brandon); *Ventouris v Trevor (The Italia Express) (No 3)* [1992] 2 Lloyd's Rep. 281 (Q.B.D.); *Tonkin v UK Insurance Ltd.* [2006] EWHC 1120 (T.C.C.), [2006] 2 All E.R. (Comm) 550, at [38] (Judge Peter Coulson Q.C.).

[6] *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association* ('*The Fanti*') [1991] 2 A.C. 1; see also *Endurance Corporate Capital Ltd. v Sartex Quilts & Textiles Ltd.* [2020] EWCA Civ 308, [2020] Lloyd's Rep. I.R. 397. It has been described as a "fiction": see Lord Mance, "The 1906 Act, Common Law and Contract Clauses – All in Harmony?" [2011] LM.C.L.Q 346, 352.

[7] *"The Italia Express"* [1992] 2 Lloyd's Rep. 281, 285–92 (Hirst J.); *International Energy Group Ltd. v Zurich Insurance Plc* [2015] UKSC 33, [2016] A.C. 509, at [89] (Lord Mance).

[8] *Normhurst Ltd. v Dornoch Ltd.* [2004] EWHC 567 (Comm), [2005] Lloyd's Rep. I.R. 27.

[9] *Tonkin v UK Insurance* [2006] EWHC 1120 (T.C.C.), [2006] 2 All E.R. (Comm) 550, at [34]. Admittedly, the clause lacked clarity, and an obligation for the insurer to pay within a specified time may have been enforceable as a separate contractual obligation: see Lord Mance, "The 1906 Act", 351.

[10] Senior Courts Act 1981, s. 35A, e.g. *Burts & Harvey v Vulcan Boiler (No. 2)* [1966] 1 Lloyd's Rep. 354 (Q.B.D.).

[11] [1999] Lloyd's Rep I.R. 111, 119 (C.A.).

[12] *Mandrake v Countrywide Assured Group* [2005] EWCA Civ 840, at [25].

[13] Law Commission, Scottish Law Commission, "Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment" (Law Commission Report 353, Scottish Law Commission Report 238, 2014), [26.76].

[14] Ibid., at [24.14], [28.43], [28.44].

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designed to promote the interests of the assured by implying a term into every contract of insurance that, "if the [assured] makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time" (section 13A(1)). To date, whether an insurer has breached section 13A has been discussed in two judgments:[15] *Quadra Commodities S.A. v XL Insurance Co. S.E. and others*[16] and *Delos Shipholding S.A. and others v Allianz Global Corporate and Specialty S.E. and others* ("*Win Win*").[17] In each case, the claim failed. These cases demonstrate that succeeding in a claim for section 13A(1) damages will be a tall order for assureds. This article asks whether section 13A is to be considered a symbolic reform or, more provocatively, a dead duck. To this end, it considers three points and argues that two of these hinder the efficacy of section 13A.

First, section 13A is at odds, technically, with the common law. However, this is straightforward to surmount. Second, informed by the judgments in *Quadra* and *Win Win*, it seems that section 13A will *not* encourage insurers to review their claims handling processes. Third, section 13A does not provide for punitive damages. Punitive damages, it is submitted, would have countered the lack of encouragement for insurers to review their claims handling processes.

II. Reconciling the Common Law and Section 13A

The implementation of section 13A raises questions about the nature of insurance compensation. For policies commenced or amended after 4 May 2017, an insurer may incur liability to an assured for a failure to pay its claim within a "reasonable time". The nature of the insurer's liability remains a *secondary* liability to hold the assured harmless against a specified loss or expense or to pay upon the happening of the risk insured.[18] The insurer's liability arises when the loss occurs. Presumably, therefore, the rule that a defendant cannot be liable to compensate for the late payment of *unliquidated* damages due by her also stands because a consequence of the "hold harmless" principle is that an assured's claim under a policy is for unliquidated damages.[19]

The issue is how the common law rules and section 13A can be reconciled. Section 13A is an implied contractual term: breach gives rise to the usual

[15] See *World Challenge Expeditions Ltd. v Zurich Insurance Company Ltd.* [2023] EWHC (Comm) 1696, at [342] (Dias J.).

[16] [2022] EWHC 431 (Comm), [2022] 2 All E.R. (Comm) 334.

[17] [2024] EWHC 719 (Comm), [2024] 1 Lloyd's Rep. 489.

[18] Law Commission, "Insurance Contract Law", [27.12].

[19] *Ventouris v Trevor* ("*The Italia Express*") *(No 3)* [1992] 2 Lloyd's Rep. 281 (Q.B.D.), 287 (Hirst J.); see also M. Clarke, "Compensation for Failure to Pay Money Due: A 'Blot on English Common Law Jurisprudence' partly removed" [2008] Journal of Business Law 291, 295.

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remedies for breach of contract, including damages for loss.[20] The nature of section 13A damages are divorced from the nature of insurance compensation: the obligation to pay under section 13A arises when the court decides that an insurer's conduct breached the implied term and the liability is *unliquidated* damages – that is, damages calculated by a court. Indeed, the late payment "clock" only starts running once the sums are deemed to be due,[21] and section 13A damages can be claimed *after* the indemnity has been paid under the policy, albeit late, separating section 13A damages from the insurance compensation.

However, if the insurer's liability remains to hold the indemnified person harmless against a specified loss or expense or to pay upon the happening of the risk insured, it may be said that the objective of section 13A is to modify the nature of the insurer's liability so that an insurer is required to pay upon the happening of the risk insured *within a reasonable time*.[22] The consequence of this would be that liability under section 13A becomes part of the risk insured. This view, it is submitted, is incorrect, although at first sight it might appear to promote the assured's interests to the fullest extent.

Traditionally, risks were encapsulated as warranties[23] – terms which represented both the promise the assured had agreed to keep in order to be covered and the underwriter's risk analysis.[24] A term is a warranty if: (1) it goes to the root of the contract, (2) it bears materially upon the risk and (3) the gravity of breach means an award of damages is an insufficient remedy.[25] The cover is said to fall apart upon the assured's breach because this fundamentally alters the nature of the bargain between the parties. Here, section 13A damages target the insurer's conduct, not the assured's, making section 13A damages inappropriate to be classified as a "risk". Indeed, conflating the assured's breach and the insurer's conduct would be conceptually difficult: the insurer's premium risk-assessment process bears upon the physical characteristics of the risk ("physical hazard") and the assured's behaviour ("moral hazard") and it would be quite improper for the insurer to calculate their own likelihood of breaching section 13A into the assured's premium price. Moreover,

[20] Explanatory Notes to the Insurance Act 2015, at [264], available at www.legislation.gov.uk/ukpga/2016/12/pdfs/ukpgaen_20160012_en.pdf (last accessed 1 September 2024).

[21] Insurance Act 2015, s. 13A(1); Explanatory Notes to the Insurance Act 2015, at [265], [269].

[22] "We therefore recommend a statutory implied term in every insurance contract that the insurer *will pay sums due within a reasonable time*": see Law Commission, "Insurance Contract Law", [24.4] (emphasis added).

[23] Unlike in ordinary contract law, in insurance law, a "warranty" is a term of great importance.

[24] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)* [1992] 1 A.C. 233, 263 (Lord Goff); *De Hahn v Hartley* (1786) 1 TR 343, 345–46 (H.L.).

[25] *HIH Casualty & General Insurance Ltd. v New Hampshire Insurance Co.* [2001] EWCA Civ 735, [2001] Lloyd's Rep. I.R. 596.

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damages are likely to be the most common remedy awarded under section 13A.[26]

The result of the view that damages incurred under section 13A are divorced from the nature of insurance compensation is that the common law rules and section 13A currently do not sit neatly together. While the text of section 13A does not overrule *The Lips* explicitly, it seems reasonable to assume that a court will interpret it as doing so implicitly, in the insurance context at least,[27] leaving the rule intact in respect of ordinary contractual damages. Additionally, while the text of section 13A does not overrule the hold harmless principle explicitly, it is suggested that the nature of the insurer's liability in indemnity contracts needs to be reinterpreted as a primary promise to indemnify the assured for the amount of their loss.[28] Interpreted in this way, the common law rules will be consistent with section 13A(5), according to which the assured is entitled to: (1) the insurance compensation due under the policy (s. 13A(5)(a)) and (2) interest on the late payment of the insurance compensation due (s. 13A(5)(b)) and (3) damages for the late payment of the insurance compensation (s. 13A(5)).[29] In short, the common law rules at odds with section 13A need to be overruled and reinterpreted to facilitate, rather than frustrate, the objective of section 13A.

III. Little to No Encouragement to Review Claims Handling Processes

It is perceived throughout the market that section 13A is to do with regulating insurers' conduct. Indeed, in their report, the Law Commission spoke of the "hold harmless" principle condoning "poor practice".[30] It was plausible to assume that section 13A(1) would incentivise, or at least encourage, insurers to make their claims handling processes more efficient. Since its enactment, section 13A has been discussed in two judgments: how do these inform our understanding of the extent to which section 13A discourages insurers' "poor practice"?

The procedure for making out a claim under section 13A(1) is as follows. The assured bears the burden of proving the insurer's failure to pay within a reasonable time; then, the onus is on the insurer to prove that there were reasonable grounds for disputing the claim. Section 13A(4)(a) provides

[26] While section 13A(5) refers broadly "remedies", damages are the only example remedy listed in the statute itself and it is difficult to imagine how other contractual remedies, e.g. specific performance, would find application here.

[27] See A. Tettenborn, "Late Payment of Claims – Better, But by No Means Perfect" in M. Clarke and B. Soyer (eds.), *Insurance Act 2015: A New Regime for Commercial and Maritime Law* (Abingdon 2016), [6.3.1].

[28] See Law Commission, "Insurance Contract Law", [26.1].

[29] Although the interest accrued appears intended to militate any award of damages under section 13A(1), see ibid., at [28.17].

[30] Ibid., at [26.1].

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that if an insurer can demonstrate that there were reasonable grounds for disputing the claim, they are not in breach of section 13A(1) merely by failing to pay the claim, or its affected part, while the dispute is continuing *but* their conduct in handling the claim may be a relevant factor in deciding whether the term was breached and, if so, when: see section 13A(4)(b).[31] Put differently, once the assured has proved that the insurer failed to pay within a reasonable time, even if the insurer has demonstrated that there were reasonable grounds for disputing the claim, the insurer's conduct in handling the disputed claim may nevertheless speak to a breach of section 13A(1).

In *Quadra Commodies S.A. v XL Insurance Co. S.E. and Others*,[32] the assured brought a claim for (1) an indemnity under a marine cargo policy, having paid for grain but failed to recover the full amount owing to a fraud and (2) for damages under section 13A(1). Butcher J. took as his starting point the analysis of the "reasonable time" within which the claim should have been paid. Here, given the nature and complicated circumstances of the case, a "reasonable time" was not more than about a year from the notice of loss.[33]

Significantly, a slow or lethargic claims handling process did not speak to "reasonable time".[34] Butcher J. remarked that there was "some force" in the argument that the manner in which the insurer conducted their investigations was too slow: their investigation was unduly protracted given the number of hours in fact spent on it; there was unnecessary delay in releasing the surveyor's report to the assured, the surveyor having been hired to investigate the facts; Crawford, hired to construct a "hypothetical ledger", could have been instructed sooner; and legal advice could and should have been taken before it was.[35] Nevertheless, these findings, even cumulatively, did not amount to a breach of section 13A(1), having occurred within Butcher J.'s formulation of a "reasonable time" for payment of the claim, strengthened by there having been reasonable grounds throughout for disputing the claim.[36]

Quadra confirms that provided an insurer pays the claim within the context-specific "reasonable time", it matters not that there was (much) room for improvement in their claims handling process. This is noteworthy

[31] "An insurer who has a reasonable basis for disputing a claim or at least conducting further investigations may nevertheless be found to be in breach of the implied term if, for example, it conducts its investigation unreasonably slowly, or is slow to change its position when further information confirming the validity of the claim comes to light"; see Explanatory Notes to the Enterprise Act 2016, [270], available at https://www.legislation.gov.uk/ukpga/2016/12/notes/division/6/index.htm (last accessed 20 August 2024).

[32] *Quadra Commodities v XL Insurance* [2022] EWHC 431 (Comm), appealed on other grounds – see [2023] EWCA Civ 432, [2023] 2 All E.R. (Comm) 909 – and waiting to be heard by the Supreme Court on these other grounds.

[33] *Quadra Commodities v XL Insurance* [2022] EWHC 431 (Comm), at [143].

[34] Ibid.; see also [142]–[143].

[35] Ibid., at [146].

[36] Ibid., at [146].

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because it was predicted prior to its implementation that section 13A(1) would encourage insurers to review and, if necessary, adjust their claims handling processes, thereby making them more efficient.[37] In theory, therefore, section 13A regulates insurers' conduct by requiring them to pay a claim within a "reasonable time", but it is really only once this is breached and section 13A(4)(b) comes into play – during the period of dispute – that section 13A may be said to regulate insurers' claims handling processes.

Turning to *Win Win*,[38] the assureds claimed (1) under their war risks policy for the vessel's constructive total loss by virtue of its being detained for more than six months and (2) for section 13A(1) damages.

In respect of the latter, the assureds contended that the insurers ought to have indemnified them for the loss of the vessel "Win Win" by February 2020 – four to six weeks after her release by the Indonesian authorities – at which point they had the opportunity to purchase another vessel, "Olympic Hope", which they could have traded at a profit. The assureds claimed losses totalling USD 27.5 million. This figure represented the loss of trading profit and the increase in the capital value of the replacement vessel. However, on the facts, Dias J. found that the assureds had failed to establish that "Olympic Hope", or any other vessel, would have been available to purchase in February 2020 or shortly thereafter,[39] this being the foundation of the assured's entire section 13A(1) claim. Consequently, she was "happily relieved" of making any finding as to whether the insurers were (un)reasonable in disputing the claim.[40]

Nevertheless, Dias J.'s comments about section 13A are instructive. She expressed obiter doubt both as to whether the insurers' continued reliance on three out of their four defences – fortuity, exclusion, and sue and labour – was reasonable and whether the remaining defence could be considered relevant to the section 13A(1) claim.[41] However, the conclusion cannot be drawn that had the assureds been able to establish their loss, they definitely would have succeeded. This reinforces the message in *Quadra*: it will be difficult for an assured to succeed in a section 13A(1) claim.

Here, the assureds' failure to notify the insurer of the accident until nearly the end of March appeared to work against them, speaking as it does to the timescale for making any payment. This was despite the assureds' arguing that the nature of the loss made it difficult for the insurer to undertake their own investigations and, in any case, no "great investigation" was needed – in contrast to a business interruption policy, for example – given that most of

[37] F. Arnold-Dwyer, "Insurance Law Reform by Degrees: Late Payment and Insurable Interest" (2017) 80 M.L.R. 489, 495.

[38] *Delos Shipholding v Allianz Global Corporate and Specialty* [2024] EWHC 719 (Comm).

[39] Ibid., at [281] et seq.

[40] Ibid., at [278].

[41] Ibid., at [276].

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the evidence needed would come from the assureds themselves, on account of the vessel's detention in Indonesia.[42] The suggestion is that while section 13A is focused primarily on whether the insurer paid within a "reasonable time", the assured's own conduct is under the spotlight too: specifically, the extent to which they did or did not facilitate the insurer's swift payment of the indemnity, in a manner evocative of equitable maxims. Notably, this is discrete from the implication of a mutual duty on assureds to notify insurers of their claims within a reasonable time,[43] which would not sit neatly with claims clauses. Instead, the suggestion is that this is the inherent logic in the operation of section 13A. Nonetheless, the fact remains that in *Win Win*, even if the assureds had been able to prove their loss, section 13A(4)(b) would have done little to discourage poor practice.

Finally, and for completeness, it is worth noting that the insurers contended that a claim under section 13A is restricted to cases of unreasonable failure to pay a claim *prior* to the commencement of the proceedings.[44] Dias J. left the matter undecided – because there was no authority on the matter and the point had been insufficiently argued. She did remark, however, that once proceedings have commenced, any claim for section 13A(1) damages already accrued is left intact, with recompense for late payment thereafter "subsumed into an award of interest".[45]

IV. A Failure to Permit Punitive Damages

Upon an insurer's breach of section 13A(1), section 13A(5) makes available to the assured the usual contractual remedies, specifying as an example "damages". It is uncontroversial that this refers to compensatory damages and that the ordinary rules regarding causation, remoteness of damage, mitigation and so on apply, although how these rules will apply remains untested.

It seems clear that section 13A does not permit punitive damages. While section 13A does not rule out punitive damages expressly and the explanatory notes are silent on this point, in contract law, punitive or "exemplary" damages are not permitted. Section 13A is an implied *contractual* term.[46]

[42] Ibid., at [274].

[43] An implied duty to negotiate and pay claims in a timely manner was rejected by Mance J., as he then was, in *ICCI v McHugh* [1997] 1 Lloyd's Rep. I.R. 94, because such a duty would "presumably have to be mutual" (at 136).

[44] *Delos Shipholding v Allianz Global Corporate and Specialty* [2024] EWHC 719 (Comm), at [272].

[45] Ibid., at [273].

[46] *Perera v Vandiyar* [1953] 1 W.L.R. 672, (1953) 97 S.J. 332; *Kenny v Preen* [1963] 1 Q.B. 499 (C.A.), 513 (Pearson L.J.), [1962] 3 W.L.R. 1233 (C.A.), 513 (Pearson L.J.); *Addis v Gramophone Co. Ltd.* [1909] A.C. 488, 496; *Johnson v Unisys Ltd.* [2001] UKHL 13, [2003] 1 A.C. 518, at [15]; see also see J. Goudkamp, "Exemplary Damages" in G. Virgo and S. Worthington (eds.), *Commercial Remedies: Resolving Controversies* (Cambridge 2017) cited in J. Goudkamp and E. Katsampouka, "An Empirical Study of Punitive Damages" (2018) 38 OJLS 90, 95.

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In tort law, punitive damages traditionally have limited scope and the measure of such damages is modest because well-settled principles determine their quantum. The shunning in *Kuddus v Chief Constable of Leicestershire Constabulary*[47] of the "cause of action" test in *Broome v Cassell & Co. Ltd.*[48] means that punitive damages can be awarded in tortious actions satisfying one of the three categories in *Rookes v Barnard*.[49] One of these is where exemplary damages are expressly authorised by statute.[50] Another is where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]".[51] Lord Devlin noted that this category is not confined to moneymaking in the strict sense: it may extend to cases where the defendant seeks to gain something at the expense of the claimant's right, irrespective of whether the defendant is successful.[52]

At first sight, it might be thought difficult for late payment by insurers to fall within this category. The industry is regulated such that insurers must have sufficient funds available to pay out all the losses in the pool should the risk(s) materialise, and the past premiums retained are invested. Nevertheless, it is not beyond the realms of imagination that an insurer might, or think that they might, stand to obtain a gain by delaying a payment, even if it has sufficient reserves.

In *Whiten v Pilot Insurance Co.*,[53] a husband and wife claimed on their policy after a house fire. Their insurer made a single payment to cover living expenses and covered the rental costs of alternative accommodation for a few months. The insurer then failed to make any further rent payments, without telling the assureds, and pursued a confrontational strategy. In essence, the insurer alleged that the assureds had torched their own home and pursued a protracted trial despite experts' opinion that there was no evidence of arson. The jury awarded one million Canadian dollars in punitive damages, reduced a majority of the Court of Appeal to 100,000 dollars. The evidence suggested that the insurer's conduct was planned, deliberate and pursued for over two years while the assureds' financial position grew increasingly desperate. It seems that such behaviour falls squarely within the second of the *Rookes v Barnard* categories.[54]

However, insurers may not always be as calculated as this. What about the insurer who, in the wake of *Quadra* and *Win Win*, considers section 13A of little consequence and drags their feet with the awareness that

[47] [2001] UKHL 29, at [68] (Lord Slynn), [117] (Lord Scott), [2002] 2 A.C. 122.

[48] [1972] A.C. 1027, [1972] 1 All E.R. 801.

[49] [1964] A.C. 1129, [1964] 1 All E.R. 367 (Lord Devlin).

[50] [1964] A.C. 1129, 1227.

[51] Ibid., at 1226.

[52] Ibid., at 1227.

[53] [2002] 1 S.C.R. 595, 2002 S.C.C. 18.

[54] See *Axa Insurance UK Plc v Financial Claims Solutions Ltd.* [2018] EWCA Civ 1330, at [27] (Flaux J.).

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any delay may result in the assured being more prepared to accept a lesser sum in settlement of the claim? To quote Lord Slynn:

> From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the [claimant's] rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour.[55]

Once an assured has proven a failure on the insurer's part to pay within a reasonable time, the insurer's conduct *may* speak to a breach of the implied term despite the presence of reasonable grounds for disputing the claim: this hints at a punitive objective and, for it to have full effect, an award of punitive damages ought to have been provided for.[56] It is fair to assume, after *Quadra* and *Win Win*, that section 13A(1) will get little successful business and, if proving a breach of section 13A(1) is particularly challenging, it would be fitting for the gravity of the insurer's breach to be reflected in an award of punitive damages, in addition to compensatory damages. This would make a rare example of the insurer's conduct and promote, in the round, the regulatory objective of section 13A by encouraging insurers to make their claims processes more efficient. Indeed, this would sidestep one of the main objections to punitive damages in this context, which is that *regular* awards of punitive damages may increase insurers' exposure which might be borne by assureds in consequential premium increases.[57] Moreover, if the insurer is protected during the period of a "reasonable time" and in practice (to a lesser extent) during the period of dispute, it cannot reasonably be said that insurers would be encouraged to pay a range of claims without investigating them for fear of punitive damages – or at least, not any more than insurers already pay claims without investigation.

Supporting this view is empirical evidence which suggests that when punitive damages *are* awarded in this jurisdiction, the amounts tend to be modest.[58] This mitigates any concern that to permit punitive damages here would result in excessive awards, thereby providing assureds with disproportionate uplifts.

V. Conclusion: A Dead Duck?

In many respects, section 13A was always going to be largely symbolic. Subject to the transparency requirements,[59] it can be contracted out of

[55] [2001] UKHL 29, at [63].

[56] On the place of punitive damages in private law more generally, see J. Goudkamp and E. Katsampouka, "Punitive Damages and the Place of Punishment in Private Law" (2021) 84 M.L.R. 1257.

[57] P. MacDonald Eggers, "Late Payment of Insurance Claims" [2013] L.M.C.L.Q. 341.

[58] Goudkamp and Katsampouka, "Empirical Study of Punitive Damages".

[59] Insurance Act 2015, s. 17.

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in non-consumer policies and this is the norm in the marine market, for example. In consumer policies, however, section 13A cannot be contracted out of. This suggests that section 13A confers upon assureds a protection too valuable to be dispensed with. Nevertheless, the practical problem presumably persists: SME assureds wishing to claim damages for late payment need to have sufficient funds to bring and sustain a claim in the first place; although section 13A permits assureds to claim for late payment *after* receipt of the late claim monies, often, the two claims will exist in tandem. In fact, it cannot be assumed that SME assureds even know of section 13A's existence.

Consequently, much of section 13A's value is in its "soft power". It has been designed to signal to insurers that they cannot get away with unduly dragging their feet. It was hoped, at least initially, that it would incentivise or encourage insurers to make their claims handling processes more efficient. However, as *Quadra* and *Win Win* illustrate, if an insurer is protected by the "reasonable time" proviso, it matters not that there was scope for improvement in their claims handling process. In the rare cases where a section 13A(1) claim succeeds, the modest award of punitive damages would counter this by sending a clear message to insurers – by making *examples* of their conduct. Thus, they would be (re)encouraged to improve their claims handling processes.

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