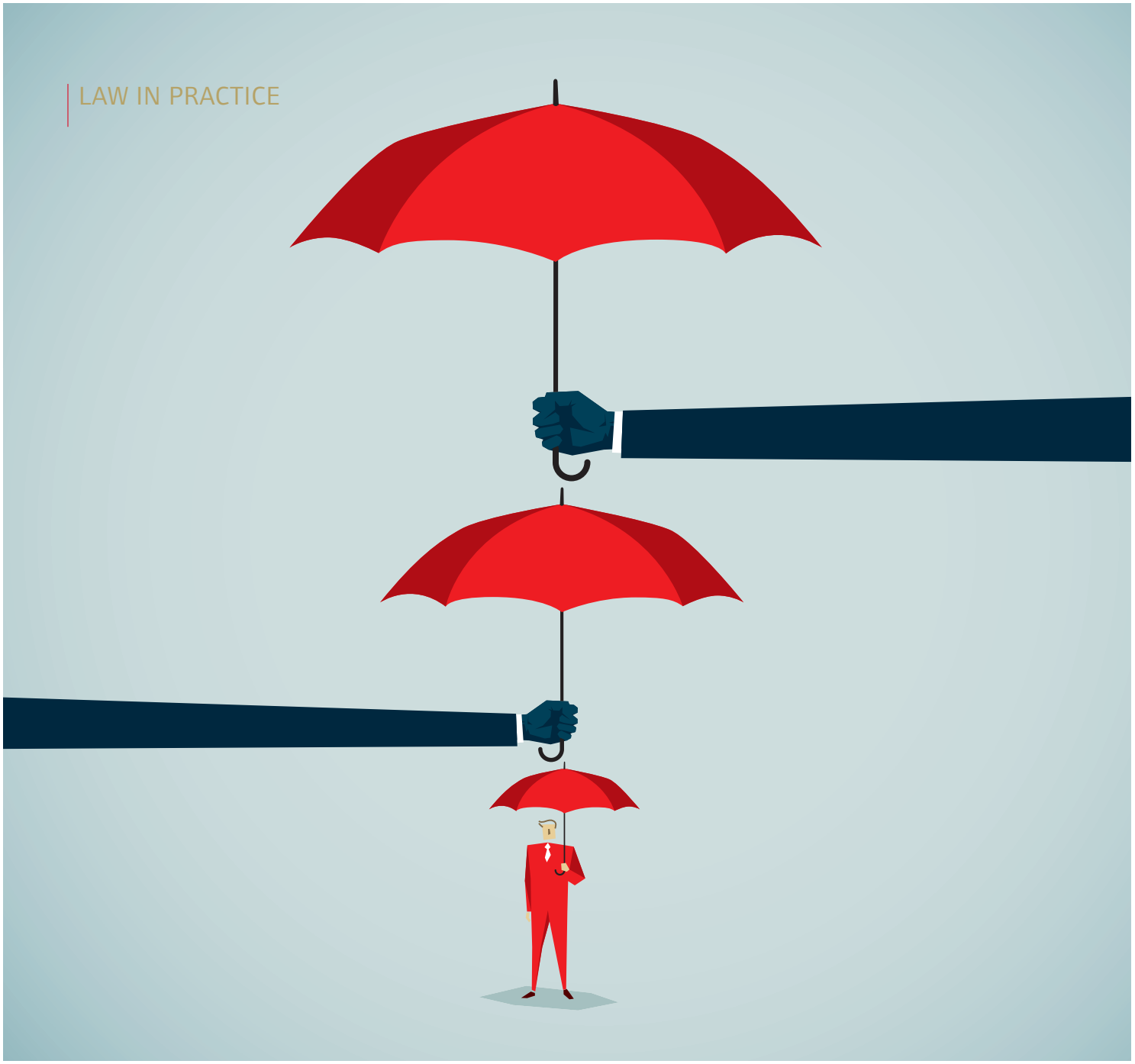

Third-party cover

Under the Consumer Insurance Contracts Act 2019, third parties can now pursue insurers directly where no privity of contract exists.[1]

Keivon Sotoodeh BL

Prior to the commencement of the Consumer Insurance Contracts Act[2] (the 2019 Act), the Civil Liability Act 1961 (the CLA) provided a limited statutory regime permitting a third party to sue an insurer directly in circumstances where no privity of contract existed between the plaintiff and insurer. This system was unfavourable and capable of producing unjust results – an issue discussed further below.

However, Sections 21 and 22 of the 2019 Act now make it possible for a third party to sue an insurer directly, notwithstanding that no privity of

contract exists between them. In order to explain the significance of this legislative development, it is proposed to first examine the previous position in Ireland governed by the CLA and the limitations of that regime, before analysing the changes introduced by the 2019 Act.

I will then compare the 2019 Act with the system in England and Wales under s.2 of the Third Parties (Rights Against the Insurers) Act 2010 (the 2010 Act) before examining the practical implications of the 2019 Act for Irish practitioners.

Previous position in Ireland and limitations under Section 62 of the Civil Liability Act 1961

Under the previous Irish system, a third party's right to pursue an insurer directly was primarily contained in s.62 of the CLA[3] and arose where an insured party had either died or been declared bankrupt, or a company[4]/partnership had either 'wound up' or been 'dissolved'. In such circumstances, any money that was payable to the insured under a policy of insurance could only be used for the purpose of paying out a valid claim in full and was not considered "assets of the insured" or applied to the payment of debts of the insured in the bankruptcy, the administration of the estate or the winding-up/dissolution.

Buckley[5] states that there have been a number of critics in relation to the previous position in Ireland in that "the rule prevents effects being given to the intention of the contracting parties … the exceptions to the rule render the law complex and uncertain [and] the rule causes difficulty in commercial life".

The limitations contained in s.62 CLA are best illustrated by the case law of the Superior Courts. In *Hu v Duleek Formwork Ltd*,[6] the plaintiff obtained judgment in default of appearance against an insured. When the plaintiff was informed that the insurer was trying to deny cover based upon the breach of a condition precedent, they successfully applied to join the insured's insurer as a co-defendant to the proceedings.

The insurer then applied to strike out the proceedings instituted against it, which application was ultimately successful. Peart J. held that he was not aware of any case that established an insurer had "a duty of care" between themselves and a third party against their "insured". He held that "[i]t would not be right in the present case in such circumstances to extend the law that far". Peart J. acceded to the insurer's application "with sympathy for the plaintiff and therefore with regret… on the basis that they disclose[d] no reasonable cause of action against the [insurer]".[7]

This case is an example of the injustice caused whereby a plaintiff lost out on compensation to which they might otherwise be entitled by reason of the fact that the third party had no privity to the insurance policy. This was so notwithstanding that the plaintiff was in a position to pay the excess due and owing under the policy.

Similarly, in *Murphy v Allianz PLC*,[8] Gilligan J. emphasised that there existed "no privity of contract between the defendant and the plaintiff … and the defendant owes no duty at law under contract, statute or in tort to the plaintiff such as might give rise to a claim against it in damages".[9]

As a result of this line of case law, a third party who may have suffered injury would have no form of redress due to the simple fact that they themselves were not a party to the insurance policy and, further, the insurer owed them no duty of care.

There was also confusion as to the correct procedural steps that needed to be taken by a plaintiff seeking to rely on s.62 of the CLA. Jennings, Scannell and Sheehan note that there may be a requirement to seek authorisation from the Personal Injuries Assessment Board (PIAB) if the matter relates to a personal injury action and if an insurer is added as a co-defendant.[10] However, In *McCarron v Modern Timber Homes Limited*,[11] Kearns P. held that an insured's liabilities to third parties under an insurance policy do not arise until "the existence and amount of his liability to the third party is first established either by action, arbitration or agreement, and that a valid claim cannot be so characterised until liability has been established against the employer and the quantum of the claim assessed".[12] This suggests that an application under s.62 of the CLA would be made after the liability of the insured has been established, by which stage no further claim for damages in personal injuries is sought and the proceedings are closer in character to that of a liquidated debt claim.[13]

More recently, s.62 of the CLA was considered in the case of *Moloney and Cashel Taverns Ltd v Liberty Insurance DAC*.[14] Heslin J. had to consider whether an insurer could decline to indemnify their insured due to the late notification of a claim, notwithstanding that this would, in effect, defeat the plaintiff's recovery of monies in respect of their claim against the insured. The Court held that the insurer was indeed entitled to refuse indemnity on this basis and that the "plaintiff [had] no entitlement to recover" from the insurer.[15]

This case is an example of the injustice caused whereby a plaintiff lost out on compensation to which they might otherwise be entitled by reason of the fact that the third party had no privity to the insurance policy. This was so notwithstanding that the plaintiff was in a position to pay the excess due and owing under the policy.

How the 2019 Act has changed the position

Under the 2019 Act, a third party is entitled to pursue an insurer directly and it is not necessary for the liability of the insured to be first established by way of separate proceedings. The terms contained in the policy can "be enforced against the insurer in the proceedings" once the liability of the insured has been established, notwithstanding the absence of privity between the injured party and the insured.[16] Liability can be established "if its existence and amount are established" by way of a declaration under the 2019 Act, or, in the alternative following a judgment/decree, an arbitral award, or "an enforceable agreemement".[17]

Where a policy is taken out by an insured against a possible third-party liability (and such a liability arises), then where either the insured has passed away or cannot be located, or is insolvent, or a court finds it just

and equitable to do so, the Court can transfer the rights of the insured under the policy to the third party to whom the liability is owed.[18] In such circumstances, a third party[19] can seek to recuperate any loss that said party suffered that is covered by the terms of the policy.[20]

Further, where a third party "reasonably believes" that such a policy exists, they are entitled to request information from relevant persons who can provide same in relation to: (i) the contract itself and the coverage it provides; (ii) the insurance provider; (iii) the provisions contained in the said contract; and, (iv) information relating to the insurance provider's intent to refuse to accept coverage.[21]

Another important change is that if a third party decides to directly pursue the insurer and a term or condition exists that the insured is required to fulfil as a condition precedent under the policy (for example to pay an excess), the third party may now step into the shoes of the insured and fulfil the condition precedent, which thereby renders the condition precedent fulfilled.[22] The insurer, however, is able to rely upon the "same defences" as the insured itself.[23] In addition, "the insurer shall be entitled to set off any liabilities incurred by the person in favour of the insurer against any liability owed by the insurer to the third party".[24]

The 2019 Act specifically provides that where the insured has "died" or "cannot be found"[25] a term that the insured must "provide information or assistance to the insurer if that term cannot be fulfilled" may not be invoked against the third party, nor may a provision that requires the notification of a claim as a condition of coverage.[26]

In the interests of reducing legal costs, an insurer may decide whether it wishes to have the issue of coverage determined before the main trial.

Under the 2019 Act, a third party is not required to first establish the insured's liability by way of proceedings, or otherwise, in order to rely upon the direct right of action against the insurer.[27] A third party is permitted to bring an action directly against the insurer[28] for declaratory relief in relation to the insured's liability or potential liability to the said third party.[29] The insurer can rely upon any defence that would have been available to the insured in such circumstances as if the insurer was the insured itself.[30]

Where declaratory relief is granted by a court, the effect is that the insurer is liable to the third party and the court may proceed to give the appropriate judgment against the insurer.[31] In addition, where declaratory relief is sought in relation to the insured's liability, rather than their potential liability, the insured may be added as a defendant to such proceedings.[32] In such a case, the insured is also bound by any declaration made.[33]

Further, it is not necessary that the third party existed at the time the contract of insurance was entered into in order to avail of the direct right of action.[34] Where two third parties are wronged by reason of an insured event and damages exceed the threshold of cover in place, the 2019 Act provides that damages payable under the policy "shall be reduced to the appropriate proportionate part of the sum insured or guaranteed".[35]

Where an insured becomes insolvent, the 2019 Act provides that any money payable to the insured under an insurance policy must only be used for the purpose of "discharging in full all valid claims by the third party against the [insured] in respect of which those moneys are payable, and no part of those moneys shall be assets of the person or applicable to the payment of the debts (other than those claims) of the person in the insolvency or in the administration of the estate of the person, and no such claim shall be provable in the insolvency or in the administration of the estate of the person".[36]

Comparison with the system in England and Wales

The position in England and Wales was originally governed by the Third Parties (Rights Against Insurers) Act 1930 (the 1930 Act), which was quite similar to s.62 of the CLA of this jurisdiction. However, unlike s.62 of the CLA, there was no necessity in the 1930 Act to establish an insured's liability before the transfer of the insured's rights to the third party took place.[37]

This regime was subsequently replaced by the 2010 Act. Under s.2 of the 2010 Act, a third party has the right to join an insurer directly to proceedings without first having to establish liability.[38] The Act allows a third party to seek declaratory relief in terms of both the liability and/or potential liability of the insured to the third party.[39] The court may make an order in granting judgment against an insurer.[40] In addition, any declaratory order that a court makes "binds the insured as well as the insurer".[41]

Further, the following provisions of the 2010 Act are nearly identical to the key provisions of the 2019 Act discussed above: (i) an insurer may rely upon a defence that would be available to the insured in normal circumstances;[42] (ii) Schedule 1 of the 2010 Act allows for a third party to request relevant information relating to an insured's policy; (iii) a third party who has acquired rights under the 2010 Act may now fulfil a condition precedent that the insured would have been required to fulfil in order for there to be coverage in the matter;[43] and, (iv) no condition shall be attached requiring the insured person to provide information to the insurer if it is not possible to fulfil said condition because the insurer had died or has been wound up.[44]

The courts in England and Wales have held that s.2 of the 2010 Act permits an applicant to bring proceedings against the insurer and the applicant may add the insurer as a co-defendant "so as to establish by way of declaration the liability of [the insured] to the claimant and secondly, the insurer's … potential liability to the claimant".[45]

Furthermore, the courts have held that if an insurer is added as a co-defendant they are "entitled to make such submissions and call such evidence as it wishes to make in response to the claims by the claimant".[46]

In addition, it is the insurer's decision whether or not they choose to take

an active role in proceedings under s.2 and the insurer may "take no part in the proceedings on the basis that it is satisfied that it has a good defence that there is no coverage".[47] An insurer may seek declarations and/or have preliminary issues determined in respect of the issue of coverage.[48] In the interests of reducing legal costs, an insurer may decide whether it wishes to have the issue of coverage determined before the main trial.[49]

Practical implications of the 2019 Act for Irish practitioners

The position in Ireland under the 2019 Act for third parties is now broadly in line with the position in England and Wales. This brings clarity for practitioners representing both plaintiffs and insurers in Ireland. As a result of the 2019 Act, a plaintiff may pursue insurers directly, rather than having to engage in multiple sets of proceedings and without first having to establish the liability of the insured.

Further, a third party may now fulfil any obligations that exist under a policy that are a condition precedent to a policy. A third party can now step into the shoes of an insured and decide to pay the excess due to the insurer under a policy. Such third party can proceed with the claim and recover damages from the insurer where such damages are rightfully due and owing. In addition, an insurer cannot rely upon the fact that an insured did not notify the insurer of the claim in order to refuse to indemnify an insured and leave the third party in a situation whereby they are unable to recover damages.

References

1. A link to this article and any future publications by the author will be provided for on the author's website – www.keivonsotoodeh.com.
2. See: SI 329 of 2020 – Consumer Insurance Contracts Act 2019 (Commencement) Order 2020.
3. The author notes that Article 18 of Directive 2009/103/EC 22 (hereinafter the Sixth Motor Insurance Directive) also allows for a right to sue an insurer directly where a party suffers injury as a result of a road traffic accident. See also s.76 of the RTA Act 1961.
4. If a claim is taken against a company that is in liquidation, then leave would have to be sought from the High Court as per s.1347 of the Companies Act 2014.
5. Buckley, A.J. *Buckley on Insurance Law (4th ed.)*. Round Hall, Dublin: p. 483.
6. [2013] IEHC 50.
7. Para 22.
8. [2004] IEHC 692.
9. Para 44.
10. *Campbell v O'Donnell* [2009] 1 I.R. 133.
11. [2012] IEHC 530.
12. Para 41.
13. Jennings, C., Scannell, B., Sheehan, D.F. *The Law of Personal Injuries (2nd ed.)*. Round Hall, Dublin: para 14-16.
14. [2020] IEHC 658.
15. *Ibid* at 163.
16. s.21(4).
17. s.21(5).
18. s.21(1).
19. It is unclear whether this Act applies to any third party or just those who fit the definition of a consumer, which is defined under the 2019 Act as per the same definition in s.2(1) of the Financial Services and Pensions Ombudsman Act 2017. However, at para 6.18 of The Law Reform Commission's Report on Consumer Insurance Contracts (LRC 113 – 2015), it states that a third party is defined as a consumer in line with the above definition.
20. 2019 Act – s.21(2).
21. s.21(3).
22. s.21(6).
23. s.21(6)(c).
24. s.21(6)(d).
25. This is defined under s.21(10).
26. s.21(7).
27. s.21(8).
28. The normal jurisdiction monetary thresholds apply. See s.22(8) and s.22(9).
29. s.22(2).
30. s.22(4).
31. s.22(5).
32. s.22(6).
33. s.22(7).
34. s.21(9).
35. s.21(13).
36. s.21(11).
37. *First National Tricity Finance Ltd v OT Computers Ltd* [2004] EWCA Civ 653.
38. s.1(3) of the Third Parties (Rights against the Insurers) Act 2010.
39. s.2(3).
40. s.2(6).
41. s.2(10).
42. s.2(4).
43. s.9(2).
44. s.9(3).
45. *BAE Systems v RSA* [2017] EWHC 2082 (TCC) at 10.
46. *Ibid* at 20.
47. *Ibid* at 21.
48. *Ibid* at 22.
49. *Ibid* para 23.