

Declinature of a claim under a policy of insurance upheld by Irish High Court

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A recent decision of the Irish High Court (1 February 2016) to uphold the declinature of a claim made pursuant to a policy of "All Risks" Contractors Liability Insurance is of particular interest as very few matters concerning claims declined by insurers are heard by the Irish courts. The lack of Irish case law in this area can be a frustration for insurers in considering their options on foot of a declinature. The recent judgment in *Kelly Builders Rosemont Limited v HCC Underwriting Agency Limited*, in which DAC Beachcroft Dublin advised the Defendant insurers, may offer some clarity to insurers in this position.

The facts

Kelly Builders (Rosemont) Limited ("Kelly Builders"), a building contractor, had a policy of insurance with HCC Underwriting Agency Limited ("HCC") which included amongst other matters "hot works".

In November 2008, Kelly Builders were undertaking repair work to the roof of the student restaurant block at the National University of Ireland in Maynooth. During the course of these works a significant fire took place which resulted in the complete destruction of the building.

Policy conditions

The policy of insurance included a condition precedent which stated: "The following must be kept available for immediate use near the scene of operations; (a) suitable and fully charged fire extinguishers."

The evidence demonstrated that the contractor who was working on the roof on behalf of Kelly Builders had only one fire extinguisher, and furthermore, when he had tried to use it, it had failed. In the circumstances HCC declined cover.

Challenge

The declinature was challenged by Kelly Builders who issued specific performance proceedings in the Irish High Court. The matter ran for nine days before Ms Justice Murphy. Judge Murphy (in a 78 page written judgment) held that based on the facts and "on the balance of probabilities" Kelly Builders had not complied with the condition precedent, and specifically found they had not proven the fire extinguisher on the roof was 'suitable and fully charged'.

On this basis, the Court dismissed Kelly Builders claim for specific performance of the contract of insurance and its claim for all other ancillary reliefs.

Analysis and consideration of English authorities

Owing to the scarcity of Irish case law in this area, HCC relied on English authorities that are of "persuasive authority" in the Irish courts. It is a notable development that an Irish judgment now specifically recognises and endorses the principles set out in these decisions.

Cornhill Insurance plc v D.E Stamp Felt Roofing Contractors Limited [2002] EWCA Civ 395, was cited throughout the judgment. As practitioners will be aware, this case is authority for the proposition that non-compliance with a condition precedent on the part of an insured will absolve the insurer of liability even if the non-compliance does not in any way cause the loss. Judge Murphy considered this principle to be directly applicable to the present case and was relied upon by HCC in defending its position.

Ms Justice Murphy acknowledged this proposition to be "an eminently logical one", and noted that "a condition precedent is one which must be complied with before the contractual obligation to indemnify takes effect. Thus, whether the compliance or non compliance leads to or affects in any way the event which gives rise to the requirement for indemnity is irrelevant."

Ms Justice Murphy further held that the Court, in this instance, "has not been pointed to any relevant authority in this jurisdiction which would suggest otherwise and on that basis, considers it appropriate to adopt the rationale of *Longmore LJ in Cornhill Insurance plc v D.E Stamp Felt Roofing Contractors Limited*."

Impact of this decision

This judgment will no doubt be of significant interest to insurers writing business in Ireland. In the absence of any specific judicial guidance on this point there has been some understandable concern to date for Irish insurers in relation to the options available to them in a declinature challenge situation. We consider this judgment will provide much needed clarity to enable full consideration of all the issues.

Kelly Builders claim for specific performance of the contract of insurance against HCC Underwriting Agency Limited was successfully defended by DAC Beachcroft Dublin.

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