The impact of Covid-19 on claims

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Changing Perceptions

Introduction

The Covid-19 emergency response measures introduced up to the date of this note will have a significant impact on ongoing litigation. In this briefing note, we outline below some issues for insurers to keep alive to when reviewing existing and prospective claims:

Recovery prospects

It is inevitable that there will be a Covid-19 triggered recession but hopefully this time the slowdown will be short, unlike the last recession. However, during the last recession there were opportunities to work on projects overseas in countries which were not as affected thereby providing alternative sources of income to certain practices. Given the far-reaching global impact of Covid-19, this alternative source of work is now extremely limited. This disruption, caused by Covid-19, inevitably means that many businesses will have less financial resources and time available for disputes. Businesses will be otherwise distracted in trying to firefight a plethora of issues ranging from the health and safety of staff to keeping the business afloat. Many SME practices are indicating that they will not survive a significant period of shut down with cash flow becoming an issue.

It is important to now be alive to the fact that a party to a claim may fall insolvent as the shutdown continues and will not be a financial mark for recovery down the line. This is especially important to consider in claims where an insured is one of many defendants to a claim. As there is an ever-increasing risk that co-defendants could fall insolvent this in turn could give rise to a situation whereby insured defendants get caught with the 1% rule as was very common during and after the last recession.

The 1% rule is known as the principle of "joint and several liability". Under Part III of the Civil Liability Act 1961 (section 11 and Section 12(1)), where two or more people are responsible to a third party (the plaintiff) for the same injury or damage, they are considered to be "concurrent wrongdoers" and are each liable for the whole of the damage in respect of which they are concurrent wrongdoers. Therefore, if a plaintiff sues two defendants who are concurrent wrongdoers and both are found liable to some degree for the damage, the plaintiff can execute the whole award against either or both of them. If an insured (as a concurrent wrongdoer) is found to be only 1% liable for the same damage, the plaintiff can look to the insured for 100% of the award. This can result in a defendant (most often its insurers) paying more than the proportionate share in damages when the other defendants do not have insurance or enough assets to cover their share. As a result, it is called the 1% rule, because all it takes is a finding of 1% liability to potentially put the insured on the hook for all of the damages.

Given that tough economic times lie ahead, plaintiffs will obviously look to the better mark for damages to meet the award, as has happened so much in the past. Insurers should factor this in when reviewing claims.

Security for costs

A defendant will not be the only party vulnerable to collapse, as plaintiffs will be also affected. In claims involving plaintiff companies, consideration should be given as to whether that company has been hit hard financially as a result of the Covid-19 crisis with a view to ascertaining whether there is a reasonable chance of bringing a security for costs application in due course. This could give a strategic advantage to a defendant, faced with proceedings from an impecunious corporate plaintiff.
A security for costs order requires the plaintiff to lodge in court a sum of money as security for the defendant's costs, in the event the plaintiff's claim is unsuccessful. If the plaintiff is a company, the defendant must establish that it is unlikely to be able to pay costs if the plaintiff were to lose the case.

S.52 of the Companies Act 2014 provides that:

"Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

However, there are certain evidential and legal hurdles that must be overcome by a defendant before a court would order a plaintiff to provide security for costs in a claim, which are outside the scope of this briefing. A real potential difficulty will be in obtaining the accounts of a corporate plaintiff, as up to date financial accounts will only be filed at year end. Therefore, this would be something to look at in time if a plaintiff company shows no signs of recovery post crisis.

Strategically, the threat of an application for security for costs on a plaintiff facing financial difficulty could also be a useful deterrent for warding off litigation by focusing a plaintiff's mind on the merits, and costs, of its case, and so could achieve much more than just securing costs.

Court delays

Another issue to bear in mind is that the Irish Courts will inevitably be overwhelmed in the months to come as efforts have been made to curb the spread of Covid-19. In the High Court all Non-Jury, Judicial Review, Chancery, Commercial and Family Law cases are being adjourned generally with liberty to re-enter. These measures are expected to be in place for the foreseeable future, with only emergency and other specific applications expected to take place. However, we do note that the Irish Courts are proposing to carry out trials by video link at the end of April.

Insurers should be mindful that going forward there may be lengthy postponement of trials and hearings pushed back. There will inevitably be an even further delay to court procedures and court lists thereby rendering the possibility for settlements and other forms of ADR done remotely to be a speedier and more realistic alternative for resolving disputes.

A situation could arise where the courts become more draconian in their approach to case management time tabling when restrictions ease in an effort to address the back-log of case load.

Client Resources

Insured clients currently involved in existing claims will now face their own in-house operational challenges around reduced staffing and resource issues, which are then likely to be followed by a period of heavy workloads during the subsequent catch-up period. This may render clients with less time to deal with such claims. Issues of social distancing and remote working may also mean less time to deal with witness statements, site inspections, experts etc in dealing with claims for instructing solicitors and insurers.

For claims in their infancy, issues will also arise from delays in having expert witnesses appointed to deal with claims and in carrying out independent physical inspections and so on.

Review settlement strategies

In light of the above-mentioned issues, now could be a good time for insurers to review claim settlement strategies as the risk profiles of many parties to a claim may change as the Covid-19 crisis continues. Settlements could be considered using services via remote, telephone and video link services.

Solicitors operating remotely may have more time now to discuss potential settlement offers and plaintiff businesses may find such settlement offers enticing given that cash flow is likely to be a significant issue for them. Given the current pandemic, claims may be delayed beyond a matter of months into years with a situation of catch up then arising. This will, by implication, have an added impact on the overall costs of the claim for each party and, most importantly on reserving.

Further Information

Caytons is a provider of specialist insurance and construction legal services.

This material is provided for informational purposes only and does not constitute legal advice.

Given that the Covid-19 pandemic is a fast-evolving situation, this note is relevant to the situation existing as of 6th April 2020.

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