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Welcome to the September edition of IM Asset Management's quarterly newsletter. The purpose of the newsletter is to provide commentary and updates on periodical payments and financial matters to those practising in the area of personal injury law.

The newsletter has been slightly delayed as we were hoping that we would be able to report on the Lord Chancellor's decision regarding the Discount Rate. Readers will of course be aware that Mr Justice Holman refused permission for APIL to apply for a Judicial Review, due to the Lord Chancellor's stated intention to carry out a public consultation.

We understand that the public consultation will be published in late September or October with the standard consultation time being 12 weeks. Therefore in January we may have news for you in our next newsletter. Fingers crossed!

This month we focus specifically on the ability of defendants to make periodical payments and the issue of reasonable security looking at a number of extreme examples. For a full list of defendants who are secure providers of periodical payments, or to find out if your defendant is secure please speak to your IM Asset Management contact.

Insurer Concerned, Section 152 of the RTA Act 1988

Whether an insurance company is considered a secure funder of periodical payments is covered in section 2(3) and 2(4) of the Damages Act 1996 as amended.

- (3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.
- (4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if:
- (a) it is protected by a guarantee given under section 6 of or the Schedule to this Act,
 - (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

- (c) the source of payment is a government or health service body.

The Financial Services Compensation Scheme (or FSCS) is the "scheme under section 213 of the Financial Services and Markets Act 2000". For an insurance company to be covered by the scheme they must be authorised by the Financial Services Authority (FSA) at the time the insurance contract was undertaken. It is against the law for insurance companies to enter into insurance contracts without being authorised by the FSA.

It is therefore usually straight forward to ensure a defendant insurer would be deemed reasonably secure with a simple check on the FSA register. This is usually enough to ensure that a company is secure for providing periodical payments and this is where our investigation usually stops, however in a recent case we were involved in, the insurer was "insurer concerned".

For those who do not know it means that there is no contract of insurance between the defendant and their insurance company, rather the insurer has to pick up the bill because of section 152 of the RTA Act 1988.

This may not sound important, however at 1.3.3 in the FSA COMP Handbook (the rules applied by the FSCS when considering whether to pay out compensation) brings this into sharp focus:

FSA Handbook COMP 1.3.3

Q1 What do I need to do in order to receive compensation?

A1 In order to receive compensation:

- (1) you must be an eligible claimant;
- (2) you must have a protected claim;
- (3) you must be claiming against a relevant person;
- (4) the relevant person must be in default.

FSA Handbook COMP 5.2

A protected claim is:

- (2) a claim under a protected contract of insurance

In “normal” claims all 4 criteria are met. For an “insurer concerned” claim there is no contract of insurance and therefore it is not immediately clear that a claimant would have a protected claim as there is no contract of insurance leading to the claim. Thankfully, further into the Handbook there is further clarity as to what constitutes a protected contract of insurance.

FSA Handbook COMP 5.4.7

The FSCS must treat liabilities of an insurance undertaking which is in default, in respect of the following items, as giving rise to claims under a protected contract of insurance:

- (4) claims by persons entitled to the benefit of a judgment under section 151 of the Road Traffic Act 1988 or Article 98 of the Road Traffic (Northern Ireland) Order 1981.

This means that any periodical payment provided would be protected by the FSCS and therefore deemed to be reasonably secure. This has separately been confirmed by the FSCS in writing.

Untraced Claims against the Motor Insurers Bureau (MIB)

The MIB was established in 1946 to compensate the victims of negligent uninsured and untraced motorists. Under the Road Traffic Act 1988 every insurer underwriting compulsory motor insurance is obliged to be a member of the MIB. The MIB is a company limited by Guarantee and is funded by its members.

The MIB do not automatically meet the criteria of reasonable security, as set out in section 2(4) of the Damages Act 1996 (as amended), however they have proved to the Court that they are a secure funder of periodical payments in the case of, **Thacker v Steeples & MIB Cox J QBD London 16 May 2005**. Briefly, Cox J and Master Lush were satisfied on the evidence provided that the MIB were secure providers of periodical payments. This was because of the MIB's longstanding nature, the number of members and (most importantly) the MIB is the body through which the Government meets its obligations under Article 4 of the Second European Directive on Motor Insurance, to provide compensation to victims of uninsured and untraced drivers.

Practitioners in this area will be aware that there are two distinct tracks that claims against the MIB can follow, Uninsured and Untraced, for which there are separate agreements:

The Uninsured Drivers Agreements 1988 and 1999, requires the MIB to meet unsatisfied Civil Court Judgments against identified motorists who may not have been insured as required by the Road Traffic Act 1988.

The Untraced Drivers' Agreements 1996 and 2003, requires the MIB to consider applications for compensation from victims of “hit and run” motorists.

It is clear that in cases proceeding against the MIB under the Uninsured Drivers Agreement that the MIB are a secure provider of periodical payments because all of the case law relates to the Uninsured Drivers Agreement. Furthermore claims under this agreement are settled in Court and any periodical payment would be confirmed in a Consent Order.

In a recent case that IM Asset Management were involved in, the MIB have confirmed that the Untraced Drivers Agreement claims are paid from the same fund (that Uninsured claims are paid from) and therefore claims under the Untraced Drivers Agreement are also secure providers of periodical payments. Furthermore, the terms of any periodical payment would be included in a Memorandum of Agreement which both parties would sign providing the claimant with an agreement.

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