

THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

Introduction

On 1 August 2016 the Third Parties (Rights Against Insurers) Act 2010 came into force.

The delay, following the Act having received Royal Assent on 25 March 2010, was caused by the need to make some corresponding changes to other aspects of the law, those steps being completed by the Insurance Act 2015.

The 2010 Act is intended to replace the Third Parties (Rights Against Insurers) Act 1930, although the terms of that earlier Act will remain relevant as the new law is not retrospective.

The new law should make the process of claimants pursuing claims against insolvent defendants more straightforward for all concerned.

The 2010 Act was required because there were a number of practical problems when pursuing claims under the 1930 Act. Accordingly, a useful starting point, before reviewing the terms of the 2010 Act, is to analyse some of the difficulties which led to the new legislation, partly because those issues will still arise for claims not subject to the 2010 Act and partly to put some of the terms of that Act into context.

The 1930 Act

The 1930 Act provided an important exception to the usual rules on privity of contract by providing for rights under an insurance policy to be transferred, in certain circumstances, to a third party who could then effectively enforce the terms of that policy as if that third party were the policyholder.

The key benefit conferred by the Act was, accordingly, in allowing a claimant, who had established liability against an insolvent defendant, to obtain an indemnity, under the relevant contract of insurance, for the claim.

Over the years, however, use of the Act in practice highlighted a number of problems for claimants.

Preliminary Proceedings

Two sets of proceedings were required because proceedings against the insurer could not be commenced without first establishing the existence and amount of the insured's liability, by proceedings preliminary to any claim under the 1930 Act.

Dissolved Companies

If the insured was a dissolved company yet further preliminary proceedings would be required to restore that company to the register in order to bring the first set of proceedings before even reaching the stage of bringing a claim under the 1930 Act.

Obtaining Information

The right to obtain information or documentation about the insurance policy was very limited, on the basis the courts took the view that a right to information did not exist until liability was established.

These difficulties were compounded by the claimant only being able to exercise the right to obtain information against a limited number of people.

Notification and Co-operation

In proceedings under the 1930 Act the insurer might be able to successfully avoid having to give an indemnity on the basis the insured had not complied with terms of the policy requiring notification of the claim and perhaps cooperation (even if the third party took such steps these might not be effective for the purposes of compliance with terms and conditions of the relevant policy).

"Pay First" Clauses

Problems could also arise from what are termed "pay first" clauses, where the contract of insurance requires the insured to pay the claim before the right to an indemnity arises.

Worthless Judgment

All of these problems generated the risk of the claimant having to pursue preliminary proceedings, and perhaps even proceedings before that, in the hope there would be insurance only to then find there was either no such insurance or that the insurer could avoid having to give an indemnity, leaving the client with a worthless judgment after considerable expenditure on costs.

The 2010 Act

The 2010 Act is not retrospective, so the 1930 Act will need to be relied upon where the liability to a third party was incurred before 1 August 2016 or where the insured defendant becomes a “relevant person” (that is subject to a formal insolvency procedure) prior to 1 August 2016.

The terms of the 2010 Act, in cases to which this applies, should avoid many of the problems experienced for claimants under the 1930 Act, though there remain some potential problem areas.

To understand the new regime, and how this deals with some of the practical problems of the 1930 Act it is necessary to consider the sections of the Act by reference to the subject matter of those sections.

Transfer of Rights Against an Insurer

Sections 1, 2 and 3 of the Act are the key provisions, providing for a transfer of rights from a “relevant person” to a third party in circumstances when the terms of the Act apply.

Sections 4 to 7 provide definitions of words and terms found in Sections 1 to 3.

Section 1(2) provides for the rights of a “relevant person” under a contract of insurance to be transferred to and vest in the person to whom a liability is or was incurred (that is the “third party” for the purposes of the Act).

Under Section 1(1) that transfer applies if:

- a relevant person incurs a liability against which that person is insured under a contract of insurance; or
- a person who is subject to such a liability becomes a relevant person.

Relevant Person

The term “relevant person” is defined by Sections 4 to 7 of the Act, covering an individual, a body corporate and an unincorporated body.

Individuals

Section 4 deals with individuals, who will be a relevant person in England and Wales if any of the following are enforced:

- an administration order made under Part 6 of the County Courts Act 1984;
- an enforcement restriction order made under Part 6A of that Act;
- subject to subsection (4), a debt relief order made under Part 7A of the Insolvency Act 1986;
- a voluntary arrangement approved in accordance with Part 8 of that Act; or
- a bankruptcy order made under Part 9 of that Act.

Deceased Individual

Section 5 confirms an individual who dies insolvent is a relevant person (but only when that person is already subject to a liability).

Body Corporate and Unincorporated Body

Section 6 deals with both a body corporate and an unincorporated body, which will be a relevant person in England and Wales if:

- a compromise or arrangement between the body and its creditors (or a class of them) is in force, having been sanctioned in accordance with section 899 of the Companies Act 2006; or

- the body has been dissolved under section 1000, 1001 or 1003 of that Act, and the body has not been—
 - restored to the register by virtue of section 1025 of that Act, or
 - ordered to;
- a voluntary arrangement approved in accordance with Part 1 of the Insolvency Act 1986 is in force in respect of it;
- an administration order made under Part 2 of that Act is in force in respect of it;
- there is a person appointed in accordance with Part 3 of that Act who is acting as receiver or manager of the body's property (or there would be such a person so acting but for a temporary vacancy);
- the body is, or is being, wound up voluntarily in accordance with Chapter 2 of Part 4 of that Act;
- there is a person appointed under section 135 of that Act who is acting as provisional liquidator in respect of the body (or there would be such a person so acting but for a temporary vacancy); or
- the body is, or is being, wound up by the court following the making of a winding-up order under Chapter 6 of Part 4 of that Act or Part 5 of that Act.

The Act gives further clarification of who will be a relevant person in Scotland and Northern Ireland.

Enforcing Transferred Rights

Section 1(3) provides that the third party may bring proceedings to enforce transferred rights against the insurer of the relevant person without having established that person's liability (although those transferred rights cannot be enforced without establishing the liability of the relevant person to the third party).

Establishing Liability

Section 1(4) confirms that liability will be established only where both the existence and amount of the relevant person's liability is established:

- by virtue of a declaration under section 2 or a declarator under section 3;
- by a judgment or decree;
- by an award in arbitral proceedings or by an arbitration; or
- by an enforceable agreement.

Section 2 allows a person who claims to have rights under a contract of insurance transferred under the terms of Section 1, but has not yet established liability of the relevant person, to bring proceedings against the insurer for either or both:

- a declaration as to the insured's liability to P;
- a declaration as to the insurer's potential liability to P.

Section 2(3) confirms that in such proceedings the court can give a declaration, on proof, of the insured's liability and/or the insurers potential liability.

If a declaration as to the insured's liability is sought the insurer may rely on any defence which the insured could have relied on if the proceedings have been brought against the insured (so that does not include any defence the insurer could have raised against proceedings, in turn, taken by the insured against the insurer).

Section 3 deals with establishing liability in Scotland.

Conditions

Section 2(3) preserves, for the insurer, any defence the insured would have had to the claim (but is silent about any defence the insurer would have had to a claim brought by the insured).

Section 9(2) confirms that anything done by the third party which, had it been done by the insured would have amounted to or contributed to fulfilment of any condition the insured had to fulfil under the contract with the insurer, will be treated as if done by the insured.

Furthermore, Section 9(3) confirms that transferred rights will not be subject to a condition requiring the insured to provide information or assistance to the insurer if that condition cannot be fulfilled because the insured is:

- an individual who has died; or
- a body corporate that has been dissolved.

Section 9(4) provides that a condition requiring the insured to provide information or assistance to the insurer does not include a condition requiring the insured to notify the insurer of the existence of a claim under the contract of insurance (so the insurer will need to be notified of the claim but under the terms of Section 9 (2) this can be done by the third party).

Section 9(5) confirms transferred rights are not subject to a condition requiring the prior discharge by the insured of the insured's liability to the third party (which avoids the problem of "pay first" clauses).

Set Off

Where rights are transferred to a third party, and without that transfer the insurer would have been entitled to set off the amount of the insured's liability against the amount of the insurer's own liability to the insured, then the insurer is entitled to set off the amount of the insured's liability against the insurers own liability to the third party.

So, for example, it seems likely an insurer could set off against sums due to the claimant any part of the premium which had not been paid, a policy excess or similar charges which would have been paid by the policyholder.

Information and Disclosure

Section 14 and Schedule 1 deal with information and disclosure to third parties.

Schedule 1 provides that, by notice in writing, information may be requested from the insured and/or any insurer where rights under the policy have been transferred.

Information that can be requested within Schedule 1 includes:

- whether there is a contract of insurance that covers the supposed liability or might reasonably be regarded as covering it;
- if there is such a contract—
 - who the insurer is;
 - what the terms of the contract are;
 - whether the insured has been informed that the insurer has claimed not to be liable under the contract in respect of the supposed liability;
 - whether there are or have been any proceedings between the insurer and the insured in respect of the supposed liability and, if so, relevant details of those proceedings;
 - in a case where the contract sets a limit on the fund available to meet claims in respect of the supposed liability and other liabilities, how much of it (if any) has been paid out in respect of other liabilities;
 - whether there is a fixed charge to which any sums paid out under the contract in respect of the supposed liability would be subject.

A person receiving a notice must give the information within 28 days of receipt, or explain why that information cannot be provided.

In default application may be made to the court for an order.

Jurisdiction

Where the third party is domiciled in a part of the United Kingdom and entitled to bring proceedings under the Act against an insurer domiciled in another part of the United Kingdom, those proceedings may be brought where the third party is domiciled or the part where the insurer is domiciled (whatever the contract of insurance stipulates as to where proceedings have to be brought).

Foreign Element

Section 18 provides that, except as expressly provided, application of the Act does not depend upon whether there is a connection with a part of the United Kingdom and in particular does not depend on:

- whether or not the liability (or the alleged liability) of the insured to the third party was incurred in, or under the law of, England and Wales, Scotland or Northern Ireland;
- the place of residence or domicile of any of the parties;
- whether or not the contract of insurance (or a part of it) is governed by the law of England and Wales, Scotland or Northern Ireland;
- the place where sums due under the contract of insurance are payable.

Avoidance

Section 17 prevents a contract of insurance seeking to avoid or terminate the rights of parties under it in the event of the insured becoming a relevant person or dying insolvent.

Summary

The 2010 Act attempts to avoid some of the problems generated by the terms of the 1930 Act, as well as bringing the law in this area into line with developments in insolvency legislation. That has resulted in a number of important changes.

- The claimant no longer needs to obtain judgment against an insolvent defendant before bringing a claim against the insurers. Consequently, in the future, only one set of proceedings will be required.
- Whilst insurers can raise defences that would have been available to the insolvent defendant the Act restricts reliance on policy conditions that the defendant would have been required to fulfil, such as notification in claims co-operation provisions.
- The Act renders “pay first” clauses, where the insured is required to pay sums due to the claimant before claiming under the policy, ineffective.
- Claimants have an enhanced right to request insurance information from insurers.
- The Act will eliminate the need to restore a dissolved company to the register to pursue its insurers.

Perhaps the focus of problems in the future will be when issues arise, for the claimant, concerning the insurer against whom the claim is to be made under the 2010 Act. For example, if the original insurer is no longer a legal entity it may still be necessary to restore a company, namely the insurer. If the insurer is a Lloyds Syndicate it will remain necessary to commence a representative action against a named individual and all other members of the relevant syndicate. Should the insurer be based out of the jurisdiction the claimant will need permission to serve the claim form accordingly. Problems might also arise, particularly in disease claims, where a number of different insurers have been at risk and care will be required to consider the extent to which, allowing for the transfer of rights, the claimant can proceed against a single insurer or may need to involve more than a single insurer in the proceedings: Durham -v- BAI (Run Off) Limited [2008] EWHC 2692 (QB); International Energy Group Ltd -v- Zurich Insurance plc UK [2012] EWHC 69 (Comm).

Conclusion

The coming into force of the Third Parties (Rights Against Insurers) Act 2010 marks an important development in the law with the new Act being much more than just an updating of the 1930 Act.

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