Neutral Citation No. [2016] NIQB 49 | *Ref:* STE9893

Judgment: approved by the Court for handing down | ***Delivered:*** 1-6-16
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

PHILIP FLANAGAN

Plaintiff:

-and-

AIG (EUROPE) LIMITED

Defendant:

_____

STEPHENS J

Introduction

[1] The plaintiff, Philip Flanagan, seeks an indemnity under an insurance *Policy* issued by the defendant, AIG (Europe) Limited, in respect of the plaintiff's liability to pay compensation for a statement published by the plaintiff on his Twitter account on 1 May 2014 which defamed Thomas Elliott. It was agreed that the defamatory meaning of the tweet was that Mr Elliott "was responsible for harassing and shooting people during his service with the UDR." On 3 February 2016 the amount of compensation to be paid by the plaintiff to Mr Elliott was assessed at £48,750 and the plaintiff was also ordered to pay Mr Elliott's costs. The defendant refused to indemnify the plaintiff in respect of the claim made by Mr Elliott initially on the ground that its *Policy* of insurance provided cover for injury or damage to a third party and that as both Mr Elliott and the plaintiff were members of the Northern Ireland Assembly ("the Assembly"), there was no cover. Subsequently the defendant articulated a number of other grounds for refusing to indemnify the plaintiff in respect of Mr Elliott's claim.

[2] Mr McDonnell appeared on behalf of the plaintiff and Mr Millar on behalf of the defendant. I am grateful to counsel for their careful preparation of the case and their well-marshalled written and oral submissions.

The insurance policy

[3] In this part of the judgment I will set out the provisions of the *Policy* upon which the plaintiff relies and then, with reference to the *Policy,* set out the basis upon which the defendant contends that it is not liable to the plaintiff. In doing that various words and expressions in the *Policy* are defined in the part entitled "General Definitions." Those words are placed in italics in the *Policy* and are in italics in this judgment.

(a) **The *Insured***.

[4] The *Insured* is defined as meaning the party detailed in the *Policy* schedule. That schedule details the *Insured* as "Northern Ireland Assembly and Northern Ireland Assembly Commission." The Assembly was established by Section 1 of the Northern Ireland (Elections) Act 1998. The defendant states that the Assembly has no separate legal personality but rather that collectively it is made up of the 108 Members of the Legislative Assembly ("MLAs") who have been elected to it. The defendant acknowledges that the plaintiff, as an MLA, is one of the persons insured by the *Policy* and that he can sue on foot of it.

(b) **The excess**.

[5] Endorsement number 3-NSW00775 to the *Policy* imposes an excess on the plaintiff so that the defendant shall not be liable for the first £25,000 of any amount payable in respect of libel or slander. If the outcome of this litigation was in favour of the plaintiff then he would not be entitled to any relief in respect of the first £25,000 that has been awarded to Mr Elliott.

(c) **The section of the *Policy* upon which the plaintiff relies**.

[6] The plaintiff relies on section 2 of the *Policy* which contains the insuring agreement in respect of public and products liability. That section is in the following terms:

> "The *Insurer* will indemnify the *Insured* for all sums which the *Insured* becomes legally liable to pay as damages or compensation consequent upon (a) *Personal Injury* to any person not being an *Employee*; … happening during the *Period of Insurance* in the *Policy Territory* and arising from or in consequence of an *Occurrence* in connection with the *Business*."

(d) **The issues in relation to Section 2 of the *Policy* which are agreed**.

[7] In relation to Section 2 of the *Policy* it is common case that

a) the *Insurer* is the defendant;
b) one of the *Insured* is the plaintiff;
c) *Personal Injury* has an extended meaning so as to include libel, slander and defamation of character;
d) Mr Elliott is not an *Employee*
e) the publication occurred during the *Period of Insurance*;
f) the publication was within the *Policy Territory*;
g) an *Occurrence* includes any defamatory statement.

(e) **The provisions of the *Policy* upon which the defendant relies and the grounds upon which the defendant refuses to indemnify the plaintiff**.

i. Extent of the cover not including claims between MLA's

[8] The defendant contends that the *Policy* only extended to cover an MLA's liability to pay compensation for libel and slander of third parties and did not cover any liability if both the person making the defamatory statement and the person about whom the defamatory statement was made, were MLAs.

ii. Insured's Business.

[9] The defendant contends that the plaintiff's claim does not fall within section 2 of the *Policy* on the basis that the *Occurrence* was not in connection with the *Business*. In the *Policy* schedule the *Insured's Business* is defined as

> "Parliamentary and Constituency activities related to and consequent upon Membership of the Northern Ireland Assembly but excluding activities directly relating to the promotion or membership of any Political Party and Property Owners."

The defendant contends that to send a Tweet of this nature was neither a Parliamentary activity nor a Constituency activity and accordingly that the matter does not fall within section 2 of the *Policy*.

iii. Knowledge of the defamatory nature of the tweet.

[10] The defendant contends that it is not obliged to indemnify the plaintiff on the basis that the libel was made with the knowledge of its defamatory nature. It is common case that endorsement number 3-NSW00775 was incorporated into the *Policy*. That endorsement whilst reciting that Section 2 of the *Policy* extends to

indemnify the *Insured* in respect of an *Occurrence* arising out of libel and slander, goes on to impose the following condition:

> "Provided always that - (a) Indemnity will not apply in respect of any libel or slander that is … (ii) made by … the *Insured* … with the knowledge of the defamatory nature thereof."

Accordingly it is a condition of the *Policy* that Indemnity will not apply if the Tweet was made with the knowledge of its defamatory nature. The defendant asserts that the plaintiff posted the tweet with "the knowledge" of its "defamatory nature" and accordingly that the defendant is not obliged to indemnify the plaintiff. The defendant accepts that an insured would not have knowledge of the defamatory nature of a publication if they believed that it was true or that they believed that they had some other defence available to them to a libel action.

iv. Reasonable precautions.

[11] The defendant contends that it was a condition precedent of the *Policy* that the *Insured* must take all reasonable precautions to prevent loss or damage and that the plaintiff was in breach of that condition.

[12] The "Reasonable Precautions" condition is in the following terms:

> "The *Insured* must take all reasonable precautions to prevent injury, loss or damage and maintain all property in good repair and comply with all legal and regulatory obligations to minimise any loss or injury. A failure by the *Insured* to take all reasonable precautions will mean that the *Insurer* can refuse to pay all relevant claims."

The defendant contends that the plaintiff took no precautions prior to the publication of the defamatory Tweet and accordingly that the defendant can and has, refused to pay the claim which was subsequently made by Mr Elliott.

v. Notification of the claim.

[13] The defendant contends that the plaintiff failed to notify it of the claim in accordance with the "Notification of Claims" condition which is to be found in the "Claims Conditions and Procedures" part of the *Policy*. The Notification of Claims condition is in the following terms:

> "In the event of any incident or circumstance which may result in a claim under this *Policy* the *Insured* shall:
>
> (a) as soon as possible report details of any claim to the *Insurer* in writing;

(b) immediately notify the *Insurer* of any impending prosecution, inquest, fatal injury or civil proceedings;

(c) forward to the *Insurer* all claim notifications received by the *Insured* including all other documents received or served;

(d) provide all information, evidence, documentation, periodic updates and assistance as the *Insurer* may require."

The defendant contends that this condition is a condition precedent, giving it the right to refuse to pay the plaintiff's claim and in that respect it relies on wording which states:

> "The following conditions and procedures are applicable to the *Insured* in respect of the whole *Policy*, except as noted. If the *Insured* does not take the measures required in accordance with these Claims Conditions and Procedures the *Insurer* can refuse to pay the relevant claim under this *Policy*."

[14] The defendant contends that as the letter of claim from Mr Elliott's solicitors is dated 2 May 2014 and the first notification by the plaintiff to the insurers was on 19 August 2014 that there has been a breach of the requirements to as soon as possible report details of any claim to the *Insurer* and to immediately notify the *Insurer* of any impending civil proceedings. The defendant also contends that as the writ of summons was issued by Mr Elliott on 2 June 2014 and was served on the plaintiff by letter of the same date and given that the defendant was first notified by the plaintiff on 19 August 2014 that also there has been a breach of the requirement to forward to the *Insurer* all claim notifications received by the *Insured* including all other documents received or served. The defendant contends that it can and has refused to pay the claim which was made by Mr Elliott.

vi. Control of claims condition.

[15] The defendant contends that the plaintiff acted in breach of the control of claims condition which is in the following terms:

> "The *Insured* will not negotiate, admit liability or make any promise to pay or settle a claim made against the *Insured* without the *Insurers* written consent."

The defendant contends that by letter dated 26 September 2014 the plaintiff admitted liability to Mr Elliott and promised to pay compensation to Mr Elliott. That at the time that this letter was sent the plaintiff did not have the defendant's consent either in writing or at all. The defendant contends that it can and has refused to pay the claim which was made by Mr Elliott.

(f) **The further provisions of the *Policy* upon which the plaintiff relies**.

[16] The plaintiff referred to other parts of the *Policy* contending that any power which the defendant may have to refuse to pay a claim has to be exercised by it transparently and in a fair manner. Alternatively that those other parts of the *Policy* indicate that the conditions upon which the defendant relies are not conditions precedent but rather are innominate conditions. In that part of the *Policy* entitled "Notification of Claims" the defendant states:-

> "We pride ourselves on the skills and expertise of our claims team and their approach to the development and delivery of claims services which is both transparent and solution driven."

In that part of the *Policy* entitled "Commercial Lines Complaints Procedure" the defendant states:

> "We believe you deserve a courteous, fair and prompt service."

The plaintiff relies on the concepts of fairness and transparency which are espoused by the defendant and asserts that those concepts should be applied by the defendant when it considers whether to refuse to pay a relevant claim.

Factual background

[17] The factual background to this action is informed by the judgment in the action brought by Mr Elliott against Mr Flanagan which was delivered on 3 February 2016 under citation [2016] NIQB 8. Both parties included that earlier judgment in the papers relevant to the determination of this action. The plaintiff gave evidence in this action and in this part of this judgment I will set out the sequence of events as informed by all the evidence in this action which includes the judgment in the earlier action.

[18] Mr Elliott is from, and was educated in, County Fermanagh. He entered politics becoming a member of the Ulster Unionist Party and was first elected as an Ulster Unionist Councillor on Fermanagh District Council in 2001. Since that date he has been and remains, an elected public representative. He was an MLA between 2003 and 2015 and in May 2015 he was elected as the Member of Parliament for the constituency of Fermanagh and South Tyrone. Between September 2010 and March 2012, he was the leader of the Ulster Unionist Party.

[19] Mr Elliott is not only a politician but also between 1982 and 1992 he served in the Ulster Defence Regiment ("the UDR") and then between 1992 and 1999 he served in the Royal Irish Rangers which due to amalgamations became the Royal Irish Regiment ("the RIR"). His service was on a part time basis except for a period of 2 years and 9 months when he was a full time member.

[20] The plaintiff, Phillip Flanagan, is also a politician from, and was a public representative for, County Fermanagh and South Tyrone. He is a member of Sinn Fein and also was an MLA.

[21] It can be seen that as at the date of the publication on 1 May 2014 both Mr Elliott and the plaintiff were MLAs, they both held responsible positions representing the public, though they were members of different political parties. The work of MLAs involves participation on Mondays and Tuesdays in plenary meetings of the Assembly at Stormont and in committee meetings on Wednesdays and Thursdays. The plaintiff is a member of two statutory committees and one standing committee of which the Employment and Learning Committee meets on a Wednesday morning, the Public Accounts Committee meets on Wednesday afternoon and a Committee for Social Development meets on Thursday mornings. The work at Stormont is arranged so that on Fridays MLAs can engage in constituency work and the plaintiff has a constituency office in Enniskillen.

[22] In 2014 the plaintiff lived in his constituency and except when the Assembly was in recess he would travel by car to Stormont everyday Monday to Thursday arriving between 9.30 am and 10.00 am.

[23] The plaintiff gave evidence that on 1 May 2014 he was listening to the Nolan Show on Radio Ulster as he drove from his home to Stormont. The Nolan Show starts at 9.00 am and the plaintiff heard Mr Elliott contributing but was disappointed to hear a one-sided narrative being painted by him as to what happened during the conflict which had occurred in Northern Ireland. The plaintiff stated that the narrative which was being painted was that one side was responsible for the conflict and that was not a narrative shared by a significant number of the plaintiff's constituents. The plaintiff considered that Mr Elliott, a political representative, was on the radio articulating a viewpoint that would represent the views of some of Mr Elliott's constituents which viewpoint did not reflect the views of a significant number of the plaintiff's constituents. The plaintiff decided to publish a Tweet, on his personal twitter account, in order to highlight the fact that there are many questions to be asked of the UDR about its role in the conflict which role was not as a referee or spectator in the conflict but rather as a participant in what happened here over several decades. The plaintiff stated that his intention in publishing the tweet was to highlight the fact that not everyone shared the narrative expressed by Mr Elliott that there was necessarily one set of good guys and one set of bad guys involved in the conflict. The plaintiff published the tweet in response to the discussion which had taken place on the radio.

[24] The plaintiff stated that he considered the wording of tweet carefully before he sent it. That he composed a draft of the tweet but did not need to correct or alter the draft before he sent it. That he composed and sent it when he had arrived at Stormont and as he was in his car in the car park. The plaintiff stated that the Nolan Show, along with a number of other radio programmes, encourages listeners to

Tweet comments or questions so as to inform debate during the course of the programme. He therefore devised the tweet in the form of a question to be asked of Mr Elliott by the broadcaster. The plaintiff considered that he was asking a legitimate question as to the role of the UDR given that Mr Elliott had been a member of the UDR and that he did not intend to make an allegation against Mr Elliott. He had no evidence to suggest that Mr Elliott had harassed anyone or had shot anyone and he thought that he was asking a question rather than making an allegation against Mr Elliott.

[25] The tweet which the plaintiff published was in the following terms:

> "Tom Elliott talks to @StephenNolan about the past. I wonder if he will reveal how many people he harassed or shot as a member of the UDR."

The plaintiff stated that he certainly did not intend to defame Mr Elliott by posting that Tweet but rather at the time he considered it was a legitimate question in the context of the role of the UDR in the conflict in Northern Ireland. Furthermore that he expected that the answer to the question would be zero. That he remained of the view that the tweet was not defamatory until he had consulted his solicitors after the writ was issued by Mr Elliott. Thereafter he accepted that the tweet did have the defamatory meaning that Mr Elliott "was responsible for harassing and shooting people during his service with the UDR."

[26] The plaintiff stated that after posting the tweet he read a tweet from the victims' campaigner, Ann Travers, bringing to his attention that she believed the Tweet to be defamatory of Mr Elliott. The plaintiff stated that at that stage he did not consider the Tweet to be defamatory of Mr Elliott but nevertheless, given the views expressed by Ann Travers, the plaintiff decided to err on the side of caution by taking down the Tweet from his Twitter account so that it was removed it within an hour of the time of it being posted.

[27] On 2 May 2014 Mr Elliott's solicitors sent a letter of claim to the plaintiff. The letter identified the defamatory publication asserting that it was a most serious libel and was grossly defamatory. It also stated that it inevitably put the plaintiff's "security and welfare at risk of attack from inter alia Republican dissidents." It demanded the publication of an apology and the payment of damages though it concluded with the following paragraph:-

> "We would further advise that the issue of defamation and libel proceedings and the measure of damages associated therewith will be *influenced by the immediacy and nature of your response to this correspondence*." (emphasis added)

That paragraph emphasised and brought to the plaintiff's attention, the need for an immediate response. The plaintiff stated that he received the letter of claim but that he did not do anything about it at the time. He stated that he was shocked by its content, as to how serious the nature of it was. He had hoped that the issue had been resolved when he had deleted the Tweet.

[28] On 2 June 2014 Mr Elliott issued proceedings for defamation with the writ being served on the plaintiff by letter of the same date. After the plaintiff received the writ it was brought to his attention that there was an insurance policy that might cover him. He approached an official within the Assembly and requested a copy of the policy. He also instructed his solicitors and when he received the policy he gave a copy of it to his solicitors.

[29] The plaintiff's solicitors entered an appearance in the action commenced by Mr Elliott and the statement of claim in that action was served on 18 June 2014. Correspondence was then exchanged about the period within which the defence was to be served but in the event and by letter dated 26 September 2014 the plaintiff made a qualified offer of amends to Mr Elliott relying on Section 2(2) of the Defamation Act 1996. In that letter the plaintiff accepted that the publication had the defamatory meaning that:-

> "The plaintiff was responsible for harassing and shooting people during his service with the UDR".

The plaintiff stated that he was prepared to post an apology on his Twitter account as follows:-

> "On May 1 2014 I posted a tweet alleging that Tom Elliott was responsible for harassing and shooting people during his service with the UDR. I now accept this was untrue and wholly without foundation and I apologise for all offence caused."

The letter went on to say that the plaintiff would pay such compensation as can be agreed between the parties and reasonable costs to be agreed or taxed in default of agreement. The letter also stated by way of "background information" that "the tweet complained of was deleted within an hour of being posted and that it was seen by 167 of the Plaintiff's followers on Twitter, of whom six re-tweeted it and one favourited it."

[30] By letter dated 9 October 2014, Mr Elliott's solicitors accepted the plaintiff's solicitors' qualified offer of amends but sought some further response from the plaintiff.

[31] There was no response from the plaintiff to the letter dated 9 October 2014 and a reminder was sent to the plaintiff's solicitors on 16 December 2014. On 4

February 2015 the plaintiff issued a summons seeking an order for the offer of amends to be enforced which came on for hearing on 8 January 2016 and in the event proceeded in relation to the single outstanding issue as to the amount of compensation.

Consideration of the grounds upon which the defendant seeks to rely, in order to refuse to indemnify the plaintiff.

i. Extent of the cover not including claims between MLA's

[32] There was no express term in the *Policy* which excluded liability if the claim was made by another individual who also happened to be insured under the same *Policy*. The plaintiff contended that to exclude such liability there would need to be an express term in the *Policy* and in that respect called in aid a condition found in other policies issued by the defendant which does expressly exclude liability in such circumstances. That condition was in the following terms:-

> "The insurer shall have no liability under this *Policy* for any claim made by one insured against any other person or entity who was also an insured under this *Policy*."

There was no such condition in this *Policy*. Furthermore the plaintiff contended that frequently in household public liability policies there is a condition excluding cover where the claim is made by a close family member against the insured and that exclusion would apply irrespective as to whether both were insured by the *Policy*. The plaintiff contended that absent such a condition the *Policy* would cover the liability of one insured irrespective as to whether the claim emanates from another who is also insured by the same *Policy*. Faced with those contentions on behalf of the plaintiff Mr Millar on behalf of the defendant accepted that the *Policy* did in fact cover the liability of one MLA to another and that it was not restricted to liability to third parties. I consider that he was plainly correct to make that concession. If the defendant had wished to exclude cover for claims emanating from one insured against another then it should have done so. It did not.

[33] This ground of defence does not avail the defendant.

ii. Insured's Business.

[34] The defendant contends that to send a Tweet of this nature was neither a Parliamentary activity nor a Constituency activity and accordingly that the the defamatory publication was not in connection with the plaintiff's *Business* within section 2 of the *Policy*. Legacy issues are a matter of general importance in our society. In my view it is quite clear that the Tweet was both a parliamentary activity and a constituency activity.

[35] This ground of defence does not avail the defendant.

iii. **Knowledge of the defamatory nature of the tweet**

[36] It is common case that the plaintiff deliberately published the Tweet. The plaintiff states that he published the Tweet without knowledge of its defamatory nature. The evidence of the plaintiff was that he had no knowledge that it was defamatory to publicly ask Mr Elliott as to the number of people that he had harassed and shot as a member of the UDR. I reject the plaintiff's evidence and find that he had knowledge of the defamatory content of the Tweet at the time that he composed and sent it. The question was not asked about the UDR in general, about the role of which regiment, the plaintiff was deeply unhappy, given the strong allegations which had been made of association of some of its members with Loyalist terrorist groups. However, no sensible reading by the plaintiff of the question contained in the Tweet could lead to the view that it was directed at the UDR in general. The question posed by the plaintiff was aimed personally at Mr Elliott. Furthermore the question was not "*if*" Mr Elliott had shot or harassed anyone. The question *presupposed* that Mr Elliott *had* harassed and *had* shot people and the only issue was whether he would reveal the number that he had harassed and the number that he had shot. The defamatory nature of the tweet was so obvious that I conclude that subjectively the plaintiff had knowledge of its nature when he sent it. I also find that at the time that he sent it the plaintiff knew that he had no evidence to suggest that Mr Elliott had harassed or shot anyone.

[37] I also reject the plaintiff's evidence that he did not realise that the Tweet was defamatory when he read the Tweet from Ann Travers and that he only realised that the Tweet was defamatory when he consulted his solicitors after the writ issued by Mr Elliott, was served on him. As I have indicated I find that the plaintiff had knowledge of the defamatory nature of the Tweet when he sent it.

[38] I find that the defendant is entitled to rely on the proviso in Endorsement Number 3 – NSW00775 to refuse to indemnify the plaintiff.

iv. Reasonable precautions

[39] The conclusion which I have reached in relation to the plaintiff's knowledge of the defamatory nature of the Tweet also leads me to conclude that there was a breach of this term of the policy. The plaintiff did not take reasonable precautions in that he knew that he was publishing defamatory material at a time when he knew that there was no evidence upon which he could base a defence to any libel proceedings.

v. Notification of the claim

[40] An issue arose between the parties as to whether the condition upon which the defendant relies was a condition precedent or whether in order to rely on the condition the defendant had to establish any prejudice caused by reason of the

plaintiff's breach of the condition. I was referred to the decision of Bingham J in *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 2 All ER 395. In that case the requirement to give written notice to the insurer was expressly stated in the policy to be a condition precedent. Bingham J addressed a number of questions including whether assuming that there had been a breach of that condition could the insurers lawfully decline payment without showing that the failure to give timeous notice caused prejudice to them? The plaintiffs in that case submitted that even if there was a breach of the condition the insurers cannot rely on it without showing prejudice. Bingham J described this as "a surprising proposition" because the condition in question was included as a condition of the policy agreed between the insured and the insurers and expressed in clear terms to be a condition precedent to the liability of the insurer to make payment under the policy. He stated that on ordinary principles of contract, it seemed to him "that the insurer could rely on this breach of condition whether the breach caused him prejudice or not and whether the refusal of payment in those circumstances was in general terms meritorious or unmeritorious." Bingham J then reviewed the authorities and found no support for the requirement of prejudice and stated that, "as a matter of general contractual principle," it appeared to him that this cannot be required of an insurer before he relies on a breach of a condition precedent in the policy.

[41] In *Pioneer Concrete* Bingham J then went on to consider a further question which was if it was necessary for the insurers in to show prejudice in order to rely on a breach of condition (1), do they succeed in doing so? He stated that from *Farrell v Federated Employers Insurance Association Ltd* [1970] 3 All ER 632, [1970] 1 WLR 1400, [1970] 2 Lloyd's Rep 170, CA; affirming [1970] 1 All ER 360, [1970] 1 WLR 498 and from the observation of Mocatta J in *CVG Siderurgicia del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd, The Vainqueur José* [1979] 1 Lloyd's Rep 557 that relatively little prejudice will suffice. In that case Bingham J found prejudice in a number of respects stating that the insurers

> "…might have wished to try and negotiate some settlement. … On any showing the prejudice would not be very great, but in my judgment there would be some. If, contrary to my view, it is necessary for the insurers, in a situation such as this, to demonstrate any prejudice, then in my judgment they would be able to show some prejudice, although of a relatively slight kind."

I consider that if a condition in this *Policy* is not a condition precedent then the insurer has only to show a degree of prejudice of a relatively slight kind in order to rely on it.

[42] In relation to the question as to whether the terms in the *Policy* in this case were conditions precedent Mr McDonnell relied on paragraph 10-011 of the 13th edition of MacGillivray on Insurance Law which states

> "The effect of the insured's breach of such a term depends upon an interpretation of the clause in question in the context of the whole policy. Clauses requiring delivery of particulars of loss within a specified time have been construed as conditions precedent to recovery even where not expressed to be either a warranty or condition precedent, but it is unlikely that a court would take the same view today. The modern drafting technique is to include a general clause which declares that the due observance and fulfilment by the insured of all the obligations cast upon him by the policy terms shall be conditions precedent to any liability of the insurers to make any payment under the policy."

Mr McDonnell submitted that in the *Policy* there was no clause which declared that the due observance and fulfilment by the insured of all the obligations cast upon him by the policy terms shall be conditions precedent to any liability of the insurers to make any payment under the policy.

[43] The plaintiff received the letter of claim dated 2 May 2014 but did not as soon as possible report details of any claim to the *Insurer* in writing nor did he forward the letter of claim to the insurer. Furthermore the writ was not sent as soon as possible to the insurer. The first notification to the insurer was dated 19 August 2014. I find that the defendant has established on the balance of probabilities that there was a breach of the contractual obligation to notify the insurer.

[44] The next question is as to whether the condition was a condition precedent. There was no clear clause in the policy declaring that it was. The clause in the *Policy* states that "if the *Insured* does not take the measures required in accordance with these Claims Conditions and Procedures the *Insurer* can refuse to pay the relevant claim under this *Policy*." The word "can" gives discretion to the defendant which is not the nature of a condition precedent where irrespective of any consideration of a discretionary nature the liability does not arise. I consider that the notification condition is not a condition precedent. Accordingly in order to rely on a breach I consider that the defendant has to establish prejudice and that it has acted reasonably and honestly. I consider that there was clear prejudice to the defendant in that it could not attempt to negotiate settlement and could not at an early stage arrange for the publication of an apology. I find that the defendant can rely on a breach of this condition in order to refuse to indemnify the plaintiff

vi. Control of claims condition

[45] The plaintiff admitted liability and made an offer without the *Insurers* consent let alone written consent. There was a breach of the control of claims condition. I do not consider that this was a condition precedent but I find that there was prejudice to the insurer in that it could not ensure that the apology was published. I find that the defendant is entitled to rely on a breach of this condition to refuse to indemnify the plaintiff.

Conclusion

[46] I dismiss the plaintiffs claim and enter judgment for the defendant. I will hear counsel in relation to costs.