Insurance Litigation

Contributing editors
Mary Beth Forshaw and Elisa Alcabes

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Insurance Litigation 2017

Contributing editors

Mary Beth Forshaw and Elisa Alcabes
Simpson Thacher & Bartlett LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2014
Fourth edition
ISSN 1757-7195

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Ireland

Sharon Daly and April McClements*

Matheson

Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

In Ireland, the jurisdiction in which court proceedings are brought depends on the monetary value of the claim. The District Court deals with claims up to a value of €15,000 and the Circuit Court up to a value of €75,000 (€60,000 for personal injury cases). Claims with a monetary value in excess of the Circuit Court jurisdiction are heard by the High Court, which has an unlimited monetary jurisdiction.

The High Court has a specialist court, the Commercial Court, which deals exclusively with commercial disputes. Proceedings are case-managed and tend to move at a much quicker pace than general High Court cases; time from entry into the list to full hearing varies between one week to four months depending on the time required for hearing. Entry to the list is at the discretion of the judge and may be refused if there has been any delay. Insurance and reinsurance disputes can be heard in the Commercial Court if: the value of the claim or counterclaim exceeds €1 million; and the court considers that the dispute is inherently commercial in nature.

The Commercial Court judges place a strong emphasis on mediation and the Commercial Court Rules provide for up to a four-week stay of proceedings to allow the parties to consider mediation.

Insurance disputes before the courts in Ireland are heard by a judge sitting alone and not a jury.

If an insurance contract contains an arbitration clause, the dispute must be referred to arbitration. However, there is an exception for consumers, who are not bound by an arbitration clause in an insurance policy if the claim is less than €5,000 and the relevant policy has not been individually negotiated.

The Financial Services Ombudsman (FSO) is a statutory officer who deals independently with unresolved complaints from consumers about their individual dealings with all financial service providers, including insurers. The FSO has broad powers and may direct insurers to: pay compensation up to a maximum of €250,000; change their practices in the future; and rectify the conduct complained of (for example, requiring the insurer to pay a disputed claim).

2 When do insurance-related causes of action accrue?

For actions in contract, the cause of action accrues on the date of the breach (and not when the damage is suffered). The general position under Irish law is that claims for breach of contract must be brought (by issue of proceedings) within six years of the date on which the cause of action accrued (section 11(1)(a), Statute of Limitations Act 1957).

Where a complaint is made to the FSO, the FSO does not currently have jurisdiction to investigate complaints where the conduct complained of occurred more than six years before the complaint is made. However, the General Scheme of the Financial Services and Pensions Ombudsman Bill 2016 proposes to amend this limitation period for complaints in respect of 'long-term financial services', namely products or services where the maturity or term extends beyond six years and is not subject to annual renewal. The proposed limitation period for such products is six years from the date of the act or conduct giving rise to the complaint or three years from the earlier of the date on which the consumer became aware of the said act or conduct or ought to have become aware. Significantly, the amendment is proposed to have retrospective effect.

3 What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

The strategic considerations will vary depending on the nature of the dispute, the parties involved and their relationship.

Where an insurer seeks to decline cover of a claim or avoid a policy, the declinature or avoidance letter will be a key proof in any subsequent litigation and should therefore be drafted carefully. Timing is also critical. An insurer should not use the same lawyers to provide coverage advice and to defend the claim under a reservation of rights.

Prior to commencing any proceedings, the contractual documentation should be reviewed, and in particular jurisdiction and choice of law clauses, to identify the appropriate jurisdiction and forum for the dispute. If the contract contains an arbitration clause, the dispute must be referred to arbitration. The contract may also stipulate another form of ADR such as mediation.

In general, consideration should also be given at the outset to the availability of evidence and witnesses.

It is usual practice in Ireland for a pre-action letter to be sent prior to proceedings being issued.

4 What remedies or damages may apply?

The remedies available to an insurer depend on the breach.

In case of a breach of the duty of utmost good faith, the remedy is to declare the contract void. Under the Marine Insurance Act 1906, this remedy is available for non-disclosure (section 18) or material misrepresentation (section 20) by the insured. However, avoidance is generally considered to be a draconian remedy and the Irish courts have traditionally been reluctant to uphold avoidance with the result that insurers can be left without an effective remedy. An insurer is not entitled to decline cover of the claim in lieu of avoidance, unless the relevant policy contains an innocent non-disclosure clause to this effect.

However a recent High Court decision (*Richardson v Financial Services Ombudsman*) has demonstrated that the Irish courts are willing to uphold policy avoidance for material non-disclosure where the proposal form is clear and unambiguous and the proposer's duty to disclose is not qualified by reference to answering the questions in the proposal form to the best of the proposer's knowledge.

The remedy for breach of warranty (including basis of contract clauses) is repudiation, however, warranties are construed very strictly.

Breach of a condition precedent to cover entitles insurers to decline cover of a claim without a requirement to demonstrate prejudice, whereas breach of a condition which is not stated to be a condition precedent to cover entitles the insurer only to damages.

Normally, damages are an adequate remedy for breach of an insurance policy. However, if damages are deemed neither adequate nor appropriate, the law of equity may intervene and the court may grant the remedy of specific performance.

Unless the contract provides otherwise, the general actions for breach of contract are available to the insured. Accordingly an insured would have an action for damages arising from the failure of the insurer to pay a valid claim.

The Consumer Insurance Contracts Bill 2017 was published on 20 January 2017. It is largely based on recommendations made by the Law Reform Commission in its report on Consumer Insurance Contracts in 2015 and largely mirrors the provisions of the draft bill proposed in this

report. The bill applies to consumer insurance contracts only (although the definition of consumer is broad).

The bill provides for the following:

- the duty of the pre-contractual duty of good faith is abolished;
- avoidance of an insurance policy will no longer be the main remedy. In cases of non-disclosure and misrepresentation, the principal remedy will be damages in proportion to the failure by the insured (however, avoidance is retained for fraudulent breaches on public policy grounds);
- warranties (including basis of contract clauses) are abolished and replaced with suspensive conditions; and
- a consumer will be entitled to seek damages where an insurer unreasonably withholds, or unreasonably delays in making a payment for a valid claim.

5 Under what circumstances can extracontractual or punitive damages be awarded?

The Irish courts occasionally award punitive or exemplary damages on public policy grounds. The Irish Supreme Court has recently confirmed that exemplary damages can be awarded where the damage caused was deliberate and malicious, and calculated to unlawfully cause harm or gain an advantage. The award of damages must be proportionate to the injuries suffered and the wrong done.

Exemplary damages are insurable in Ireland. The LRC considered this issue in a report published in 2000 ('Aggravated, exemplary and restitutionary damages') and considered that public policy considerations in favour of prohibiting insurance for exemplary damages were not sufficiently strong to necessitate legislation in this area. It is therefore a matter for individual insurance companies whether they choose to expressly exclude exemplary damages from cover.

Interpretation of insurance contracts

6 What rules govern interpretation of insurance policies?

Insurance contracts are subject to the same general principles of interpretation as other contracts. The Irish Supreme Court has confirmed in two judgments, *Analog Devices v Zurich Insurance and ors.* and *Emo Oil v Sun Alliance and London Insurance Company*, that the principles of construction as set out by Lord Hoffman in I*CS v West Bromwich Building Society* should be applied to the interpretation of insurance contracts.

In summary, interpretation is the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. The background or 'matrix of fact' should have been reasonably available to the parties and includes anything that would have affected the way in which the language of the document would have been understood by a reasonable person. The previous negotiations of the parties and their declarations of subjective intent are excluded from the admissible background. The meaning that a document (or any other utterance) would convey to a reasonable person is not the same thing as the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would, nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

The court will apply an objective approach to determine what would have been the intention of reasonable persons in the position of the parties.

Where a contractual term is ambiguous, the interpretation less favourable to the drafter is adopted using the contra proferentem rule (see question 7).

In circumstances where the policyholder is a consumer, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 and the Consumer Protection Code 2012 will apply to the contract.

7 When is an insurance policy provision ambiguous and how are such ambiguities resolved?

An insurance policy wording is ambiguous if a provision can have more than one meaning or if the policy is silent in relation to a particular situation. In addition to the rules set out in question 6, the contra proferentem rule will be applied where there is ambiguity. This rule provides that, if a term is ambiguous, it is interpreted against the person who drafted it. This is usually the insurer and thus the ambiguity is interpreted in favour of the insured. However, if drafted by the broker, the ambiguous term would be interpreted against the insured.

Notice to insurance companies

8 What are the mechanics of providing notice?

Notice requirements vary from policy to policy. The policy wording will typically confirm to whom a claim should be notified and the manner in which the notification should be made. Typically, notice must be given in writing within a specified time period after the policyholder becomes aware of a claim or a circumstance likely to lead to a claim.

9 What are a policyholder's notice obligations for a claims-made policy?

Claims-made policies generally require claims to be notified during the policy period and as soon as reasonably practicable or within a specified time limit. Claims-made policies may also require or permit circumstances that may give rise to a claim to be notified to insurers. The policy may contain a discovery period that allows claims to be notified within a specified period following the expiry of the policy period.

Where the notice requirements are stated to be a condition precedent to cover, the insurer is entitled to decline cover for a breach without any requirement to establish it has suffered prejudice as a result of the breach. In the absence of a condition precedent to liability, the only remedy available to insurers for breach of a notice condition is damages.

10 When is notice untimely?

See question 9. If an insurer wants to ensure compliance with a notification requirement, it must make timely notification a condition precedent. Where the notification is of a circumstance and not a claim, the courts have interpreted the knowledge of the policyholder on a subjective rather than objective basis.

11 What are the consequences of late notice?

The consequences of late notice will often be specified in the policy.

Where the notice requirements are stated to be a condition precedent to cover, the insurer is entitled to decline cover for a breach without any requirement to establish it has suffered prejudice as a result of the breach. In the absence of a condition precedent to liability, the only remedy available to insurers for breach of a notice condition is damages.

In practice, the Irish courts are reluctant to permit insurers to decline claims for technical breaches of notice conditions, particularly where there has been a failure to notify a circumstance. While the test to be applied is objective, the court will consider whether the insured had actual knowledge of the particular circumstance that it is alleged should have been notified to insurers. The knowledge of the insured is subjective.

Insurer's duty to defend

12 What is the scope of an insurer's duty to defend?

This is a matter of contract and Irish law does not impose a duty to defend on the insurer. The policy may impose such a duty or may simply provide that the insurer has a right to associate in the defence of the claim.

13 What are the consequences of an insurer's failure to defend?

This will depend on the extent to which the contract imposes such a duty on the insurer. The insured may have a remedy for damages for breach of contract in the event that the insurer breaches a contractual duty to defend. In the event that an insurer takes on the defence of the claim, it must defend the claim subject to the contract of insurance. The interests of the policyholder and the insurer are not always aligned and this can lead to negotiations between them on how to settle or defend the claim.

Update and trends

Ireland has a thriving domestic and international insurance industry, which includes life, non-life, captive, reinsurance and intermediary activities. It is a leading jurisdiction for domiciling head office insurers targeting the EU/European Economic Area (EEA) markets and a number of the world's leading insurance groups have significant operations in Ireland. Post Brexit, Ireland will be the only English-speaking common law jurisdiction in the EU. It is expected that a number of insurance and reinsurance groups will relocate to Ireland in the wake of Brexit in order to continue to avail of the European Financial Services Passport.

Following implementation of the Insurance Act 2015 in the UK in August 2016, insurance law in Ireland is now significantly different from UK law for the first time since 1906. We anticipate that the implementation of the Act will have an impact on the Irish insurance industry as the Irish market is closely connected to the UK (in particular the London market) and many Irish risks are written subject to English law. The significance of this impact remains to be seen.

The LRC published its report on Consumer Insurance Contracts in July 2015, together with a draft Consumer Insurance Contracts Bill 2015. The report contains 105 recommendations, many of which are similar to those proposed by the UK Insurance Act. In particular the LRC has recommended reform of the duty of disclosure, the introduction of proportionate remedies, the abolition of warranties, third-party rights, and damages for late payment of claims. The reforms recommended by the LRC are to be welcomed as they seek to improve the level of certainty in insurance contract law for both insurers and insureds. The LRC reforms are limited in scope to consumer contracts. The LRC recommendations have largely been incorporated into the Consumer Insurance Contracts Bill 2017 which passed the Second Stage in the Dáil on 9 February 2017. At the time of writing, the bill is being sent to Committee stage, however there is no clear timeline for implementation.

As noted above, it is anticipated that the Financial Services and Pensions Ombudsman Bill 2016 will be published shortly and will change the limitation period applicable to complaints to the FSO in respect of long term financial services, which definition captures insurance products such as life insurance policies to three years after the date upon which the policyholder becomes aware of a claim or reasonably should have been aware. The focus of the FSO is on offering a genuine alternative to the courts and it has significantly increased the number of complaints being resolved through mediation in the last two years.

The High Court has confirmed that ATE insurance is valid and does not fall foul of the rules on maintenance and champerty, which remain in force in Ireland. Following the 2015 decision of the Court of Appeal in *Greenclean Waste Management Ltd v Leahy*, the way is clear for ATE insurance to be used as a legitimate form of third-party funding in this jurisdiction, provided the policy in question is sufficiently certain. ATE insurance is the only valid form of third-party funding in this jurisdiction, pending the outcome of an appeal to the Supreme Court in another decision of the High Court, *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise*, which confirmed that professional third-party funding arrangements are unlawful. This appeal will be determined in April 2017.

Finally, in recent times there has been a significant increase in the number of insurance law decisions that emanate from appeals of findings by the Financial Services Ombudsman. For example, in the recent decision of *Richardson v Financial Services Ombudsman & anor* the High Court upheld a finding of the FSO that an insurer was entitled to avoid a life assurance policy on the grounds of non-disclosure. This was a significant judgment as the Irish courts have traditionally been reluctant to permit insurers to avoid policies. The decision of the High Court turned on the strength of the proposal form and serves as a useful reminder to insurers of the importance of a well-drafted proposal form.

Standard commercial general liability policies

14 What constitutes bodily injury under a standard CGL policy?

Commercial general liability is not a standard type of cover available in Ireland. Bodily injury is however a term that is used in liability policies. The definition used varies from policy to policy but typically refers to physical injury including illness and death.

15 What constitutes property damage under a standard CGL policy?

See question 14. In public liability policies, property damage is typically defined as loss or destruction of or damage to material property.

16 What constitutes an occurrence under a standard CGL policy?

See question 14. Liability policies are 'occurrence' based. Occurrence will be defined in the policy but usually the relevant occurrence is the event that triggers the bodily injury or property damage suffered by the third party.

Product liability policies can be 'occurrence' or 'claims-made' policies.

17 How is the number of covered occurrences determined?

It is very common for both claims-made and losses-occurring policies to contain aggregation wording which provides that claims or occurrences arising out of a single event or source or cause will be treated as a single claim or occurrence for the purposes of the limit of indemnity and excess. Whether the aggregation clause favours the insurer or insured is highly dependent upon the facts and the specific wording of the aggregation clause.

18 What event or events trigger insurance coverage?

If the insured suffers loss or damage that is an insured risk under the policy and the claim is made in compliance with policy terms and conditions, a claim will be triggered.

In the case of insurance policies covering the risk of damage to the insured's property, this is typically when damage to the property occurs. The trigger is set out in the policy wording in the case of property policies. In the case of a policy that covers the risk of liability to third parties, a claim will be triggered when the third party seeks to be compensated by the insured or the insurer suffers loss as defined in the policy.

19 How is insurance coverage allocated across multiple insurance policies?

It is often the case that more than one policy responds to the same loss. In such circumstances the parties will need to understand how the responsive policies interact and which policy responds first.

There is a distinction between double insurance and where there are layered policies to cover different levels of cover. Where there are different policy layers, the excess policy is not triggered until the primary policy has been exhausted. Where there is double insurance (ie, two or more policies covering the same risk on behalf of the same insured), the principle of contribution applies.

Section 80(1) of the Marine Insurance Act 1906 provides that each insurer shall contribute rateably to the loss in proportion to the amount for which the insurer is liable under contract.

It is also necessary to consider whether its policies contain rateable contribution clauses, non-contribution clauses or excess clauses.

First-party property insurance

20 What is the general scope of first-party property coverage?

First-party property coverage is essentially property insurance for loss or damage to an insured's goods or buildings, or both, following the occurrence of an insured event. The policy can either specify the insured event (earthquake, fire, flood) or be an 'all risks' policy. 'All risks' material damage property policies are common in Ireland. There is no standard wording. It is accepted that there is a limit on the range of risks covered and that the policy may expressly exclude or include particular risks.

21 How is property valued under first-party insurance policies?

The insured cannot recover more than his or her actual loss on the basis of the principle of indemnity (unless the policy provides otherwise).

In the absence of 'reinstatement as new conditions', insurers are liable for the value of the property at the time of the loss, destruction or damage. Insurers will generally seek to agree the value based

on reinstatement costs less a deduction for betterment, the cost of an equivalent modern replacement, or market value.

Directors' and officers' insurance

22 What is the scope of D&O coverage?

Legislation in Ireland prohibits a company from including in its constitutional documents and contracts any provision which indemnifies its directors and officers from liability to the company in respect of negligence, breach of duty, default or breach of trust. There is one exception to this, which provides that a company may indemnify a director or officer from any liability incurred by that director or officer in successfully defending civil or criminal proceedings taken against him or her.

A company is, however, permitted to purchase directors' and officers' (D&O) insurance in relation to the negligence, breach of duty, default or breach of trust of a director. D&O policies generally cover damages awarded against the director, legal costs in relation to an action and in certain circumstances, the costs of the director in relation to any official investigation taken by the regulatory authorities in Ireland. However, D&O policies generally exclude cover for fraud and criminal fines imposed.

D&O cover is available in Ireland for side A (loss suffered by director or officer as a result of a claim that has not been indemnified by the company), side B (indemnifications by the company to the director or officer) and side C (actions brought against the company). Side A cover is the most common form. On side A, the director is the insured person whereas for both side B and C the insured person is the company.

23 What issues are commonly litigated in the context of D&O policies?

In Ireland, D&O policies commonly respond to restriction and disqualification applications made in the context of insolvency.

From a coverage perspective, insured versus insured claims may be covered depending on the policy wording. There has been an increase in insured versus insured claims in recent years, in particular where, for example, a liquidator has been appointed to the company.

Issues of non-disclosure and late notification can arise in the context of D&O policies.

Cyber insurance

24 What type of risks may be covered in cyber insurance policies?

Cyber policies frequently cover the cost of responding to a breach as well as providing first-party and third-party cover.

Breach response coverage may include the cost of IT forensic experts to investigate how the breach occurred, whether it is ongoing and to identify system weaknesses, PR to manage the fallout publicly and to prevent or minimise brand damage, as well as legal experts and other costs associated with the notification process.

First-party cover relates to the insured's loss and covers business interruption costs due to the breach.

Third-party coverage includes defence costs and damages arising from third-party claims against an insured where, for example, the insured's negligence enabled the data breach to occur.

25 What cyber insurance issues have been litigated?

Cyber insurance is still a relatively new product on the Irish market, however it has become more popular in recent times. We are not aware that any cyber insurance coverage issues have been litigated before the Irish courts as of yet. There have been data breaches and it is highly likely that the cyber policies have responded in these cases.

Terrorism insurance

26 Is insurance available in your jurisdiction for injury or damage caused by acts of terrorism and, if so, how does it generally operate?

There are insurance products available in Ireland which cover damage to property and loss of income as a result of terrorism. Cover extends to physical damage to commercial buildings and their contents resulting from terrorism and associated business interruption expenses, including profit loss and increased operational costs.

* *The authors would like to thank Mark Dunne for his contribution to this chapter.*

Matheson

Sharon Daly **sharon.daly@matheson.com**
April McClements **april.mcclements@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2, D02 R296
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Insurance Litigation
ISSN 1757-7195

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law