

## WHEN DOES AN INSURERS RIGHT TO INDEMNITY ARISE? THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT

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### *William McIlroy Swindon Ltd v Quinn Insurance Ltd*

The Third Parties (Rights Against Insurers) Act 1930 confers on third parties rights against insurers of third party risks when certain events regarding the solvency of the insured occur. In the case of an individual it applies where a bankruptcy order or insolvency administration order is made or a composition or arrangement is entered into with creditors. In the case of a company it applies when a winding-up order is made (or voluntarily occurs), the company enters administration, a receiver of the company's business is appointed, and so on. The Act safeguards third parties compensation by transferring the rights of the insured tortfeasor under the insurance contract to the third party (or victim). Once judgment is obtained against the insured, under the 1930 Act, the third party is entitled to proceed directly against the insurer. The Act does not apply to re-insurance contracts.

In *McIlroy v Quinn* (18 July 2011) claims were brought against the respondent insurer under the 1930 Act appealing against a finding that the claims were time-barred.

### The Facts

In September 2006 there was a fire in shop premises that were being refurbished. It was alleged that the fire was caused by one of the insured's employees using a blowtorch negligently. In February 2009, the insurer declined indemnity cover because the insured had been in breach of certain policy conditions and particularly the condition that the insured had to take all reasonable precautions to prevent accidents.

The owners of an adjoining building sued the insured contractor claiming damages caused by the fire. By January 2010, they had secured judgment against the insured and damages were assessed. The insured then promptly went into voluntary liquidation and so the judgment was not satisfied.

The insured's rights (as is usual) vested in the owners of the adjoining building (pursuant to the Third Parties (Rights Against Insurers) Act 1930) and they sought to bring a claim, in about April 2010, against the insurers under the Act.

The insurers argued that proceedings were time-barred because there was an arbitration clause in the policy that read:

*"any dispute between the insured and the company on our liability in respect of a claim ... shall ... be referred within nine months of the dispute arising to an Arbitrator".*

And, if this was not done then:

*"the claim shall be deemed to have been abandoned and not recoverable thereafter".*

The insurer's argued that the nine-month period had been spent by November 2009, nine months after it had repudiated liability. The claimants' case was that time did not begin to run until the insured's liability had been established and quantified.

### The Judgment

At first instance the court found in favour of the insurer: the contractor had sought indemnity under the policy before the trial and the insurer had refused that claim. It was on this date therefore that a dispute arose and, as no arbitration had been commenced within nine months, the claim by the adjoining owners (now standing in the shoes of the contractor) failed.

The Court of Appeal, however, took a different view (recognising the dangers of the first instance decision which could lead to an insured becoming time-barred in a claim under a policy well before it has any cause of action to bring that claim) and the judgment was reversed. Relying on *Post Office v Norwich Union Fire Insurance Society Ltd* (1967) they

said that it was “trite law” that an insurer’s liability under an indemnity policy does not accrue unless and until the existence and amount of the liability to relevant third parties has first been established. The court then concluded that the word “claim” referred to the insured’s claim against his insurers and not the third parties’ claim. Since the contractor’s claim did not arise until liability was established, in about January 2010, the claims were raised within the nine month period; the period running from the date that the damages were assessed and the losses crystallized.

### The Implications & The Future

The decision confirms that an insured’s cause of action against its insurer concerning a third party claim will only arise when both liability and quantum have been ascertained (indeed, this must be right in the context of a public liability policy). The practical difficulty for a third party in a case such as this, is that it may not know of short time limits in underlying insurance policies before it needs to rely on the 1930 Act. Whilst there are likely changes coming to the Act in the future (the Third Parties (Rights Against Insurers) Act 2010), this is not yet in force and it is recommended that third parties take the necessary steps, as soon as possible once insolvency occurs, to obtain details of insurance cover.

If/when the new Act is brought into force, it will make it easier for third parties to claim directly against the insolvent’s insurance policy. Thus, a third party can make the relevant enquiries of brokers even before the liability of the insured is established: this will enable one to obtain information at an early stage discovering the rights which will be transferred, and therefore assisting the consideration as to whether a cause of action is worth litigating.

It also has the following additional benefits:

(a) There is no longer a need to establish the insured’s liability by judgment, settlement, or arbitration award: the new Act allows the third party to issue proceedings directly against the insurer. Thus, all issues, including the insured’s liability, can be resolved in one set of proceedings against the insurer (and, optionally, the insured);

(b) The definition of “insolvent” is widened to include (i) companies who are the subject of Company Voluntary

Arrangements or Schemes of Arrangement (under Part 26 of the Companies Act 2006) with creditors and (ii) individuals, incorporated and unincorporated bodies and certain trusts;

(c) The Act can apply where the defendant is not insolvent but involved in proceedings where he may become insolvent as a result of the judgment;

(d) The Act does not depend on whether there is a connection with a part of the United Kingdom. In particular it does not depend on: (i) whether or not the liability of the insured to the third party was incurred in, or under the law of, England and Wales, Scotland or Northern Ireland; (ii) the place of residence or domicile of any of the parties; (iii) 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; and (iv) the place where sums due under the contract of insurance are payable.

(e) In cases where there is a foreign element the Act provides that as long as a transfer of rights is triggered in accordance with its provisions the Act will apply;

However, and as before with the 1930 Act, the Act will (i) not apply to reinsurance contracts and (ii) a transfer of rights does not put a third party in a better position: the rights transferred are only as good as the insured’s claim to indemnity.

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