Common complexities of motor and liability insurance, and some practical tips for managing them

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The fundamentals (1)

Historical development of insurance in Scotland

The general principles of insurance law are the same in both Scotland and England.

Cowan v Jeffrey 1998 SC 496 at 502, per Lord Hamilton:

> *"While a Supreme Court may, by re-assessment of existing authority and on grounds of legal policy, choose to take such a course, it is not one which a judge sitting in the Outer House of the Court of Session can readily take. Albeit English authority, including decisions of the House of Lords sitting on English or (as in Macura v Northern Assurance Co) Northern Irish appeals, is not technically binding on me, it is in a field such as the law of insurance highly persuasive and ought, in my view, to be followed unless there are principles of Scots law or conditions local to Scotland which dictate an alternative approach."*

The fundamentals (2)

What is insurance?

A contract *uberrimae fidei* (of the utmost good faith) which imposes a positive duty of disclosure on both the insurer and the insured.

A contract in which "*the insurer undertakes, in consideration of the payment of an estimated equivalent beforehand, to make up to the assured any loss he may sustain by the occurrence of an uncertain contingency*"- *Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co* (1883) 11 R 287 at 303, per Lord Justice-Clerk Moncrieff.

Four essentials: (a) the benefit received is money or money's worth; (b) the event insured against must involve some element of uncertainty; (c) there must be an insurable interest i.e. a subject in which the insured has an interest; and (d) the event insured against must be outwith the insurer's control.

The fundamentals (3)

Four material terms of a contract of insurance: (a) the definition of the risk to be covered; (b) the duration of the cover provided; (c) the amount and mode of payment of the premium; and (d) the amount of the insurance payable in the event of a loss.

Four main constituent parts:

- (a) Heading- contains identification details, specifying the insurer, the policy number, the duration of insurance, the premium payable, and the sum insured.
- (b) Contract details- outlines the duration of insurance (both commencement and termination), the sum insured, the premium payable, the risks insured against and exceptions thereto, and any terms incorporated from other documents.
- (c) Reverse side of the policy- unless expressly referred to, nothing on the reverse side of a policy is binding on the parties. It may deal with matters such as cancellation rights or dual insurance.
- (d) Docket- a summary of the policy, which may draw the insured's attention to important provisions. These may be made part of the contract by express incorporation.

The fundamentals (4)

Two categories of indemnity insurance:

First-party insurance- the risk insured against is that of loss or harm to the insured e.g. cyber insurance.

Third-party insurance- the risk insured against is for loss or harm to some third party which is caused by the insured.

Two main classes primary of compulsory third-party insurance in the UK: motor insurance, by virtue of sections 143-162/part VI of the Road Traffic Act 1988; and employers' liability insurance, in terms of the Employers' Liability (Compulsory Insurance) Act 1969.

Almost all other types of third-party insurance are, as a matter of law, non-compulsory, but are often highly desirable.

Construction/interpretation of insurance contracts (1)

An insurance contract, like any other contract, is to be interpreted in accordance with the principles discussed and set out by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at paras 10-13:

"10. ***The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning****. In Prenn v Simmonds [1971] 1 WLR 1381 , 1383H–1385D and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*

Construction/interpretation of insurance contracts (2)

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900 , para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. ***Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause*** *(the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571 , para 12, per Lord Mance JSC. ***To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.***

Construction/interpretation of insurance contracts (3)

13. ***Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.*** *Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571 , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.*"

Lord Hodge's approach was applied in the recent Scottish decisions of *Grant v Inter Hanover* 2021 SC (UKSC) 1 at 29, and *Network Rail Infrastructure Ltd v Fern Trustee 1 Ltd* [2022] CSIH 32 at para 20

Construction/interpretation of insurance contracts (4)

Take-away points from Lord Hodge's opinion in *Wood*- an insurance policy is to be (a) interpreted objectively (b), by asking what a reasonable person, (c) with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, (d) would have understood the language of the insurance contract to mean.

Yorkshire Water Services Ltd v Sun Alliance and London Insurance plc [1997] CLC 213 at 221, per Stuart-Smith LJ:

> *"1. The words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement. They must be construed in their context…*
>
> *2. A literal construction that leads to an absurd result or one otherwise manifestly contrary to the real intention of the parties should be rejected, if an alternative more reasonable construction can be adopted without doing violence to the language used.*
>
> *3. In the case of ambiguity the construction which is more favourable to the insured should be adopted; this is the contra proferentem rule."*

Construction/interpretation of insurance contracts (5)

Hawley v Luminar Leisure Ltd [2006] EWCA Civ 18 at paras 101-102, per Hallett LJ:

"101 …However, virtually every word in the English Language is capable of having more than one meaning, and most can have many different shades of meaning. The precise meaning to be ascribed to a word or phrase in a particular contract must therefore ultimately be decided by reference to its linguistic and here its commercial context.

102. The three principles identified [in Yorkshire Water Services] also serve to underline the caution which a court, seeking to identify the meaning of a word in a particular contract, must adopt when considering what assistance can be derived from either the word's acontextual meaning, or judicial decisions as to the meaning of the same word in a different contract. Because the contractual and commercial circumstances of each case are inevitably different, it can be positively dangerous to draw assistance from the acontextual meaning or from decisions of other courts as to the meaning of a particular word, when context is so important on issues of interpretation. Of course, very different considerations may apply where a particular word or phrase has a specific well-established meaning in a certain type of contract."

Motor insurance (1)

Sections 143-162/part VI of the Road Traffic Act 1988 - Consolidated Motor Insurance Directive 2009/103/EC

Three significant changes post-Brexit:

1. European Union (Withdrawal) Act 2018, section 6: (a) a UK court is not bound by any CJEU decision reached after 31 December 2020 and can no longer make preliminary references to the CJEU; (b) a UK court may nevertheless 'have regard' to CJEU decisions reached after 31 December 2020; and (c) existing decisions on EU legislation remaining part of domestic law after 31 December 2020—including motor insurance law—remain binding other than in the Supreme Court unless reversed by primary or secondary legislation.

2. European Union (Withdrawal) Act 2018, schedule 1: removal of possibility of *Francovich* damages.

3. The rights conferred by the Directives upon UK-domiciled persons injured in road traffic accidents in the EU have been removed.

Motor insurance (2)

Sections 143 and 145 of the 1988 Act- compulsory to have insurance against liability in respect of death or bodily injury to third parties (including passengers), and in respect of liability for damage to a third party's property.

Section 143 makes it an offence for any person to use, or to cause or permit any other person to use, a motor vehicle on a road or other public place unless there is in force a policy of insurance in respect of third-party risks as complies with the minimum requirements of section 145.

Any person- includes a limited company (*Briggs v Gibson's Bakery Ltd* [1948] NI 165; not restricted to the owner of a vehicle (*Williamson v O'Keefe* [1947] 1 All ER 307).

To use- the obligation to insure attaches to the user of the vehicle, not necessarily the driver- *Ellis v Hinds* [1947] KB 475. 'Use' includes the leaving of a car on a road, even though it is incapable at present of being mechanically propelled- *Elliott v Grey* [1960] 1 QB 367. 'Use' does not include use as a passenger – so, in *Brown v Roberts* [1965] 1 QB 1, where a passenger negligently opened her door and injured a pedestrian, without any control over the vehicle, she was held not to be using the vehicle in the statutory sense – unless the passenger owns the vehicle, where they are to be taken as using it- *Bretton v Hancock* [2005] EWCA Civ 404.

Motor insurance (3)

Employment and use- the 'user' of a vehicle driven by an employee can be that driver's employer- *Lees v MIB* [1952] 2 TLR 356. An employer remains the user of the vehicle even if the employee is acting in contravention of her instructions, so long as the employee's acts remain within the course of their employment- *James & Son Ltd v Smee* [1955] 1 QB 78. A full employment relationship is required before the employer is to be treated as the user- *Jones v DPP* [1999] RTR 1. Does not apply to an independent contractor working on the instructions of an employer- *Howard v GT Jones & Co Ltd* [1975] RTR 150.

To cause or permit any other person to use- of itself a criminal offence. To 'cause'- express or positive mandate to use a car in a particular way; to 'permit'- merely denotes express or implied licence to use a vehicle.

A motor vehicle- "*a mechanically propelled vehicle intended or adapted for use on roads*"- section 185(1). A vehicle is 'intended' for use on a road if that was reasonably contemplated as one of its uses. It is 'adapted' for that use if it is fit and apt for road use- *Burns v Currell* [1963] 2 QB 433. A motorbike adapted for scrambling has been held not to fall within the definition- *Chief Constable of Avon and Somerset v Fleming* [1987] 1 All ER 318. However, a dumper truck stolen from a quarry and driven on a road has been held to fall therein- *Lewington v MIB* [2017] EWHC 2848 (Comm).

Motor insurance (4)

A road or other public place- if not on a road or other public place at the *exact* time of the event giving rise to loss, then difficult to assert that the liability is caused by or arises from use of the vehicle on a road or public place. Insufficient that the vehicle had to be driven *from* a road or other public place *to* the locus on private land.

Lewis v Tindale [2018] EWHC 2376 (QB)- where the claimant was struck by a vehicle in a privately-owned field, after the defendant had deliberately driven from a public road through a metal fence, it was held that his injuries had not been caused by the use of the vehicle on a road or other public place. That analysis was subsequently affirmed by the Supreme Court in *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd* [2019] UKSC 16.

Motor insurance (5)

Actions for the proceeds of compulsory motor insurance policies

Road Traffic Act 1988

Sections 151-152- an extensive remedy for an injured pursuer to seek redress against the insurer of a negligent driver. A statutory mechanism for the pursuer to enforce a decree against the insurer.

To bring a claim against an insurer under section 151 it is necessary first for liability to be established against the driver (the duty under section 151 is, of course, to satisfy *decrees*). That requires the driver to be positively identifiable, not merely an unknown person who drove the vehicle. In those circumstances, the only recourse is against the MIB by way of an untraced driver claim- *Cameron v Liverpool Victoria Insurance Co* [2019] UKSC 6.

Section 152 provides an insurer with immunity from liability in action brought against them under section 151, if any of four defences are made out- section 152(1)(a), section 152(1)(b), section 152(1), section 152(2).

If the insurer is required to compensate under a policy which was voidable or cancellable as against the insured, the insurer has a right of recovery against the insurer to the extent of that payment- section 151(7)(b).

Motor insurance (6)

European Communities (Rights Against Insurers) Regulations 2002

In general terms, the pursuer may, as an alternative to first obtaining decree against the negligent insured under section 151 of the 1988 Act, instead proceed directly against the insurer.

In such proceedings, the pursuer steps into the shoes of the insured, in accordance with regulation 2(3): "*the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person*".

The insurer has the right to defend the proceedings on the basis that their insured was not liable to the pursuer, and also on the basis that, for whatever reason, the policy did not respond to the claim.

Motor insurance (7)

Regulation 3(1) provides that a direct action may be brought against the insurer if four conditions are met:

1. The pursuer is an entitled party- defined as an EU or EEA national, or a British national.

2. The pursuer has a cause of action against an *insured* person in delict. That extends to a person who is not the policyholder, but who is insured to drive the vehicle under the policyholder's policy. It also extends to a person who is not the owner of the vehicle, but is insured to drive it where her own policy extends to driving any other vehicle- *Advantage Insurance Co Ltd v Stoodley* [2019] RTR 7.

3. The cause of action arises from an accident- defined as meaning an accident on a road or other public place in the UK caused by, or arising out of, the use of any insured vehicle.

4. The accident was caused by or arose out of the use of a vehicle on a road or other public place in the UK- defined as any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer whether or not coupled, which is normally based in the UK.

Motor insurance (8)

There are two main situations in which direct action under the 2002 Regulations is unavailable, and in which the pursuer will need to resort to obtaining decree against the driver which can then be enforced against the insurer under section 151:

1. Any defence which the insurer has against the driver will prevail against the pursuer- *Allen v Mohammed* [2017] Lloyd's Rep IR 73.

2. Section 151 allows an action to be brought against the insurer in respect of the uninsured use of the vehicle. The 2002 Regulations do not extend to such a case, as they simply transfer to the pursuer the insured's claim on the policy.

Motor insurance (9)

Uninsured and untraced drivers

The Uninsured Drivers' Agreement 2015- applies to accidents occurring on or after 1 August 2015. It is concerned with cases in which the driver responsible for causing a motor vehicle accident is identified but is not insured against the risks for which insurance is required under part VI of the 1988 Act.

The Untraced Drivers' Agreement 2017- applies to accidents occurring on or after 10 March 2017. It is concerned with cases where the identity of the driver, or any one of the persons responsible for the accident cannot be ascertained.

A claim is to be made against the MIB only where there is no insurer with responsibility for the pursuer's loss. It is the fund of last resort. If the MIB is involved by a pursuer where there is an identifiable insurer who has accepted liability, the court may order that the MIB's costs be borne by the pursuer or his solicitors- *Severn Trent Water v Williams* [1995] CLY 3724.

The MIB's liability is restricted to the range of risks which are subject to the compulsory insurance regime under part VI of the 1988 Act. Their liability depends upon an actual or notional finding of negligence against the driver whose liability the MIB is asked to accept.

Motor insurance (10)

The Uninsured Drivers' Agreement 2015

Clause 3- subject to the exceptions, limitations and preconditions in the 2015 Agreement, if a pursuer has obtained an unsatisfied decree against any person in a Scottish court, then the MIB will pay the relevant sum (plus interest and expenses) to the pursuer, or will cause that sum to be paid.

Clauses 12 to 15- preconditions to the MIB's obligation. Some administrative, all exacting.

Clause 6- situations where the MIB's liability is excluded by virtue of the pursuer having other sources of recovery. The MIB will not meet subrogated claims. In terms of clause 6(1), the MIB is not liable to meet "…*any claim, or any part of a claim, in respect of which the claimant has received, or is entitled to receive or demand, payment or indemnity from any other person (including an insurer), not being the Criminal Injuries Compensation Authority or its successor*."

Clause 6(3) extends the scope of what is deemed a subrogated claim: *"An entitlement to receive or demand, payment or indemnity in paragraph 1 extends to where the insurer, under a contract of insurance or any other insurance, regardless of when such insurance was incepted, does not make the payment or provide the indemnity because the claimant: (a) has not made or does not make a claim under that insurance; (b) has made or does make a claim under that insurance but not within its stipulated timeframe; or (c) has incurred a liability to any other person where that liability could have been avoided by making a claim under and in accordance with the provisions of that insurance."*

Motor insurance (10)

Clause 8 provides an exception to the MIB's liability for passenger claims in certain circumstances.

Clause 8(1) excludes the MIB's liability where the claim is by a pursuer who, at the time of the use giving rise to that liability, was voluntarily allowing himself to be a passenger in the vehicle and, either before the start of the journey or thereafter when they could be reasonably expected to exit the vehicle, knew or had reason to believe that (a) the vehicle had been stolen or unlawfully taken, or (b) the vehicle was being used without there being in force in relation to its use a valid policy of insurance.

Clause 8(3) provides that the onus of proving the passenger's knowledge of these matters rests with the MIB. However, so far as clause 8(1)(b) is concerned, in the absence of evidence to the contrary, proof by the MIB that the passenger knew that the driver was disqualified from holding or obtaining a licence would be taken as conclusive proof that the vehicle was being used without a valid policy of insurance- clause 8(3)(c).

Clause 8(5)(b) provides that for the purposes of the exception, knowledge which the passenger had or had reason to have includes knowledge of matters which he could reasonably be expected to have been aware had he not been under the self-induced influence or alcohol or drugs.

Motor insurance (11)

White v White [2001] UKHL 9- ‘knew or ought to have known’. Per Lord Nicholls:

> *“The phrase "knew or ought to have known" in the agreement was intended to be coextensive with the exception permitted by article 1 of the Directive. It was intended to bear the same meaning as "knew" in the Directive. It should be construed accordingly. It is to be interpreted restrictively. "Ought to have known" is apt to include knowledge which an honest person who enters the vehicle voluntarily would have. It includes the case of a passenger who deliberately refrains from asking questions. It is not apt to include mere carelessness or negligence. A mere failure to act with reasonable prudence is not enough.”*

Accordingly, even if actual knowledge cannot be established, legal knowledge in the *White v White* sense will be sufficient.

Law v Ronald & MIB 2010 SCLR 542

Motor insurance (12)

The Untraced Drivers' Agreement 2017

The 2017 Agreement applies where the following cumulative conditions are satisfied:

1. The claim is in respect of the death of or bodily injury to any person or damage to property which has been caused by, or has arisen out of, the use of a motor vehicle (including a trailer) on a road or other public place in Great Britain- clause 3(1)(a).
2. The death of or bodily injury to any person or damage to property occurred in circumstances giving rise to a liability of a kind required to be covered by a contract of insurance under part VI of the 1988 Act- clause 3(2)(b).
3. The person who is alleged to be liable in respect of the death of or bodily injury to any person or damage to property is an unidentified person (and where more than one person is alleged to be so liable, all such persons are unidentified persons)- clause 3(2)(c).
4. The claim is made within the time limits provided for the victims of identified drivers bringing actions in delict by the Prescription and Limitation (Scotland) Act 1973.

Motor insurance (13)

- The limitations to the MIB's liability for untraced claims follow those for uninsured claims in terms of the 2015 Act.
- Determination of untraced claims is non-adversarial, and is adjudicated by the MIB itself, subject to a right of appeal by way of an arbitration process. The MIB cannot be sued as a defender in an untraced case because there is, of course, no driver against whom proceedings can also be directed.
- Clause 12 sets out the determination process. The MIB must at its own cost carry out all reasonable inquires to investigate a claim in order to decide whether to make an award and, if so, the amount and form of the award or payment. Where the MIB concludes that the claim falls outside the 2017 Agreement, or that it is within the 2017 Agreement but for one or other reason there is no liability, the claimant must be given a written reasoned decision to that effect- clause 12(2)-(3). In the same way, an award must be accompanied by written reasons- clause 12(4)-(5).
- Where an award is made, clause 21 sets out the expenses regime. It is a fixed scale of fees plus reasonable outlays, and is comparable to that within the pre-action protocol.

Employers' liability insurance (1)

Employers' Liability (Compulsory Insurance) Act 1969, section 1(1):

"Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain, insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or diseases sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain."

Section 1(2) requires that insurance is taken out up to a value of £5 million per 'occurrence', including costs and expenses incurred by the employer in respect of any claim.

Section 2(1) defines an employee as "*any individual who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, whether such a contract is express or implied oral or in writing*." Independent contractors used by the employer, and other visitors to the employer's premises, are not included with the scope of the 1969 Act. Also excluded are near relations of the employer- section 2(2)(a).

Employers' liability insurance (2)

In terms of section 2(2)(b), there is no obligation to insure in respect of employees not ordinarily resident in Great Britain.

The insurance requirement is imposed only in respect of bodily injury or diseases, including claims by bereaved relatives.

Not all risks to which an employee is exposed are insured against. Insurance only needs to cover the liability of an employer to his employees arising out of the course of his employment. That term is likely to be interpreted in the same manner as the well-known part of the common law test for vicarious liability, per *Mohamud v WM Morrisons* [2016] UKSC 11 et al.

Employers' liability insurance (3)

Failure to insure

There is no equivalent to the MIB or any central fund of insurers to pay out in the event that the employer does not insure.

Section 5 provides that an employer who fails to conform with the requirements of section 1(1) is guilty of a criminal offence. But- what about an injured employee trying to obtain the value of a worthless decree against the employer? Does the 1969 Act create a civil liability against the directing mind(s) of the company that had caused the company to be uninsured?

David Richardson v Pitt-Stanley [1995] QB 123

Campbell v Gordon [2016] UKSC 38

Employers' liability insurance (4)

The employer's insolvency

If the employer becomes insolvent at a time when it is liable to an employee, that employee is entitled to stand in the shoes of the employer in relation to its liability policy in terms of the Third Parties (Rights Against Insurers) Act 2010.

Sections 1(3) and 3 permit a third party (the employee) to bring proceedings to enforce the rights of a relevant person (the employer) under a contract of insurance without the relevant person's liability to pay damages to the third party having been established, and that by way of declarator as to the insurer's potential liability to indemnify the relevant person.

That change removed the need to retore the insolvent employer to the register of companies. It allows for there to be a declarator of liability against the employer, and additionally the liability of the insurer to meet that declarator.

Employers' liability insurance (5)

Transfer of the employer's business

Under the TUPE Regulations 2006, any transfer of an undertaking from one employer to another is not to prejudice the rights of the transferor's employees. The effect of the 2006 Regulations is that the transfer does not terminate the employment contract, and that the transferor's obligations and liabilities towards the employee are transferred to the transferee.

In the joined cases of *Martin v Lancashire CC and Bernadone v Pall Mall Services* [2000] Lloyd's Rep IR 665, employees were injured due to the negligence of the transferor employer, and subsequently the undertaking passed to the transferee. The Court of Appeal held that the 2006 Regulations were to be taken as transferring to the transferee the transferor's claim against its liability insurers.

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