BALANCING ACT

Andrew Burns QC and Jonathan Butters examine which Act will apply when a defendant is insolvent

The Third Party (Rights Against Insurers) Act 2010 ('the 2010 Act') came into force on 1 August 2016. This provides a more straightforward process for a claimant to recover damages from the insurer of an insolvent defendant – an improvement on the Third Party (Rights Against Insurers) Act 1930 ('the 1930 Act').

The judgment in *Redman v Zurich Insurance plc* [2017] EWHC 1919 (QB), handed down in July this year, addresses whether a personal injury claim should be brought against an insurer relying on the 1930 Act or the 2010 Act.

The 1930 and 2010 Acts

Under the 1930 Act, it is first necessary for the claimant to establish the liability of the defendant by judgment, award or settlement before pursuing a claim directly against the insurer (*Post Office v Norwich Union* [1967] 2 QB 363). Until then, the claimant has only contingent rights (*In re OT Computers Ltd* [2004] Ch 317).

Under section 1 of the 2010 Act, the rights of the defendant under the policy are transferred to the claimant if the defendant becomes insolvent when it has already incurred a liability to the claimant; or the liability is incurred at a time when the defendant is already insolvent.

The claimant may bring an action against the insurer 'without having established the relevant person's liability'. The defendant's liability must be established before those rights can actually be enforced, but this can be achieved by a declaration of the court in the same claim.

In practical terms, this means that under the 2010 Act, it is not necessary for the claimant to first pursue a claim against the defendant, having gone to the trouble of restoring it to the register of companies. An action can be brought directly against the insurer in the first instance.

Schedule 3 to the 2010 Act contains the transitional provisions and determines that the 1930 Act will continue to apply in circumstances where both the event of insolvency and the incurring of liability take place prior to 1 August 2016.

The claim

Mr Redman was exposed to asbestos fibres during 30 years' employment by Humber as an electrician. He died in 2013, just over a year after cancer symptoms developed. Humber became insolvent in 2014, but had an employer's liability insurance policy with Zurich. Breach of duty was admitted, but causation and quantum remained in dispute.

Mrs Redman issued a claim under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. The claim was brought against Zurich Insurance, relying on the 2010 Act. In order to protect her position under the 1930 Act, Mrs Redman subsequently added Humber as a defendant after restoring it to the register of companies.

Discussion

Zurich applied to strike out the 2010 Act claim against it. This was on the basis that only the 1930 Act applied to the claim, since for the purposes of the transitional provisions the defendant's liability *and* its insolvency both took place before 1 August 2016.

Mrs Redman initially argued that Humber had not 'incurred' a liability before 1 August 2016, and so the 2010 Act applied. This was held by Turner J

to be rightly abandoned on the basis that 'liability is incurred when the cause of action is complete, and not when the claimant's rights against the wrongdoer are thereafter crystallised, whether by judgment or otherwise'.

For most personal injury claims, it will be obvious when the liability is incurred. The point in time when negligence and damage coincide (*Post Office v Norwich Union* approved in *Bradley v Eagle Star Insurance* [1989] 1 AC 957) will be the moment when the accident happens.

However, with an asbestos cancer, the date is not and cannot be known, because medical science can only assume when the damage first occurs. This is why the complex legal analysis in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 and *Barker v Corus UK* [2006] 2 AC 572 have been developed. These cases impose liability for the mesothelioma on persons who have created a risk of mesothelioma by exposing the victim to asbestos.

In *Durham v BAI (Run Off) Ltd* [2009] Lloyd's Rep IR 295, Burton J, whose key conclusions were upheld by the Supreme Court, decided that in mesothelioma and lung cancer cases it should be assumed that 'injury/disease takes place five years prior to diagnosability, unless there is some evidence that the tumour was either faster or slower than the norm, in which case a factual investigation would be necessary'.

Thus the problem of identifying the precise date when the liability was incurred will not manifest itself in asbestos cases until 2021, when the court may count back five years from diagnosability to a date that could be before or after the coming into force of the 2010 Act. Similar issues may arise in deafness or vibration white finger cases if it is uncertain exactly when the injury first occurred.

Mrs Redman's alternative argument accepted that Humber became insolvent in January 2014 at a time when it was subject to a liability to her. However, it was contended that the transitional provisions did not preclude the parallel application of the 2010 Act alongside the 1930 Act.

It was argued that this was necessary in order to make the 2010 Act workable in industrial disease cases, where the difficulties in establishing the precise date liability was incurred are likely to arise, particularly in long tail cases such as mesothelioma.

Turner J rejected Mrs Redman's contention, holding that it was inconsistent with the wording of the section, and would mean that the 2010 Act applied retrospectively and indiscriminately without reference to any point or circumstances of transition.

Turner J observed that 'it is well recognised that identifying the point at which the process of the development of malignancy, for example, gives rise to damage can be medically and legally controversial. Nevertheless, such difficulties do not entitle the court to ride roughshod over the clear wording of the 2010 Act'.

He said that 'the problems commonly found in industrial disease cases do not arise in the vast majority of more straightforward claims and, in most cases, there is likely to be no difficulty in establishing when liability accrued'.

Conclusion

Therefore a claimant can only proceed under the 2010 Act if the insolvency occurs after 1 August 2016 *and* the cause of action in respect of the injury is complete after that date. Otherwise, the claimant must proceed under the 1930 Act, initially proceeding against the insolvent defendant who has been restored to the company register. The two regimes are exclusive and not concurrent.

It follows that in industrial disease cases where the insolvency pre-dates 1 August 2016, the claimant will need evidence as to whether it is more probable that the injury first manifested in the body before or after 1 August 2016.

Parliament may decide to legislate to provide clarity as to when liability is incurred for the purpose of the 2010 Act, especially for mesothelioma cases.

Unless and until this happens, costly and unproductive disputes as to which regime applies may be avoided by the parties taking a pragmatic approach in pre-action correspondence.

It is submitted that unless a defendant accepts in such correspondence that the injury and insolvency both occurred after 1 August 2016, the safer route is to bring the claim under the 1930 Act (in which case there can be some costs protection if it is later contended that using the older, more complex and expensive process was unnecessary).

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