

IMPACT OF CONTRACT (RIGHTS OF THIRD PARTIES) ACT ON INSURERS

This article examines the position in Singapore taken by the insurance industry since the Contract (Rights of Third Parties) Act 2001 ("CRTPA") came into force on 1 January 2002.

The insurance industry in Singapore, both life and non life, have chosen the path of caution and taken the position that CRTPA does apply to insurance contracts, presumably because these contracts have not been expressly excluded from its application under section 7.

Consequently several insurers have maintained the status quo regarding privity of contract between insurer and insured by expressly excluding the application of the CRTPA from all insurance contracts entered into on or after 1 July 2002. This is the start of the period when parties to a contract, must "opt out" of the CRTPA. The first six months when the CRTPA came into force, contracting parties could "opt in" to the CRTPA.

The commonly used clause or slight variations is usually "The application of the Contracts (Rights of Third Parties) Act 2001 (No. 39 of 2001) and any subsequent revision or replacement thereof is expressly excluded insofar as this contract of insurance is concerned". Does this express exclusion of the CRTPA extinguish all avenues available to third parties, who may wish to pursue from an insurer, some perceived benefit under an insurance contract? It appears not.

Third parties may still obtain limited assistance from the UK Third Parties (Rights Against Insurers) Act 1930, (the "1930 Act") which is brought into Singapore by virtue of The Application of English Law Act 1993. The statutory rights of third parties against insurers under the Motor Vehicles (Third Party Risks and Compensation) Act Cap 189 and the Workmen's Compensation Act Cap 354, still remain irrespective of whether the application of the CRTPA is excluded or not.

Under the 1930 Act if an insured who has an insurance contract against liability to a third party which he may incur, becomes bankrupt or makes a composition of arrangement with his creditors; or if the insured is a company, becomes wound up or falls under receivership; or if its property has been possessed by debenture holders of a debenture secured by a floating charge of such property; then if either before or after that event, any such liability to a third party is incurred by the insured, the insured's rights against the insurer under such insurance contract, shall be transferred to and vest in the third party to whom the liability was so incurred.

However, under such an insurance contract against liability to a third party, the third party cannot rely on the 1930 Act to sue for indemnity from the insurers unless and until the existence and amount of the insured's liability to the third party has been established by action, arbitration or agreement. (*Bradley v Eagle Starr Ins Co* [1989] AC at pg. 57).

Under the 1930 Act, the third party can have no better rights than the insured has against the

insurers under such an insurance contract against liability. The effect of section 1 of the 1930 Act has been likened to a statutory assignment, which implies that the third party steps into the shoes of the insured in respect of the liability incurred by the insured to the third party. (*Murray v Legal & General Assurance Sy Ltd* [1970] 2QB 495, at 503 per Cumming-Bruce).

As such, the insurers are entitled to rely on defences that would be available to them if the claim had been made by the insured directly, such as misrepresentation; non disclosure or breach of a condition or warranty.

The provisions of the 1930 Act are reflected in section 10 of the Motor Vehicles (Third Party Risks and Compensation) Act Cap 189. However, a third party's rights under the Motor Vehicles (Third Party Risks and Compensation) Act Cap 189 are stronger as this Act prohibits an insurer from avoiding the policy on the ground of misrepresentation and non-disclosure where a third party's rights are affected.

In fact, insurers who simply endorse on all their motor policies excluding the application of the CRTPA may unwittingly be letting their policy holders run afoul of section 3 of the Motor Vehicles (Third Party Risks and Compensation) Act, which stipulates that it is mandatory for a person who uses or causes or permits any other person to use a motor vehicle to have in place a policy of insurance or such security in respect of third-party risks.

The provisions of the 1930 Act are similarly reflected in section 19 of the Workmen's Compensation Act Cap 354. Under section 19, an insurer who has issued a workmen's compensation insurance policy to an employer will be liable to indemnify a third party workman even though the insurer is entitled to avoid liability because of policy breaches by the policy holder. The third party workman's rights against the insurer remain effective to cover the liability of an employer even though the policy is void or voidable.

However, the third party workman has no greater rights against the insurer than his employer and is under a duty to inform the insurer of any claim arising under the policy as soon as practicable after he becomes aware of the institution of bankruptcy or winding up proceedings against his employer.

Aside from the compulsory insurances mentioned, the 1930 Act also has application to other types of insurance contracts against liability. Insurers who find themselves faced with a claim commenced by a third party due to the insolvency of the insured, must decide whether to ignore the litigation between the insolvent insured and the third party by refusing or withdrawing cover to the insolvent insured in respect of any defence of the third party claim or instruct the defence of such claim on the basis that the insurer is not liable under the policy. The decision taken to refuse defense cover should not be taken lightly by insurers as an insolvent or soon to be insolvent insured will be less likely to defend such a third party claim on liability and quantum.

In the recent case of *Hartford Insurance Co (Singapore) Ltd (fk The People's Insurance Co Ltd) v*

Chiu Teng Construction Pte Ltd [2002]1 SLR 278, the insurers chose the former option, which worked against them. After the third party claimant had obtained judgment against the insurers' insolvent insured, they sought to claim payment of the judgment sum from the insurers. Although the insurers wanted to challenge the quantum of the judgment sum, the Court of Appeal held that the insurers could not re-open the question of quantum of loss as this had already been adjudicated upon.

A third party claimant who believes that he is entitled to some benefit under a life policy or group policy, may still proceed against insurers even if such policy excludes the application of the CRPTA if the third party claimant can establish that a trust had been created for his benefit under such a life or group policy.

The most common form of trust would be the statutory trust created by virtue of Section 73 of the Conveyancing and Law of Property Act, Cap 61. To avoid being caught by disputes between competing claimants to insurance proceeds, certain life insurers have disallowed the creation of such statutory trusts by specific nomination (which incidentally also has the benefit of protecting the life insurance proceeds from the insured's creditors).

However, other forms of trusts can also be created depending on the terms of the life or group policy itself. A third party claimant's rights to insurance proceeds will turn on whether the terms of a policy expressly create a trust for the beneficiaries of the policy. Further it has to be ascertained from the wordings whether the policy holder reserved for himself the right to revoke any such trust created. A third party claimant's rights can also be defeated if policy holders, especially employers of group policies do not make it an obligation on their part to maintain or renew the policy and the discretion to do so, remains solely with them.

Life insurers can also include as an endorsement, as part of the policy terms that the policy holders are the absolute owners of the policy and that the insurers are not be bound to recognize any equitable or other claim to or interest in the policy and the receipt of the insured or the insured's legal representative alone shall be effectual discharged, (*Green v Russell* [1970] 2 Q.B.226). Words to this effect were also used in the case of *Annuar Bin Ismail v Tan Sri Tan Chin Tuan*, [1992] 1 MLJ 155 and these were held sufficient by the courts in Malaysia to defeat the claim by the third party claimant, who was not privy to the contract of insurance.

It would seem that the only type of contracts that will benefit from the express exclusion of the application of the CRTPA, are reinsurance contracts as the 1930 Act does not apply to reinsurance contracts. In reinsurance contracts, unless there is an express "cut through" clause, a third party insured will have limited recourse to seek the benefits under a reinsurance contract as the Courts have held, by and large that reinsurance contracts are very different creatures from insurance contracts.

Therefore, it would seem that the mere exclusion of the CRTPA by insurers in Singapore maintains

the status quo in the sense that a third party claimant can still rely on other existing statutory or common law rights to pursue a claim against an insurer under a contract of insurance, where no privity of contract exists.

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