

BRIEFING NOTE

**Roger Mellie, the Man on the Telly, on the very cusp of a Hard Market tells us:
What the Adjuster Really Means When Negotiating an Insurance Claim**

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A Student's Life

One of the many highlights of a law student's life in the 1990's was not the examination of the dissenting dicta in *Leyland Shipping v Norwich Union Insurance* as various legal luminaries grappled with causation theory. Instead, the monthly publication of Viz, an adult comic written and published by a group of friends from a converted railway station, presented a gallery of colourful characters who might not be allowed to exist today, even in the liberal world of fiction. The adventures of Buster, Jonny and two young ladies with an abundance of body confidence lifted the mood during the darkest hours in the law library, specifically before the final examination in that impenetrable enigma known as the law of equity and trusts.

Enter Mr. Roger Mellie

The start of the FIFA World Cup evokes memories of one of Viz's most celebrated characters, Roger Mellie, aka the Man on the Telly. Roger had the unfortunate habit of uttering innocent but explosive expletives whilst commentating on live sporting events, something which today enlivens the tiresome monotony that is the commentary of live golf. Such was Roger's ability to say the wrong thing at the wrong time, that one Christmas edition of Viz published a most helpful "Profanasaurus", authored by Mr. Mellie himself, that set out certain words and phrases deployed by Roger during live sports casts, and defined what they really meant.

Enter the Hard Market

For the first time in 18 years, the global insurance industry is facing a "*hard market*". This, an industry term, broadly means that insurance premiums (and deductibles) are going to rocket, the insurance cover (and limits) are going to shrink and it will be an almighty scrap to get any commercial claim, borderline or not, paid in anything like the right amount. Of course, the first point in any claim is the appointment of the loss adjuster and then the publication (after many rounds of market and/or legal review) of the loss adjuster report. That report may be littered with words and phrases that might say one thing but mean something completely different. So, in the spirit of Roger Mellie and his famed Profanasaurus, here's a brief guide to what the loss adjuster may really mean when adjusting or negotiating a large industrial claim.

Phrase: "We must look to the Underwriter's intention."**Means: "We must completely ignore the policy's express wording and its plain meaning."****Commentary:** Usually deployed when adjusting a claim for a class of business that the insurer is no longer underwriting, such as trade credit, or wishes it had never underwritten, such as infectious disease, Often raised after a string of calamitous events, such as the collapse of the commodities market or a global pandemic, which triggers cover limits on multiple policies. Perhaps explains why the reasonable underwriter test was abolished by the Insurance Act 2015, because of the almost insurmountable difficulties of finding one.

Phrase: "It's not damaged, it's merely defective."

Means: "We have no idea what went wrong. Go sue the manufacturer, designer, contractor, anybody but the Property Insurer. That way it's off our desk, at least for six months."

Commentary: Usually deployed when adjusting an industrial or construction loss and the loss adjuster has no idea as to the failure mechanism of the insured property. Often raised when there is a significant business interruption or delay in start-up financial loss consequent upon the property damage. A phrase that ignores the Insurer's right to a subrogated action but one that is adored by coverage defence counsel, and their bank managers, worldwide as it throws open up a Pandora's Box of interpretative argument and complex engineering evidence.

Phrase: "It's not sudden damage, it's merely a continuum of operational wear and tear."

Means: "OK, we accept it's broken. But we think you broke it. But we're not sure how."

Commentary: The deployment of Latin (inter alia, per se) or long words (continuum) means the markets' lawyers have been over-zealous in the drafting review and want to earn their crust by splitting hairs as to the period over which the damage occurred. Often raised after the underwriter realises it has insured new but poorly made or constructed kit that has fallen apart and wants off risk at the next renewal. Results in cover holder dismay and frustration but rarely any discernible shift in purchasing patterns. Cheap today. Expensive tomorrow.

Phrase: "We do not recommend instructing lawyers. We can work constructively towards a resolution with the Claims Advocacy Team under the Claims Preparation clause."

Means: "Insurers appointed lawyers from the get-go and they're all over it. It's not looking good so the last thing we want is the cover holder lawyering up. Let's focus on driving down the amount of the indemnity and see if we can fudge a deal when we get to renewal."

Commentary: The lure of free advice is as irresistible as ever. Why pay lawyers when the Insurers pay the Claims Advocates under the Claims Preparation clause? Because Claims Advocates cannot advise on the law that determines the cover given by the policy. Can result in settlements well below the amount payable. But you don't miss what you don't see. The prospect that a Claims Advocate might do porridge for breach of the Legal Profession Act has yet to act as any deterrent, at the market side or the broker side. Client dedication gone mad.

Phrase: "We think it sensible to refer our difference of opinion to mediation."

Means: "We think you are right but our client will not listen to us, his lawyers, his experts, you or your lawyers. We hope he might listen to a mediator. Probably not but worth a try?"

Commentary: Mediation has been described as "the last refuge of the weak case". Mediators over promise and under deliver, shying away from banging heads and retreating to the role of "Speckled Jim", the ill-fated carrier pigeon, as they shuttle offers between the parties. Give it a go to test the evidence or resolve of the other party but be prepared to be underwhelmed.

Phrase: "We think it sensible to refer the dispute to arbitration under English law."

Means: "We are stuffed under the local law that governs the policy and we'll get hammered before an unsympathetic court in the cover holder's hometown. Let's shift the dispute before Insurer friendly arbitrators in a jurisdiction where our lawyers can earn real dosh."

Commentary: Yes, there is a substantial body of English insurance law, but most of it favours the Insurer. No, English lawyers cannot appear before the local courts, but they can appear before arbitral tribunals and can opine on English law. Is that the sound of a fast-approaching

gravy train drowning out the deafening noise of a conflict of interest? Or just the tills ringing? Either way, arbitration and the lack of insurance specialist arbitrators is one of the greatest risks to proper claims resolution. And that's the view of a senior insurance claims manager.

Phrase: "We pay claims"

Means: "We pay some amounts in respect of some claims. So, we can say we pay claims. In the same way that we can say that both Ferrari and Kia make cars. They do. Kind of."

Commentary: The rallying cry of the Insurer or its adjuster, called out after months of delays, deferments and denials, as it stampedes towards the moral high ground. Almost as insidious as the despot turned motivational speaker who advises the C-Suite to motivate the workforce not by fear, where you know where you stand, but by hope, where you don't. Overlooks the introduction of Section 13A of the Insurance Act 2015 which penalises unreasonable delay in the payment of claims by the payment of damages and interest. So now the rallying cry should be: "We pay claims and damages for delay and interest and costs". But not quite so punchy.

Phrase: "We will pay your claim. But not interest. Or costs".

Means: "Have you never heard of the power of compounding? And why on earth would we want to pay anyone who exposed our position to the extent that we have to pay you more?"

Commentary: Warren Buffet likes to invest in insurance companies for cash flow and compounding. As interest rates rise, compounding becomes ever more attractive, because the longer the payment of a claim is delayed, the more interest the money on reserve earns. Nobody wants to pay interest earned in a claim settlement and nobody expects it to be paid. And nobody likes lawyers or paying lawyers. Not even other lawyers. Time for change?

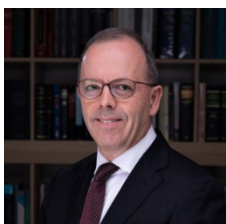
Phrase: "Remember. You will need our security at renewal."

Means: "You won. But if you do a victory lap then we will hobble you on the final bend."

Commentary: Sour grapes at its worst, but a fact of the hard market. But dig deeper and ask what is the purpose of insurance? If the purpose is simply to show an insurance certificate to a bank to satisfy the insurance part of the lending requirements, then job done. But if the purpose is to buy an indemnity for accidental property damage, then the cover holder needs more than AAA security. It needs an insurer with a mature approach to the payment of claims.

Viz never offered a mature approach to anything much, but it held up a mirror for those at a time in their lives when they never took, and were not expected to take, anything seriously. And perhaps that held them in good stead for a career in the practice of insurance law?

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