



## Two's company, three's a result: the Third Parties (Rights Against Insurers) Act 2010

**You have suffered as a result of shoddy work by one of your contractors or suppliers. As a result, you want to claim but discover that they have gone under. It quickly becomes apparent from the contractor's financial state that all realistic chances of a recovery from the contractor have disappeared. However, all may not be lost - you may be able to take advantage of a very useful recent development in the law to bring your claim against the contractor's insurer.**

The Third Parties (Rights Against Insurers) Act 1930 ("**1930 Act**") was the previous legislation enabling you, in theory at least, to bring a claim against an insolvent insured directly against its insurer, where the insurance covered the claim. However, the 1930 Act was impractical, expensive to use, and ripe for consignment to the legislature's dustbin.<sup>1</sup>

The Third Parties (Rights Against Insurers) Act 2010 ("**2010 Act**"), which was given Royal Assent on 25 March 2010, replaces the 1930 Act and sets out a new, claimant-friendly regime for pursuing the relevant insurer.

This article examines the flaws of the 1930 Act and discusses how the 2010 Act can help you recover on your claim from the insolvent party's insurer.

### The 1930 Act v The 2010 Act

#### One set of proceedings

A regular criticism of the 1930 Act was that, before you were able to pursue a claim against the relevant insurer, you first had to obtain a Court judgment against the bankrupt individual or insolvent company. This meant that you would effectively need to incur the cost of bringing two sets of legal proceedings, first against the insured, and then secondly, assuming you won, against the insurer.

The 2010 Act removes the requirement of multiple proceedings, enabling you to issue proceedings directly against the insurer. Within these proceedings, all pertinent issues can be resolved, including those concerning the insured's liability.

#### Re-registration of dissolved companies

Under the old law where the insured was a dissolved company and had been removed from the register at Companies House, you faced a further step in the process. Before you could start proceedings against an insolvent company to prove liability for the debt, you first had to restore the insolvent company to the register.

However, as the 2010 Act removes the requirement to bring proceedings against the insured first, there is no longer any need for a requirement to re-register a dissolved company. You are provided with direct rights against the insurer, simplifying the process and potentially reducing your costs.

#### Access to policy information

Under the 1930 Act, you were only able to obtain the bare minimum of information prior to establishing the insured's liability. In particular, you were only entitled to request information from a limited list of persons. Crucially, this list did not include insurance brokers. This meant that proceedings were often brought in ignorance of the cover available. For example, you may have re-registered the dissolved company and successfully brought proceedings against it to prove liability, only to find that the policy had been invalidated (for example, by the insured's failure to pay premium), rendering your claim futile.

However, under the 2010 Act, your rights to information about the insurance policy are significantly improved. In particular, at the point that litigation is being contemplated, you are provided with a relatively free rein and can require policy information from anyone reasonably believed by you to be in control of it. There are also clearer guidelines as to how such an information request should be dealt with by the responding party. For example, a response must be provided within 28 days of receiving notice of the request.

#### Insurer's unfettered defences

Under the 1930 Act, the insurer had the upper hand from the outset. In particular, the insurer could rely upon all the

<sup>1</sup> Third Parties Rights Against Insurers (July 2001) The Law Commission & The Scottish Law Commission (LAW COM No 272) (SCOT LAW COM No 184)

defences that they would have relied upon against a claim made by the insured. This allowed legitimate claims to fail on the basis that policy conditions had not been satisfied, even where performance of these conditions could only ever have been carried out by the insured themselves, and were entirely outside the claimant's sphere of influence.

The 2010 Act still allows insurers to utilise against claimants the defences that they would have had available against the insured. However, there are three important limitations placed upon these:

- 1 The defence of non-performance by the insured is removed. This means that once the rights under the insurance policy have transferred to you, you are able to meet conditions that were required of the insured. An example of such a condition would be where the insurance contract requires the insured to provide notice of a claim. Previously, had the insured not provided notice, the claim would have been defeated. However, under the 2010 Act, if you provide notice to the insurer, as required by the policy, then this condition is deemed to be satisfied.
- 2 Any claim has the potential to be time-barred. Claims must be brought within the appropriate limitation period. Under the 2010 Act, however, the insurer is prohibited from relying on a limitation defence if proceedings had been issued against the insured in time. By contrast, the 1930 Act did not provide for such an extension to the limitation period. This is despite the fact that, under the 1930 Act, proceedings generally had to be brought against the insured first, which provided a greater risk that the limitation period would be exceeded.
- 3 "Pay first" clauses require the insured to have paid sums to you in respect of their liability before they are entitled to an indemnity from the insured. Where the insured is insolvent there will usually be no sums available to pay you first. Under the 1930 Act, no clarity was provided concerning the effect of these clauses and insurers had been able to use them to defeat your claim. The 2010 Act makes such clauses void against you. The one exception to this is for

marine insurance policies, where "pay first" clauses are only nullified if the claim is for death or personal injury.

### Additional developments

The 2010 Act also resolves certain other ambiguities that were never satisfactorily resolved by the 1930 Act. In particular:

- 1 The 1930 Act neglected to deal with the case where the insolvent party was a partnership. This has been rectified under the 2010 Act.
- 2 Developments in insolvency law and company law were ignored by the 1930 Act, leaving confusion as to how certain voluntary winding up procedures should be treated. There are now more circumstances in which you are able to obtain rights, from the insured, against the insurer. For example, these now include the appointment of a provisional liquidator and procedures where formal winding-up is postponed through agreement with creditors.
- 3 The 1930 Act failed to provide clarity as to whether it applied when foreign companies were involved. This weakness has been remedied under the 2010 Act: where one of the insolvency-type events listed in the Act occurs within England, Wales or Scotland, the 2010 Act will apply. You are able to bring proceedings either in that part of Great Britain in which you reside or in the part where the insured is based.
- 4 Finally to prevent the 2010 Act from becoming outdated, as befell the 1930 Act, the Secretary of State is provided with the power of amendment enabling new developments in insurance and insolvency law and practice to be accommodated without the need for new primary legislation.

### Conclusion

If you have a claim against an insolvent contractor or supplier for a breach for which they would have been insured, you should now find yourself in a much stronger position. You can bring your proceedings swiftly and directly against the insurer, on the basis of proper information showing you whether the claim is worth pursuing.

Please contact us if you would like to discuss any of the issues raised in this briefing



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