September 2019

Insurers must pay costs of coming off record

Susan Levingstone v Arthur O'Leary, Aidan Kenny and Paddy Kelly [2019] IEHC 550 (High Court, Barrett J, 17 July 2019)

A recent decision of the High Court provides some insight as to the extent to which an insurer may be liable to pay costs when it instructs its solicitors to come off record for an insured in legal proceedings, on the basis that they are refusing to provide indemnity/cover in respect of the proceedings.

Background

LK Shields applied for an order to come off record for Mr. O'Leary, the first named defendant, in circumstances where Liberty Insurance, Mr. O'Leary's insurer, had refused to provide indemnity/cover as a result of the failure by him to respond to correspondence from LK Shields about the case.

Coming off record

The court noted that since the Supreme Court decision in *O'Fearail v. McManus*, the general view is that the courts should not place a solicitor and a client into a "*forced form of liaison*". The court also noted the comments made by the judge in *Moloney v Malhas & Ors* that *"in deciding an application to come off record in … insurance cases, it is no function of the court to decide whether the insurer was or was not entitled to repudiate liability*". However, while an insurer is

For further information on any of the issues discussed in this article please contact:

Rachel Turner
Senior Associate, Litigation
DD: + 353 (0)1 673 1845
rachel.turner@dilloneustace.ie

Thomas Kelly
Trainee, Litigation
DD: + 353 (0)1 673 1895
thomas.kelly@dilloneustace.ie

entitled to come off record, there can be consequences from a costs perspective if they do.

Costs

The court noted that the position with costs had been comprehensively dealt with in *Moloney*. The court said it was free to make three types of orders relating to costs: (i) no order as to costs; (ii) an order for the costs of the motion; and (iii) an order for costs beyond the costs of the motion. LK Shields argued, as the court had found in *Moloney,* that a plaintiff would have to show that there was an "*unusual feature*" to a case to lead the court to depart from the standard award of the costs of the motion only.

In this case, the court was of the view that an "*unusual feature*" did exist in circumstances where, in the face of the persistent failure by Mr. O'Leary to respond, it did not see that it should have taken close on six years for the insurer to decide that he was in breach of condition 7(a)(iv) of the policy (which required Mr. O'Leary to give any information and assistance as the insurer required).

The court was of the view that by the time the second batch of reminder letters were sent to Mr. O'Leary, close to three years after the initial letter was sent, and with LK Shields (and the insurer) being no further down the road in terms of getting him to provide the necessary information and assistance, the insurer was in a position to decline cover on the basis eventually proceeded with.

The court emphasised that its comments in this regard were not to determine whether the insurer's decision to decline cover was valid or not - but rather to determine when the court considered the handling of matters strayed into such an extraordinary level of delay as to constitute an "*unusual feature*". The court was of the view that the insurer had been responsible for an extraordinary level of delay.

Conclusion

The court allowed LK Shields to come off record, subject to the condition that Liberty must bear the costs of the application and also any costs borne by the plaintiff in processing her claim against Mr. O'Leary from 5 February 2015, the date on which the court was of the view that Liberty was in a position to decline cover on the basis eventually proceeded with, to the date of the application. The court held that if the insurer was prepared to give an undertaking to the court to discharge the costs as outlined, the matter would be dealt with on that basis, otherwise, it would have to be joined as a party to the proceedings for the purposes of ensuring recovery of those costs.

Comment

Where an insured is being uncooperative, an insurer will be required to give enough time to allow the insured the opportunity to engage with them. In such circumstances, the insurer will have to take care, however, not to allow for more time than may be deemed necessary to establish that cover is being declined. If a court feels that there has been excessive delay in making a decision to

decline, the insurer will be liable not only for the costs of an application to come off record but also any costs incurred by the plaintiff in pursuing a defendant for any period after which the insurer could be considered to have delayed in making its decision.

Dillon Eustace
September, 2019

DILLON EUSTACE

Dublin
33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands
Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York
245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo
12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.