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Insurer's silence can go against them and clients should use it against them!

In a recent case **Ted Baker v AXA [2017] EWCA Civ 4097,** the Court of Appeal has for the *first* time considered the issue of whether and in what circumstances an insurer might be under a duty to speak during the claims process, *that is*, is required to make its position plain in order to avoid being estopped from running certain procedural defences in due course. The factual scenario was that the loss adjuster appointed by insurers had, as was routine, requested a 'shopping list' of documentation which he required to substantiate the claimed quantum. The insurers remain silent subsequently and then raised the procedural defence.

The importance of this judgment is that it establishes for the first time that there may be circumstances where an insurer is obliged to spell out to an insured that its actions (or inactions) during the claims process may risk jeopardising a claim. This is in spite of the fact that, as was common ground between the parties, there is no general duty on insurers to warn an insured of the need to comply with policy conditions, in particular there is no general duty to warn an insured that its conduct is or might amount to a breach of a condition precedent or that the insurer will later insist on procedural requirements having been met

The Court of Appeal further observed that:

An estoppel of this nature in a contract of this kind does not require dishonesty or an intention to mislead; nor any impropriety beyond that inherent in the conclusion that the insurers should have spoken but did not.

Therefore, it would be easier for the clients to assert and *establish an estoppel of this kind in the right factual circumstances.*

FDD department based in Shanghai advice to the client of the Andrew Liu is that:

(a) During the claim process, it is advisable to engage the insurers extensively and one has to be tactful in communicating with them.
(b) Any typical issue of liability or quantum can be discussed with the FDD department before submitting it to the Club.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk