Third Party Claims against Insurers – The Irish Position

Introduction

We are frequently asked by Insurers whether there is an Irish statutory equivalent, similar to the UK Third Parties (Rights against Insurers) Act 1930. Following the recent High Court decision in Yun Bing Hu v. Duleek Formwork Limited (in Liquidation) and Aviva direct Limited t/a Aviva [2013] IEHC 50 (“Hu v Duleek”) on this very issue. We thought it a timely opportunity to set out the Irish position on what rights injured persons have to pursue an insurer if an insured defendant becomes insolvent.

The Irish Position

There is no equivalent legislation to the UK Third Parties (Rights against Insurers) Act 1930. This Act gives a claimant priority over the proceeds of an insurance policy in the event that the insured defendant becomes insolvent, where this occurs, the insured’s right of action against the insurer transfers to the claimant. In Ireland in the absence of an equivalent piece of legislation, the Common Law

Key facts:

There is no equivalent legislation to the UK Third Parties (Rights against Insurers) Act 1930.

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Seek legal advice if served with a third party request for discovery of information on indemnity arrangements between you and an insured.

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principle of privity of contract, applies and a contract cannot generally be enforceable by a person who is not a party to it. Section 62 of the Irish Civil Liability Act 1961 has been interpreted to provide for similar results to those provided under the UK Third Parties (Rights against Insurers) Act 1930.

Section 62 was designed to protect an injured claimant whose defendant had died, gone bankrupt or gone into liquidation. It ensures that monies payable on a policy of insurance to the defendant are not used to meet the claims of other creditors but go to satisfy the compensation claim. Whist there is nothing on the face of Section 62 to confer a right of action by an injured party which has gone into liquidation, this is the interpretation which the Supreme Court gave to the provisions of Section 62 in Dunne v. P.J White Construction (in liquidation) [1989] ILRM 803.

In the Dunne case, proceedings had been taken by Michael Dunne, the Claimant against PJ White Construction Company Limited (“PJ White”). In the course of the proceedings Mr Dunne recovered judgment against the company in liquidation for IRE143,586 and costs. After judgment had been obtained against the company in liquidation, the Claimant joined the relevant insurer, Michael Payne and Company, as a Defendant to the proceedings in reliance on Section 62. However the Trial Judge, Murphy J dismissed the claim against Michael Payne and Company. Murphy J held that the onus was on the Claimant to the proceedings to establish that the Insurers did not have any right to refuse or repudiate the policy of insurance. It was impossible for the Claimant to discharge that onus of proving a negative in that way and, as a consequence the case against the insurer, Michael Payne and Company was dismissed.

The Claimant appealed to the Supreme Court. Finlay CJ expressed the view in the Supreme Court that it was an inevitable consequence of Section 62 that a right of action in favour of the injured third party against an insurer of an insured party who has gone into liquidation is created, with the qualification that this is a matter to be fully argued before it is finally determined.
As you will see from Chief Justice Finlay’s comments the exact scope and application of Section 62 has yet to be authoritatively decided upon by the Irish Courts.

Section 62 was considered in another recent case namely H McCarron –v- Modern Timber Homes Limited and Others (2012) IEHC 530. The court held that liability needs to be established and quantum needs to be assessed against the Insured in liquidation before the Insurer can be sued under the Section. Therefore any claims against the Insurers brought in the same set of proceedings as those against the insolvent Insured should be stayed until the liability of the Insured is established.

However, there has been a glimmer of hope for insurers in the case of Hu v. Duleek.

In this case, the claimant carpenter sued his former employer for a personal injury he sustained while at work. Duleek his employer held a valid employers liability policy and duly informed its insurers Aviva of the claim in 2009, but after the company had gone into liquidation Aviva advised the liquidator that they would not indemnity Duleek unless the liquidator paid the excess under the policy which was €1,000. Payment of the excess was a condition precedent to indemnity being provided under the particular policy. The excess was not paid by the liquidator and Aviva declined indemnity in respect of the claim.

The Claimant obtained judgement against Duleek (in liquidation) but at the time was unaware indemnity had been declined by insurers until March 2010. The Claimant then joined Aviva to the proceedings and an application was then taken by Aviva to have the claim against them struck out.

Aviva argued the Claimant was not a party to the insurance contract and therefore had no right to sue Aviva under the policy. The Claimant sought to rely on Section 62 of the Civil Liability Act 1961.
However the Court held Section 62 applied to circumstances were monies are payable and this did not arise in this case as Aviva had repudiated liability due to non-payment of the excess and this was not disputed by the Claimant.

Interestingly for insurers, this case further held that Aviva had no third party duty of care to the Claimant to ensure he was informed by way of information or otherwise as to whether the insured had complied with any conditions under the policy. This decision sits in tandem with a prior decision which held that an injured Claimant was not entitled to discovery of information as to the insurance arrangements of an insolvent defendant where a liquidator refused to provide details. Indeed the Judge noted in that case there should be a procedure which would require this information to be revealed in order to make Section 62 workable.

Practical Advice for Insurers

In light of the above, we set out some brief practical points which may assist insurers writing risks in the Irish market:

- Consider carefully any information requests on insurance arrangements when sought by third parties and/or liquidators;
- Consider if there are any valid policy points that could be taken before providing an indemnity to an insured and/or third parties, particularly if solvency of the insured is going o be an issue;
- Seek legal advice if served with a third party request for discovery of information on indemnity arrangements between you and an insured, and
- Obtain advice on the options available if served with proceedings which purport to join insurers pursuant to Section 62 of the Civil Liability act 1962 and certainly no later than immediately after service of an Appearance for the proceedings.
As you can see from the Irish decisions reported to date third party claimant has not had much luck in operating Section 62 against insurers to date and the lack of inside information on the insured’s insurance arrangements appears to be a key factor in those decisions.

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