HOMS SOLICITORS

HOMS News

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In this our latest edition of HOMS News, I would like to advise of an HOMS Project *"Getting Ahead of the Curve".* HOMS has been working with external consultants, Ingenium, (a company set up by Hugh O'Donnell formerly of Kentz) to carry out a strategic reorganisation of the business to better position the firm to grow towards 2020 and to serve your needs in an ever changing environment.

At HOMS, we are always looking forward, anticipating new developments and building effective responses to best represent you, our valued clients. We are seeking to further develop our firm to be the foremost provider of choice for expert legal services throughout Ireland. Our challenge is to keep evolving, to innovate and to deepen our relationship with you, our clients, to get you ahead of the curve. We see technology driving change and we as a business want to understand your needs further. We are undergoing a process of renewal and reorganisation to better serve your needs. We are investing in our people and building our succession plan to bring continuity in the delivery of legal services to you.

Our mission has been redefined as *"Providing a wide range of legal services nationwide, delivering quality, knowledge, experience and value, working in partnership with our clients, investing in our people by supporting the communities in which we operate."*

Over the coming months, we will reach out to you to engage you on this journey in *Getting Ahead of the Curve.*

I hope you enjoy this latest edition of HOMS News. Thank you for your continued support.

Kind regards,

Harry Fehily, Managing Partner.
Holmes O'Malley Sexton Solicitors

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Payment of Excess as a Condition Precedent to Liability

By Harry Fehily, Partner, Insurance Unit

The case of ***Hu-v-Duleek Formwork*** *and Anor* [2013] IEHC 50, has prompted interesting deliberations as to the likely interpretation and approach of the courts, should they have occasion to examine the requirement of a payment of an excess by an insured, as a condition precedent to liability.

Conditions

The express conditions in any policy are categorised as follows;

1. **Conditions precedent to the validity of the policy**

   Failure by the insured to observe and fulfil such conditions will result in the policy being deemed *void ab initio,* meaning the policy will be treated as invalid from the outset.

2. **Conditions subsequent to the policy**

   Relating to matters after the formation of the contract and breach of which gives the insurer the right to void the policy from the date of the breach.

3. **Conditions precedent to liability of the insurer**

   Relating to matters arising after a loss has occurred. Failure to comply with these conditions entitles the insurer to repudiate liability for the loss, but not to void the policy, meaning a contract of insurance will remain in place between the insurer and the insured.

Condition Precedent

In *London Guarantee Company v Fearnley* [1880] 5 App. Cas. 911, the court noted as per Lord Watson, *'When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear to be so capricious and unreasonable that a court of law ought not to enforce it, or to be sua natura incapable of being a condition precedent.'*

The court's observations above raise an interesting point as to the nature of a payment of excess and whether it can be construed as a condition precedent to liability. The payment of the excess, frequently occurs at or around point of settlement or once a court order for damages has been made. The insurer will discharge the portion of the settlement/ award for which they are responsible and it will be a matter for the insured to discharge their excess, for which the insurer tends to have no responsibility generally.

'Ordinary Excess' v 'Up front Excess'

In considering the validity of a condition precedent in respect of an excess, a distinction should be drawn between what may be termed for convenience an 'ordinary excess' and an 'upfront excess'. It is arguable that an ordinary excess, i.e. one payable at the conclusion or settlement is not, by its very nature, a condition which could be interpreted as a condition precedent to liability and is by its nature more readily interpreted as a condition subsequent under the policy, as payment of same takes place at the time where liability is established at the very end of the claim.

Conversely, the type of excess in existence in *Duleek*, namely an 'upfront excess', is by its very nature a condition which *could* be seen as a valid condition precedent to liability, as the payment is required within a short time frame following the loss.

Yun Bing Hu v Duleek Formwork Limited (In Liquidation) & Anor, [2013] IEHC 50

The plaintiff was suing his employer for an injury sustained during employment as a result of his employer's negligence. One of the conditions precedent to liability included in the policy, was the payment of an 'upfront excess' of €1,000. The employer had not discharged the excess payable on the policy. Aviva, repudiated liability for the claim on the basis that the aforementioned condition precedent had not been met. The plaintiff then sought to join Aviva, insurer of the employer, as a co-defendant to the proceedings.

The plaintiff sought to pay the excess payment of €1,000 himself but the court quite correctly ruled that the plaintiff did not enjoy privity of contract to be able to validly do so on behalf of the insured employer and, in those circumstances, no finding could be made against Aviva. The plaintiff was effectively left without recourse as indemnity was not available against Aviva and the employer was in liquidation. The court therefore concluded that no monies were payable under the contract of insurance.

Whilst this decision has been interpreted in some circles as an approval of the classification of the non-payment of the excess constituting a valid condition precedent, in reality, this was not the matter upon which the court ruled directly.

Further considerations of public policy are also worthy of a mention. Insurance is required first and foremost for reasons of protecting the public against the loss which they may suffer from the negligence of the insured. Policies which necessitate the payment of an upfront excess as a condition precedent to liability, may be struck down as being contrary to public policy by the courts, in circumstances where such excesses result in a plaintiff receiving no compensation for injuries suffered at the hands of the insured, simply because an excess was not paid by the insured. However, it is important to note that such a public policy argument may well stand up to scrutiny in cases of compulsory insurance policies, but would be less likely to do so in cases of non-compulsory insurance policies.

Conclusion

The courts will look to the nature of the condition in an insurance contract in determining whether or not they consider it to be a valid condition precedent. For this reason, it could be argued that the payment of an ordinary excess would not be upheld as a valid condition precedent by the courts. However, the position with respect to what has been termed an up-front excess may be quite different. As stated, by its very nature, it is capable of being construed as a condition precedent and may well be upheld accordingly as a valid contractual term. Unfortunately, there has been no definitive pronouncement on the matter by the courts to date, and it may well be a matter of awaiting a definitive pronouncement from the courts as to whether a condition precedent in the form of an upfront excess will be upheld in due course.

Summary

An insurance policy may require payment of an excess upon a notification of a claim or claim being made on the policy. If this excess is not paid can insurers avoid liability for paying the claim on the basis that payment of the excess is a condition precedent?

Harry Fehily, Managing Partner, Litigation Department

Children First Act 2015

By Sarah Ryan, Senior Solicitor, Litigation Department

The Children First Act 2015 ("the Act") was signed into law by the President on 19 November 2015. The Act is a watershed moment in the history of the overall protection of children in Ireland where far too often in the past child abuse was silent and unreported.

The most important and main provisions of the Act have yet to come into force and will eventually be fully enacted by the government. An overview of the main provisions of the Act is however important as once fully enacted the Act will place, for the very first time, a legal obligation on:-

- A range of professionals and others working with children (referred to as "mandated persons") to report child protection concerns to the Child and Family Agency.
- A 'provider of a relevant service' involving children to comply with with certain important obligations.

The purpose of this Article is to outline the main provisions of the Act.

Obligations on Mandated Persons

Mandated persons are those professionals who either work with children or young people or are in service sectors that encounter children where there is risk of abuse and neglect. Examples include: teachers, medical professionals, gardai, clergy, social care workers, child care staff in a pre-school service, youth workers.

Mandated persons will be required to report information regarding child abuse above a defined threshold which comes to their attention in the course of their professional or employment duties. Mandated persons will also be required to report any direct disclosures of abuse from a child.

'Provider of Relevant Service'

A provider of a relevant service is defined as any work or activity which is carried out by a person, consisting mainly of the person having access to, or contact with, children including for example: an early years' service, school, hospital, centre for children with disabilities, priest.

The definition also extends to any work or activity providing educational or recreational, leisure, social and physical activities to children, whether for commercial use or not.

The Act will therefore cover a broad range of services including the voluntary and sporting sector which involve children, for instance children's GAA, rugby and soccer teams.

Obligations on a Provider of a Relevant Service

The Act will place a duty on a provider of a service involving children to ensure, as far as practicable, that each child is safe from harm while availing of its service.

The Act will oblige a provider to undertake an assessment of the potential for risk of harm to a child while that child is availing of its services and to prepare an appropriate 'Child Safeguarding Statement'.

Child Safeguarding Statement

The purpose of the statement will be to identify how the provider of a service will manage any risks identified in the risk assessment.

The provider will also be obliged to display the statement in a prominent place where the service is being provided. A provider will also be obliged to furnish a copy of the statement to members of staff and on request to a parent or guardian of a child availing of the service and to members of the public.

Summary

When commenced, the Act will place, for the very first time, a legal obligation on defined categories of people to report child protection concerns to the Child and Family Agency.

Relevant organisations will be obliged to undertake an assessment of any risks to children and must develop this into a Child Safeguarding Statement to identify how the organisation will manage any risks identified.

Whilst the Act has not been fully enacted, organisations providing services to children need to be fully aware of its provisions in advance to ensure they will be fully compliant.

Sarah Ryan, Senior Solicitor, Litigation Department

Undue Influence & Independent Legal Advice - Recent Developments

By Áine Kehoe, Senior Solicitor, Banking Unit

The case of *Ulster Bank Ireland Limited v Roche and Buttimer* relating to undue influence was considered by my colleague Frank Wall in the HOMS News 2013 Issue. The outcome of this case led to uncertainty as to what steps a prudent lender should take when dealing with vulnerable sureties. The Irish courts have recently considered the issues of undue influence and independent legal advice in the context of enforcement of guarantees providing further clarity on these matters.

ACC Loan Management Limited v Gerard Sheehan

In the Sheehan case the defendant entered into a guarantee to secure a loan facility made in favour of a company of which the defendant, together with his brother, was a director and shareholder. The loan fell into default and the bank demanded repayment.

The defendant argued that he was subjected to undue influence arising from the sibling relationship between the defendant and his brother, and that the legal advice obtained was deficient. The defendant claimed that he entered into the guarantee under pressure believing that if he did not do so the business would fail. He further argued that the independent legal advice obtained was inadequate as the advising solicitor acted for the borrowing company.

The Judge, in dismissing the claim of undue influence, stated that a mere desire to be of assistance to a sibling is not evidence of undue influence. To extend the principles laid down in Etridge to brothers who are both directors and participants in a commercial enterprise, *"would constitute a major evolution of the principles"*. Nonetheless the bank was not granted summary judgment on the basis that it had required confirmation of independent legal advice as a pre-condition to the release of funds but instead relied on an assurance from the defendant's solicitor. The better approach would have been to insist on receipt of a signed waiver of independent legal advice.

The Governor and Company of the Bank of Ireland v Curran & anor

The Curran case saw the courts adopt a similar approach to undue influence. The bank sought summary judgment against a 73 year old widow who had guaranteed the liabilities of a company which was owned and managed by her son. The defendant claimed that the guarantee was unenforceable on the grounds of, amongst other things, undue influence.

The High Court held that *"there is no obligation on bank's insisting on customers obtaining legal advice before entering into contracts with them absent some clear evidence of the need to insist on it"*. In determining whether such a need arises McGovern J stated that it is necessary to consider whether there is a non-commercial element to the guarantee or if the defendant is not acting as a free agent. In the present case it was held that there was no evidence to suggest that the bank were on notice to ensure that independent legal advice should have been sought.

Conclusion

The recent case law has served to clarify lenders' obligations when taking guarantees from vulnerable sureties. It is clear that guarantors will need to meet a high threshold when seeking to rely on a defence of undue influence. Notwithstanding that independent legal advice is not required to be obtained in every case, a bank should carefully consider whether there is a non-commercial element to the guarantee or if the guarantor is acting as a free agent.

Summary

The defence of undue influence is frequently argued by guarantors in the context of enforcement of guarantees. The Roche case created uncertainty by extending the onus on banks when dealing with vulnerable sureties. Recent case law demonstrates that the courts are taking a pragmatic approach to the issues of undue influence and independent legal advice. Notwithstanding this welcome development a lender will need to ensure that it considers free will and commercial benefit when dealing with personal guarantees.

Áine Kehoe,
Senior Solicitor, Banking Unit.

The Living City Initiative – An Overview

By Pauline McNamara, Senior Solicitor, Property Department

The Living City Initiative was introduced by the Finance Act, 2013 and is a scheme of property tax incentives, designed to regenerate both residential and commercial buildings in specified cities, one of which is Limerick.

The relief can be split into two elements – commercial and residential.

Commercial Relief

- The commercial / retail relief is given in the form of an accelerated capital allowance for a "qualifying expenditure" on conversion/refurbishment of premises within the special regeneration areas.
- There are a number of conditions to be satisfied to fall within the meaning of "qualifying expenditure". One such condition is the expenditure on conversion / refurbishment must be at least 10% of the value of the property immediately before the work was carried out.
- The capital allowance is given at the rate of 15% of qualifying expenditure for each of 6 years and 10% in year 7.
- There is also a "use" condition, so the premises must be in use for the purposes of providing services or retailing goods, or be let under a lease on arm's length terms and used for such a qualifying purpose.
- Even though there is no limit on how much can be spent on the conversion / refurbishment, there is a limit on the amount of relief which can be obtained. This is capped at €200,000 for any individual project, so it does not matter how many investors there are.
- Any unused capital allowances from previous years can be used by the claimant in addition to the capital allowances which he is entitled to in any year. Passive investors should note, though, that any unused capital allowances under the Living City Initiative, which are carried forward beyond the tax life of the building to which they relate, are lost immediately.
- For the purposes of calculating the tax relief available, companies are deemed to have a marginal tax rate of 12.5% and individual investors 50%.

Residential Relief

- The relief is only available for owner / occupiers of buildings built for use as a dwelling prior to 1915. Therefore, for example, an old derelict church located within the "special regeneration area", which is to be converted into a dwelling does not qualify, as it was not originally built as a dwelling.
- Landlords cannot claim relief under the residential arm of the Initiative. The claimant is entitled to a deduction from their total income for each of 10 consecutive years of an amount equal to 10% of the qualifying expenditure.
- A "Letter of Certification" must be obtained from the applicable Local Authority before any works have commenced.
- The property must be occupied as the claimant's sole or main residence for all or any part of each year for which he is claiming the relief. The claimant is not obliged to occupy the property for the entire 10 year period but no relief can be claimed for any year in which there was no period of occupation by the claimant.

Conclusion

This is a laudable initiative launched by Minister Noonan with the aim of encouraging people back to the centre of Irish cities to

live in historic buildings and encourage the regeneration of the retail heartland of central business districts. So far the uptake in Limerick city has been minimal. One criticism of the residential relief is that the period of the relief is spread out too long. Another observation is that, historically, Limerick city dwellers have tended to be transient. This initiative should be seen as one element of the overall rejuvenation of these designated areas. Hopefully, it is a relief that is embraced.

Summary

The scheme applies to certain "special regeneration areas" in Dublin, Cork, Limerick, Galway, Waterford and Kilkenny.

The relief applies to both residential and commercial refurbishment and conversion work.

These works must be incurred in a 5 year period from 5 May, 2015.

Pauline McNamara, Senior Solicitor, Property Development.

Spent Convictions and your Insurance Contract

By Tríona Walsh, Associate Solicitor, Litigation Department.

The insurance contract includes a duty known as "*uberrima fides*", the duty of utmost good faith. It means that a higher duty of disclosure is required from people in relation to insurance contracts than other types of contract. If someone fails to disclose a fact deemed to be material to an insurance contract, the insurance company may have the right to cancel the policy, *ab initio*. This results in the possibility of a contract being deemed null and void and treated as never having been in existence.

Court convictions are generally required to be disclosed when seeking insurance. The enactment of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 ("the Act") means that where certain criteria are met, a person may no longer have to disclose certain convictions when seeking insurance. The Act came into force on 29th April 2016.

Under the new Act, for a conviction to be regarded as "spent", generally the following conditions must apply:-

- The person must be over the age of 18 on the date of commission of the offence,
- At least 7 years must have passed since the effective date of conviction,
- The sentence imposed by the court in respect of the conviction cannot be an "excluded sentence"; and
- The person must have complied with the court order in respect of the conviction concerned.

The "effective date of conviction" means the date on which a sentence, e.g, fine, driving ban, imprisonment, becomes operative. This is particularly important, for example, in drink driving cases where a delay of perhaps six months is allowed before a driving ban takes effect. The 7 year period will run from this later date, rather than the date of actual conviction.

Generally, no more than one conviction may be regarded as spent. More than one conviction will mean that none of the convictions can be regarded as spent. However, if a person is convicted of 2 or more offences committed simultaneously or arising from the same incident the convictions can be regarded as one single conviction.

The Act also sets out other exceptions to the one conviction rule. For example, in the case of minor road traffic offences, other than dangerous driving, more than one conviction can be regarded as spent.

Where an "excluded sentence" is applied on conviction, it will not be allowed to be spent. An "excluded sentence" under the Act, means a sentence imposed by a court where there has been a term of imprisonment of more than 12 months or any serious criminal offences which are tried in the Central Criminal Court, ie rape, murder etc, or a sexual offence. Again, there are certain exceptions to this.

Similarly, anyone convicted of fraud, deceit or dishonesty in respect of a claim under an insurance policy of assurance will not be excused from disclosing such a conviction when applying for any subsequent insurance.

Where a conviction is regarded as spent a person no longer has to disclose this conviction when seeking insurance.

To Conclude

In circumstances where people have minor convictions dating back over 7 years with no subsequent convictions, this legislation means that they can finally put those convictions behind them. These people often faced significant barriers to entry in terms of obtaining insurance, with many insurers simply refusing to quote people who had convictions.

Summary

Under the new Act:-

People no longer have to disclose spent convictions when seeking insurance.

There is increased access to insurance for a large number of people.

Tríona Walsh, Associate Solicitor, Defence Litigation & Insurance Units.

HOMS Fittest Company Challenge

Once again we are proud to have sponsored the HOMS Fittest Company Challenge (FCC) at the Barrington Hospitals Great Limerick Run (GLR) which took place on Sunday 1st May 2016. The FCC is a fun and friendly competition between companies. Companies earn points per mile for each of their employees who take part in GLR. The companies with the most points win the fittest company title. The competition promotes and encourages a healthy lifestyle and team building within companies. HOMS are delighted to have come third in the medium company category! Congratulations to all the winners. A great day was had by all.

Some of our HOMS Solicitors team after taking part in the great Limerick Run.

COMPANY CATEGORY	Micro Company Category: (1-10 Employees)	Small Company Category: (11-50 Employees)	Medium Company Category: (51-200 Employees)	Large Company Category: (200+ Employees)
WINNER:	Feale Fit	Action Point	Barringtons Hospital	An Garda Siochana
RUNNER-UP:	Tecksoft	Banogue Community Creche	AMCS	Regeneron
3RD PLACE:	Metis Life	Caherdavin Credit Union	HOMS Solicitors	Analog Devices

All of the winners of the HOMS FCC are pictured at our prize giving event on 18th May 2016.

HOMS Solicitors personnel enjoying the race.

New Partners Appointed

We are pleased to announce the appointment of two new partners, George Kennedy and John Ringrose.

Managing Partner, Harry Fehily, commented on the new appointments saying, *"We are dedicated to developing our core values of quality, knowledge, experience integrity and competitiveness. To do this we recruit, develop and retain exceptional personnel and these latest appointments are part of that core strategy. George and John are market leaders in their field and we are delighted to welcome them as partners at HOMS Solicitors."*

George Kennedy, Partner, is head of the Corporate and Commercial Department at HOMS Solicitors. He specialises in corporate M&A, private equity and venture capital transactions and general commercial law advisory. He has extensive experience advising multinational and indigenous corporate clients. Last year, among other things, he advised the team at H&MV Engineering in relation to an investment made by MML Capital Partners and the exiting shareholder of Tara Oil in relation to the sale of their company to East Cork Oil. He also advised NVMDurance and PolyPico on successful venture capital fundraising rounds.

John Ringrose joined HOMS Solicitors in 2006 and is a Partner in our Personal Injury unit. He has built up an impressive track record in recent years in successfully managing and concluding a number of complex and high value plaintiff cases. John is highly specialised in personal injury actions, litigating in both the Circuit and High Courts. He has expertise in a number of specialist areas including workplace and industrial accidents.

Harry Fehily (centre), Managing Partner, is pictured with HOMS Solicitors newly appointed partners, John Ringrose (left) and George Kennedy (right).

Legal Directories Recommend HOMS Solicitors

Legal 500 EMEA 2016 and Chambers Global 2016, esteemed legal directories of top law firms, have again recommended HOMS Solicitors.

In the Legal 500's latest 2016 EMEA edition we have been ranked as one of the best firms in Ireland in practice areas such as Banking and Finance, Construction, Dispute Resolution, Employment, Insolvency and Corporate Restructuring, Insurance, Planning and Environment, Public Sector and Real Estate.

HOMS have been ranked in Chambers Global 2016 with our Managing Partner, Harry Fehily, being singled out for particular recognition for dispute resolution.

Comments included:-

"Harry Fehily's practice is primarily focused on insurance-related disputes, in which he is "energetic and exceptionally client-focused." Clients particularly praise his "knowledgeable style, which is geared towards solving problems. He always moves things forward and gets results." Alongside his insurance expertise, he offers a broad commercial practice as a litigator and mediator."

We would like to thank you, our clients, for your continued support and for providing feedback to the legal directories on our legal services.

HOMS Trainee Wins Moot Court Competition

We are pleased to extend congratulations to our trainee solicitor Orla Donovan and her mooting partner, Aaron Vickery, who won the Law Society of Ireland's Trainee Moot Court Competition on 24th February. Orla made it through several rounds and succeeded at the final after advocating in respect of a case concerning human rights, constitutional rights and equal rights.

The judges of the competition are pictured presenting Orla and Aaron with their trophy.

Photo left to right:- TP Kennedy (Director of Education), Mr Justice Michael Peart (Court of Appeal), Aaron Vickery, Orla Donovan and Mr Justice Donald Binchy (High Court).

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Corporate Social Responsibility

At HOMS we have all been busy organising and supporting various CSR events – in addition to the HOMS Fittest Company Challenge at the Great Limerick Run.

HOMS are excited, as part of our involvement in the Leaders at Limerick Institute of Technology programme, to have donated €12,000 for a four year student scholarship award at LIT to help promote and assist education and innovation in the Limerick region. Leanne Roche was awarded the scholarship by our Managing Partner, Harry Fehily, and Paul O'Connell at an event in February this year. Best of luck to Leanne in her studies and future career.

Harry Fehily, Managing Partner and CEDR accredited mediator, welcomed supporting the University of Limerick when he presented a mediation awareness seminar to the students in October.

In December we braved the elements and pounded the streets in the HOMS sponsored university's 5K Blanket Walk for the homeless.

In February we supported the Bank of Ireland Mortgage Event at which celebrity guest Dermot Bannon of Room to Improve provided prospective home buyers with tips on what to look out for when buying a home. Olivia Harris, Senior Solicitor, was on hand to give prospective first time buyers legal insight and clarity on home buying and mortgages.

Ger McNamara, our Financial Controller, is President of Old Crescent RFC and the ladies of the office were only too pleased to support the club's fashion event for Mid Western Cancer Foundation on 25th February at the Strand Hotel, Limerick.

HOMS sponsored the Pakie Ryan Memorial 10K Run, Ennis, in March through provision of the t-shirts and Mairead Doyle, Senior Solicitor in our Personal Injury Unit, competed in the race.

On Good Friday we donned the high-vis vests and took part in the Team Limerick Clean-up 2. A ten strong team from HOMS went out in force to clean up the area around our Limerick office and surrounding streets. Donal Creaton who led the team commented, *"It was a great event and terrific to be involved and inspired by the great Paul O'Connell."*

UL Scholarship: Donal Creaton, Partner, is pictured presenting successful student Therese Madden (a fourth year Law and Accounting student, who achieved the highest results in her final year) with the €2,500 HOMS Solicitors scholarship award.

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