[2020] IEHC 658

**THE HIGH COURT**

**[2013 / 1925 P]**

**BETWEEN**

**STEPHANIE MOLONEY**

**PLAINTIFF**

**AND**

**CASHEL TAVERNS LIMITED (IN VOLUNTARY LIQUIDATION) AND LIBERTY INSURANCE DAC**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 10th day of December, 2020**

**Introduction**

1. The Plaintiff was employed by the First Named Defendant and alleges that she sustained an accident at work on 8 May 2010. Arising out of same, the Plaintiff issued a personal injuries summons dated 25 February 2013. At the time of the accident, the First Named Defendant had an insurance policy with Quinn Direct which subsequently became Liberty Insurance DAC (hereinafter "Liberty"). Liberty was first notified of the accident some seventeen months after it occurred. When the personal injuries summons was issued, it named only the First Named Defendant. The proceedings were set down for hearing and listed before Mr. Justice Haughton on 20 June 2017, in Waterford. On that date, and there being no appearance on behalf of the then - Defendant, Cashel Taverns Ltd., and on hearing oral evidence by the Plaintiff, an order was made that the name of the Defendant be amended to read "Cashel Taverns Ltd. (in voluntary liquidation)" and the court found that the said Defendant was negligent and assessed damages in the sum of €35,000 for general damages and €2,332 for special damages. The said order also granted the Plaintiff liberty to serve short notice of a motion returnable for 29 June 2017. On 29 June 2017, Haughton J. made an order, in the absence of any attendance by the Defendant, that Liberty be joined as a co-Defendant.

**Section 62 of the Civil Liability Act, 1961**

2. The Plaintiff's application to join Liberty was for the purposes of enforcing judgment and reliance was placed on s. 62 of the Civil Liability Act, 1961. It is appropriate at this juncture to quote that section in full as follows: -

***"Application of moneys payable under certain policies of insurance.***

*62. Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt or dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy or in the administration of the estate of the insured or in the winding-up or dissolution, and no such claim shall be provable in the bankruptcy, administration, winding-up or dissolution".*

**Moneys *payable* in respect of a *valid* claim**

3. It is fair to say that the import of the foregoing provision is that, where a company is wound up, and where "*moneys are payable*" to the insured company under an insurance policy in respect of a "*valid*" claim, such moneys do not constitute the assets of the company in question and such moneys are not available to discharge the company's debts. It is uncontroversial to observe that s. 62 does not create a blanket entitlement for a Plaintiff to receive moneys from an insurance company in respect of a policy which was maintained by a company which is subsequently wound up. On the contrary, s. 62 explicitly refers, inter alia, to moneys which are "*payable*". It is equally uncontroversial to say that if a policy maintained by a particular company was validly repudiated by the insurer, moneys will not be payable and, in such circumstances, s. 62 will not avail the Plaintiff. On behalf of the Second Named Defendant, Liberty, it is said that the foregoing is precisely what has arisen in the present case. At the heart of the application before this Court is Liberty's contention that it was entitled to repudiate the relevant insurance policy which the First Named Defendant had at the time of the accident. Liberty accepts that the onus is on it to prove that its repudiation of the relevant policy was valid and, in that context, the Second Named Defendant is, in effect, Plaintiff or Applicant in relation to the matter before the court, whereas the Plaintiff opposes Liberty's application.

**Matters which are not in dispute**

4. It is also appropriate to make clear, as Mr. Nolan for the Applicant did at the outset, that there is a considerable amount of common ground between the parties, in that the following is not in dispute: -

(i) It is agreed that an accident took place;

(ii) It is agreed that the Plaintiff was, at the time of the accident, employed by the First Named Defendant;

(iii) It is agreed that the Plaintiff suffered an injury and was out of work for a relatively short period of time, (there was some dispute as to whether this period amounted to two days, ten days or two weeks and this is something which will be discussed later in this judgment but, for present purposes, I am satisfied that nothing turns on the length of the Plaintiff's absence from work);

(iv) It is also agreed that the manager of the bar in which the accident occurred, a Mr. Patrick Horan, was aware of the accident on the day it occurred;

(v) It is also agreed that the First Named Defendant did not notify the insurer at the time the accident occurred;

(vi) Furthermore, it is agreed that the first time the insurer was notified of the accident was on 14 October 2011, which was some seventeen months after the accident which occurred at the First Named Defendant's premises on 8 May 2010;

(vii) It is agreed that, in or about July 2012, Liberty formally refused to indemnify the First Named Defendant and;

(viii) It is not in dispute that, prior to July 2012, Liberty advised the First Named Defendant on a number of occasions that it was late in relation to giving notice of the accident and that Liberty reserved its position.

5. At the heart of the matter before this Court is whether Liberty was within its rights to refuse to indemnify the First Named Defendant by reason of late notification. This is the key issue which this judgment considers. Two books of discovery documents were handed into court, comprising 1,003 pages of documentation in total.

**No witnesses as to fact**

6. Most helpfully, Mr. Nolan SC for Liberty, and Mr. Tracey SC for the Plaintiff agreed between themselves that it would not be necessary for Liberty to call any witness to prove any document. The concession made by the Plaintiff at the outset of the hearing was that anything written in any document could be taken as evidence. That concession was entirely appropriate and served to increase the efficiency with which the trial proceeded and the Court can only be grateful to Mr. Nolan and to Mr. Tracey, to the respective junior counsel and to the instructing solicitors on both sides, for ensuring this efficiency. Mr. Tracey, however, emphasised very clearly that no concession was being made on behalf of the Plaintiff with regard to the burden of proof resting on Mr. Nolan's client. Against the foregoing background, the only witness called to give evidence was Mr. Peter Sreenan, a gentleman with significant experience in the insurance industry, who was called to provide expert opinion. I will examine his testimony later in this judgment.

**The pleadings**

7. It is appropriate to refer briefly to the contents of certain of the pleadings, as follows. In the Plaintiff's personal injury summons, which was issued on 25 February 2013, the Plaintiff pleads, inter alia, that:-

*"(a) On or about the 8th of May 2010, the Plaintiff whilst present at the premises of the Defendant in the course of her employment was caused or permitted to lose her footing and fall on the stairway which had no protective handrail and thereby sustain severe personal injuries, loss and damage . . ."*

8. The foregoing plea appears at para. 3.a, whereas para. 5 goes on to plead, inter alia, that the Plaintiff's right ankle twisted causing her weight to come down on the ankle and that the Plaintiff struck her right shoulder off the wall, which broke her fall. It is also pleaded that the Plaintiff was taken to South Tipperary General Hospital where no bony injury was found on x-ray and it is pleaded, inter alia, that the Plaintiff was prescribed analgesics for extensive swelling and was given crutches and discharged with a plan to return for further radiology when the swelling had resolved. It is also pleaded, inter alia, that on 5 July 2011, further x-rays taken at South Tipperary General Hospital revealed degenerative changes attributed to the injury complained of.

9. On 22 July 2013 a notice for particulars was raised by a firm of solicitors, namely Martin C. Ryan & Co., who had come on record for the Defendant. It will be recalled that, at that point in time, the sole Defendant was described as "Cashel Taverns Ltd.". In para. 2 of the 22 July 2013 notice for particulars, the Defendant asks the Plaintiff whether there

were any witnesses to the alleged injury and to identify same, and, in replies to particulars dated 4 September 2013, Messrs Cian O'Carroll, solicitors for the Plaintiff, respond as follows:- "*2. Witnesses are not a matter for particulars. The Plaintiff reported the incident immediately to Mr. Pakie Horan, manager, and to waiter Dessie Taylor*".

10. It is clear from the foregoing that the Plaintiff identified Mr. Pakie (otherwise Patrick) Horan as the relevant "manager" of the premises in which the accident occurred and it was to this manager she immediately reported the incident on 8 May 2010. Later in this judgment, further reference will be made to Mr. Horan and his role but, at this juncture, it should be pointed out that it is accepted by all parties that Mr. Horan was indeed the First Named Defendant's manager "on the ground" so to speak. It is also common case that there was no other manager in charge of the premises in which the accident occurred.

11. As well as detailing, in the 4 September 2013 replies to particulars, the manner in which the Plaintiff alleged that the injury continued to affect her, the Plaintiff stated that she left the Defendant's premises at approximately 6 p.m. on the day of the accident and that she attended at South Tipperary General Hospital on 8 May 2010 at approximately 6:40 p.m. The replies provided by the Plaintiff at paras. 33 – 35 relate to the Plaintiff's absence from work due to the accident as well as the nature of her employment. It is appropriate to set these replies out verbatim as follows: -

> *"33. The Plaintiff believes that she was absent from work for a period of ten days but she is not sure of the precise duration of her absence. The reply to this particular should be within the knowledge of the Defendant who was the relevant employer.*
>
> *34. The Plaintiff ceased working with the Defendant approximately two years ago.*
>
> *35. The Plaintiff has gained employment since working for the Defendant. She works as a waitress on a full time basis".*

12. On 16 April 2015, Martin C. Ryan & Co., solicitors for the Defendant, delivered a Personal Injuries Defence. It is fair to say that, other than not requiring proof of the description of the parties, the fact of the Plaintiff's employment with the Defendant and the fact that the Plaintiff was working at the time of the alleged accident, the said defence put the Plaintiff on formal proof of the entirety of the claim made against the Defendant.

13. It is not in dispute that Messrs. Martin C. Ryan & Co. issued a notice of motion, dated 19 June 2017 which came before the High Court on 19 June 2017 and that, in circumstances where there was no attendance in court by the Defendant, an order was made on 19 June 2017 by Haughton J., declaring that Martin C. Ryan & Co. ceased to be the solicitors acting on behalf of the Defendant. Thus, solicitors came off record for the company and it was on the following day, 20 June 2017, and in the absence of any appearance in court by or on behalf of the Defendant, that Haughton J. made the order to which I have referred earlier and which, inter alia, ordered that the Plaintiff recover the sum of €37, 332.00 against the Defendant.

14. Earlier in this decision I also referred to the order made on 29 June 2017 joining Liberty as a co-Defendant. The Plaintiff's personal injury summons appears to have been amended on 14 July 2017 and the relevant amendments include the following. In para. 1(iii) it is pleaded that the Second Named Defendant was, at all material times, the insurer for the First Named Defendant. In para. 1(iv), the Plaintiff pleads that she was entitled to the benefit of the presumption that the policy of insurance in place in respect of her employment was valid. A specific plea which is of central importance to the issue which this Court has to resolve is made in para. 3(ii) of the Plaintiff's amended personal injury summons, as follows:-

*"3(iii) On or about the 13th December 2012 the Second Named Defendant wrongly and without proper justification refused to indemnify the First Named Defendant in respect of the aforesaid injuries".*

15. It seems clear that reference to the 13 December 2012 is incorrect and that, as a matter of fact, it was at the end of June 2012 when the Second Named Defendant, Liberty, notified the First Named Defendant's broker of its decision to refuse indemnity, and, shortly thereafter, Liberty wrote to the First Named Defendant accordingly. Nothing, however, turns on the fact that the incorrect date is pleaded in para. 3(ii). Central to the current dispute is the Plaintiff's reliance on the provisions of s. 62 of the Civil Liability Act, 1961 and it is appropriate, therefore, to quote verbatim, para. 5 of the Plaintiff's amended personal injury summons, as follows: -

"5. PARTICULARS OF WRONG PURSUANT TO S. 62 OF THE CIVIL LIABILITY ACT,1961 ON THE PART OF THE SECOND NAMED DEFENDANT, ITS SERVANTS OR AGENTS

*i. Failing to honour the policy of insurance in respect of the First Named Defendant and its premises*

*ii. Failing to prove that the policy of insurance was validly refused, rescinded or otherwise not honoured;*

*iii. Failing to adhere to the said provisions of s. 62 of the Civil Liability Act;*

*iv. Such further matters as may hereinafter be pleaded".*

16. In para. 7 of the amended personal injury summons, the Plaintiff seeks inter alia: - *"(iv) Enforcement of the High Court order of the 20th June 2017 as against the Second Named Defendant".*

On 23 August 2017, Messrs. Tormeys Solicitors, came on record for Liberty and on 25 May 2018 delivered the Second Named Defendant's defence. Given the matter in dispute, it is appropriate to quote verbatim the following paragraphs from the defence which comprises a total of nine paragraphs:-

*"4. It is denied that on the 13th of December 2012, this Defendant wrongfully and without proper justification refused to indemnify the First Named Defendant in*

*respect of the Plaintiff's alleged accident. On the contrary, it was a condition precedent of this Defendant's liability under and pursuant to the policy which had been issued to the First Named Defendant, that it should notify any occurrence which may give rise to a liability under the policy, regardless of the likelihood or prospect of such a claim being brought. In the context of the Plaintiff's proceedings, the First Named Defendant did not notify the Second Named Defendant, as it was bound to do, of the occurrence of that accident, until some seventeen months after its occurrence, on the 14th of October, 2011.*

*Accordingly, this Defendant was entitled, as the successor to the rights and obligations of Quinn Insurance, who had actually entered into the contract with the First Named Defendant, to refuse to indemnify the First Named Defendant under the said policy by reason of its clear breach of that policy.*

5. *Further, this Defendant does not accept, insofar as such an argument is going to be made, that the Plaintiff has a direct right or cause of action as against the Second Named Defendant under and pursuant to the provisions of s. 62 of the Civil Liability Act, 1961.*

6. *By reason of the foregoing, the proceedings herein are misconceived and defective, and are bound to fail, disclosing no reasonable cause of action, and are frivolous and vexatious, and further, ought to be dismissed pursuant to the court's inherent jurisdiction . . ."*

17. It appears that the Second Named Defendant issued a motion, dated 24 May 2018, seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts, striking out the proceedings as against Liberty on the grounds that the proceedings are frivolous and/or vexatious and/or disclose no reasonable cause of action. It is not in dispute that the proceedings were not struck out although the suggestion was made that the order made by the High Court on 9 July 2018 does not accurately reflect what was decided. Nothing turns on the foregoing in that the matter came for hearing before the court on 13 October 2020 and on 14 October 2020. Evidence concluded on 14 October 2020, at which point the parties agreed to prepare and exchange written legal submissions and to address the court in respect of their submissions at a later date. A day was set aside for the hearing of legal submissions and this took place on Tuesday 24 November 2020.

**Examination of the evidence in this case**

18. It will be recalled that, by agreement between the parties, anything written in any document can be taken as evidence. There is a considerable amount of documentation which is of relevance and, insofar as possible, I propose to examine the relevant documentation in chronological order, beginning with the relevant insurance policy.

**Insurance Policy no. GEI/COM/001526354, dated 5 May 2010**

19. It is not in dispute that the relevant insurance policy is one dated 5 May 2010 issued under policy number GEI/COM/001526354. It describes "The Insured" as being "Cashel Taverns Ltd. t/a Rock Bar". The business address is stated to be "Cashel, County Tipperary", whereas the business description is stated to be "Publican & Property Owner".

The period of insurance is stated to be 1 May 2010 to 30 April 2011. The renewal date is specified to be 1 May 2011. The premium is stated to be €14,000.00 and the risks covered are "Employer's liability, public/product liability, property damage, business interruption, computer equipment". Employer's liability is, of course, of particular relevance in the present case. The policy schedule comprises a total of 45 pages and it is not in dispute that the "General Policy Conditions" are set out from internal p. 41, onwards, of the policy schedule. Given that they play a central role in the dispute under discussion, it is appropriate to quote Clause 2 and from Clause 8 of the general policy conditions, as follows: -

***"2. COMPLIANCE WITH CONDITIONS***

*The due observance and fulfilment of the terms and conditions of this Policy and of any Endorsements herein insofar as they relate to anything to be done or complied with by the Insured shall be a condition precedent to any liability of the Company under this Policy . . ..*

***8. NOTICE AND CLAIMS PROCEDURE FOR CLAIMS UNDER LIABILITY INSURANCE SECTION(S) (Applicable if Liability Insurance cover has been provided)***

*In the event of any occurrence which may give rise to liability under this policy, and regardless of the likelihood or probability of a claim being brought under this policy:*

*(a) The Insured shall:*

*(i) notify the Company immediately on becoming aware of any incident or as soon as practically possible (or in accordance with any agreement made with the Company) and as soon as possible thereafter, provide any other documentation which the company may require with the (sic) regards to the occurrence; . . .*

*. . . .*

*(iii) forward to the company immediately on receipt every written notice or information as to any verbal notice of claim and any communication whatsoever relating to the occurrence;*

*(iv) give all such information and assistance as the Company may require and shall not hinder or obstruct the Company in obtaining this information.*

*(b) The Insured shall NOT negotiate, admit liability or make any promise, payment or settlement without the company's written consent;*

*(c) The Company shall be entitled:*

*(i) if and so long as it desires, to have sole conduct and absolute control of any claim and legal proceedings relating thereto and shall have full and absolute discretion in the settlement of any claim;*

*(ii) to prosecute in the name of the Insured for the company's benefit any claim for compensation or indemnity".*

20. Internal pages 2 to 4 of the policy schedule deals with "Employer's Liability Insurance". It is not in dispute that references to the "Company" can be taken to mean Liberty, insofar as the present dispute is concerned. Internal page 4 and 5 sets out a number of "Employers' Liability Definitions" and, given that certain of these definitions were focused on by the Plaintiff, it is appropriate to set out, verbatim the following definitions as they appear on internal p. 4 of the "Employers' Liability Insurance" section of the policy: -

***"5. EMPLOYEE***

*Any person under a contract of service or apprenticeship with the insured including:*

*(a) Any labour masters or any labour only sub – contractor or any persons supplied by them;*

*(b) Any self – employed person performing work of a kind ordinarily performed under a contract of service or apprenticeship with the Insured;*

*(c) Any person supplied to the Insured under a contract or agreement the terms of which deem such person to be in the employment of the Insured for the duration of such contract or agreement;*

*(d) Any person under a training or work experience scheme. . . . .*

***10. THE INSURED / YOU / YOUR***

*Shall mean the person(s), partnership, company or unincorporated association named in the Schedule as the Insured".*

21. It is not in dispute that the policy Schedule names the "Insured" as "*Cashel Taverns Ltd. t/a Rock Bar"*. It should be noted that it does not specify, for example, that the Insured is a "Director" of that company or the "Secretary" of the company (a company Director, or Secretary, having a separate and distinct legal personality to the company in which they are officers). Nor does the definition of the "Insured" include servants or agents of the Insured. On the contrary, the relevant insurance policy makes very clear that the "Insured" is a named corporate entity, specifically the First Named Defendant in these proceedings, that entity currently being in voluntary liquidation.

**Companies Registration Office printout regarding the Insured company**

22. During the hearing, the Plaintiff provided the court with a 3-page Companies Registration Office ("CRO") printout in relation to Company No. 390479, entitled "Cashel Taverns Ltd.". It is not in dispute that the foregoing company constitutes the relevant Insured. The CRO printout records, inter alia, the company's incorporation on 1 September 2004. The printout in question appears to have been obtained on 19 February 2016. Among other things, the printout specified the Next Annual Return Date as being 1 September 2015 and the "Designation" of the company was specified to be "liquidation". Under the heading "Particulars of property", the CRO printout makes reference to premises situate at 48 – 49 Main Street Cashel known as "The Rock Bar". The relevant entry is in respect of a charge in favour of ACC Bank plc. Later on in the CRO printout, in the context of a charge in favour of Bank of Ireland, reference is made to premises at the same address,

48 – 49 Main Street Cashel, Co. Tipperary, and that entry states that the premises is "*known as the Brian Boru".* There is no doubt, however, that the relevant property for the purposes of the present proceedings is the property at 48 – 49 Main Street, Cashel in County Tipperary, being the only property identified in the said CRO printout. The CRO printout also identifies the company as having two directors, namely Mr. Frank Leeson and Ms. Ciara Fox, the former also being the company secretary. During the trial it was suggested on behalf of the Plaintiff that the First Named Defendant may operate numerous bars and restaurants from numerous properties. That may or may not be the case, but what can be said with certainty is that only one property, namely the premises at Main Street Cashel, is referred to in the CRO printout which was provided to the Court, being the premises in which the Plaintiff's accident occurred on 8 May 2010, which premises was managed, at the relevant time, by a Mr Patrick Horan.

**Commercial insurance Proposal Form, re policy no. GEI/COM/001526354**

23. In the manner explained above, the relevant insurance policy at the heart of the present proceedings has a policy no. GEI/COM/001526354. Among the discovery documents is a Quinn-Insurance Limited "*Commercial Insurance Proposal Form*" signed by Ms. Ciara Fox in respect of the First Named Defendant. This is a 13-page document which specifies the same policy number as the insurance policy in dispute and, among other things, the following information is included in this "*Proposal Form*". The postal address on the proposal form is specified to be "*Cashel, Co. Tipperary*". As will be seen later in this judgment, when the insurer begins writing to the insured, from 17 October 2011 onwards, immediately after receiving notification of the Plaintiff's, claim, it is to "*Cashel, Co. Tipperary*" that the insurance company writes. This is clear from the contents of the insurers' letters dated 17 October, 2011 and 15 October, 2011 both of which will be examined in this judgment. I am satisfied that the insurer wrote to the aforesaid address because that is the one which Ms. Fox supplied on the insurance proposal form.

**Type of Business**

24. As to the "*Type of Business*", the said proposal form contains the following information which has been inserted in manuscript on the form: "*Public House, Restaurant, Music Venue (incl. private functions); P. Dinners*." The company name is that of the First Named Defendant and is specified on the proposal form to be *"Cashel Taverns Ltd T/A Rock Bar"*. As regards the "Cover Classes" required, the proposal is for Employer's Liability, Public/Product's Liability, Property Damage, Business Interruption and Computer Equipment. For present purposes, the "*Employer's Liability Section*" of the proposal form is of particular relevance. This section comprises internal pages 4 and 5 of the proposal form. Under the heading "*Number of Employees*", it is confirmed that there are "*13*" and these are described as "*Manual Employees*". This complement of employees comprises the vast majority of the projected wage bill for the year which is specified to be "*250k*". A further "*10k*" is projected for, *inter alia*, clerical staff with an additional "*30k*" projected in respect of self-employed contractors, security and property repairs and the sum of "*60k*" projected in relation to "*working directors – non-manual*". Thus, the total projected wages for a year comes to €350,000, €250,000 of which is referable to 13 employees. On the basis of the information provided in the insurance proposal form, the insured could fairly

be called a mid-sized business, further illustrated by the estimated annual gross turnover which is specified, on internal page 7 of the proposal form, to be *"€1,500,000".*

25. In light of the foregoing details I am entitled to reach a number of findings of fact. It is not clear whether the First Named Defendant had another insurance policy or policies, but I am entitled to conclude that there was not another insurance policy covering the self-same employees in respect of the self-same business operating from the self-same premises and addressing the self-same risks which some other insurer provided. If it were the case that the First Named Defendant had insurance cover under a *different* policy in respect of the incident which occurred on 8 May 2010, the present proceedings would be of no relevance.

26. I am also entitled to conclude that the First Named Defendant's pub and restaurant business which operated in Cashel, Co. Tipperary had 13 employees and it is not in dispute that the Plaintiff was one of them when the incident occurred on 8 May 2010. It is not in dispute that at the time of the Plaintiff's accident, Mr. Patrick Horan was the manager "on the ground" so to speak and that he was the most senior representative of the First Named Defendant who was based in Cashel and running the type of business which Ms. Fox described as that of "*Public House, Restaurant, Music Venue (incl. private functions)*". Given that the foregoing was the nature of the business, I am entitled to conclude that the manager of that business was someone who played a key role for the First Named Defendant and who performed a very important function with a range of responsibilities. It can hardly be disputed that running a public house, restaurant and music venue would require *inter alia*, compliance with licensing laws, employee protection legislation, food hygiene standards and it is uncontroversial to say that it would be the manager, on the ground, who played a key role in terms of ensuring such compliance day to day. In addition, it seems uncontroversial to suggest that the manager would be the person responsible for ensuring adequate staffing levels and to ensure that the business was properly and efficiently run as well as interacting with staff, customers and suppliers and dealing, day to day, with any issues which arose, or taking steps to ensure that such issues were dealt with, be they relating to security, hygiene, banking, stock ordering or otherwise.

**Senior employee**

27. Given the type of business involved, as per the information supplied by Ms. Fox on the Commercial Insurance Proposal Form, I am satisfied that, as a matter of fact, the manager running the public house and restaurant business in Cashel could only be considered to be a senior employee performing an important role. It is also inconceivable that a manager would not have a certain level of authority so as to enable them to perform their role on a day to day basis and to make the many decisions in "real time" which the manager of a business would undoubtedly need to make. It could hardly be suggested that the manager of a pub and restaurant business would need to ask permission from somebody else to make each and every one of the many day to day decisions which management of such a business requires. Nor is there any such evidence before the court that this was the position. To illustrate the point, there was absolutely no

evidence before the Court that there was a more senior manager than Mr. Horan who was based in Cashel at the time of the accident and to whom Mr. Horan reported and without whose authority Mr. Horan could take no decision. Nor was there any evidence whatsoever that there was any other manager, apart from Mr. Horan, in Cashel running the business at the relevant time. Furthermore, there was no evidence before the Court that Mr. Horan had to check every, or any, decision with someone else, be that Ms. Fox or any other person.

**Management**

28. In short, the evidence is that Mr. Horan was the manager running the First Named Defendant's business in Cashel when the accident occurred and, as such, Mr. Horan plainly performed a key function. Given the type of business involved and the fact that Mr. Horan was the sole manager of same in Cashel, it is not reasonable to suggest that the manager of the business on a day to day basis was not part of the insured's *management*.

29. During the hearing, the suggestion was made on behalf of the Plaintiff that the First Named Defendant may have operated numerous public house businesses at a variety of locations and could have had very large numbers of staff. That may or may not be the case. The findings of fact, to which I have referred, arise from the evidence before the Court and do not depend on whether the First Named Defendant may, or may not, have operated other public houses and/or restaurants and/or music venues elsewhere and if so, how many. It is indisputable, however, that the First Named Defendant operated a public house, restaurant and music venue business from premises situate at 48-49 Main Street, Cashel, being the premises specifically referred to in the CRO printout for Cashel Taverns Limited, which business was managed, day to day, by Mr. Horan when the Plaintiff sustained her accident. At the time of the accident the Bar in Cashel in which the Plaintiff fell was known as the "Brian Boru".

**15 April 2010 – the First Named Defendant's claims history.**

30. On 15 April, 2010 Ms. Sharon Devereaux of Aviva sent an email to Mr. Terry Keaney, the First Named Defendant's insurance broker, in relation to details of previous claims by the First Named Defendant, including the relevant payments made, the date of each, the claim reference and the nature of the claim, of which there were two "*public liability*" and one "*employer's liability*" payments. The dates were 14 June 2008, 20 September 2009 and 18 July 2009, the payments being €500, €500 and €1,220, respectively. In light of the foregoing, I am entitled to find that as a matter of fact the First Named Defendant did have previous insurance claims which were dealt with under a previous insurance policy or policies and which resulted in three separate payments being made by an insurer in respect of the indemnified losses, one of which related to employer's liability insurance. That being so, I am entitled to conclude that the relevant incidents were notified by the insured to the relevant insurer in sufficient time to ensure that indemnity was not refused on the basis of late notification. Although nothing turns on it as regards the key dispute in the present proceedings, the contents of this document suggests that there was some procedure in place within the First Named Defendant to ensure that claims were notified to the insurer and that claims were notified on time. It is not in dispute that Mr. Patrick

Horan was the manager when the Plaintiff's accident occurred on 8 May 2010. Later in this judgment, I will refer to a statement made by Mr. Horan on 27 February 2012, in which Mr. Horan confirms that he started in 2008. Thus, it is a matter of fact that Mr. Horan was working in Cashel at the time when two, if not three, claims were dealt with under the insured's policy without any evidence of any of same having been notified late to the insurer. Although nothing turns on it, the foregoing does at the very least suggest that Mr. Horan may well have had some familiarity with insurance claims which were undoubtedly dealt with during his tenure as manager.

**3 May 2011 – email from Mr. Eddie Condon to Mr. Liam Ryan attaching "1/5/2011 incident report"**

31. It is clear from the evidence that, at the time of the Plaintiff's accident, the manager of the Brian Boru Bar in the First Named Defendant's Cashel premises, was Mr. Patrick Horan. It is also a matter of fact, which emerges from the evidence, that Mr. Horan's successor as manager was a Mr. Eddie Condon, who started working at the Brian Boru Bar in February 2011. There is no evidence before the court to the effect that Mr. Condon's role as manager was in any way materially different to Mr. Horan's role as manger and I am entitled to conclude that when performing what was the same role, namely that of manager of the Brian Boru bar, Mr. Horan and, subsequently, Mr. Condon, had the same duties, responsibilities and authority, insofar as performing the role of manager of the premises was concerned. It is a matter of fact that on 5 March 2011, Mr. Condon sent an email to Mr. Ryan of the insurer in which Mr. Condon forwarded what was referred to in the subject title of the email as "*1/5/2011 Incident Report*" and which comprised a typed document which I now set out verbatim:-

> "***Incident Report 1/5/2011***
>
> *At approx. 16:45 a male entered the front bar of the Brian Boru, he was known to us as a person who had been previously barred by our security for an incident he was involved in on previous weeks. He was refused on that basis, he failed to accept that and asked to speak to a member of management, Eddie Condon (general manager) then came up to the gentleman and spoke to him regarding his previous actions. The man then began to get very angry. He took a swing for Eddie Condon then grabbed a bottle from the far side of the counter, threw it at him, he also picked up 3 high bar stools threw them over the counter which resulted in the breakage of approx. €500 worth of spirits on display. No staff were injured in any way, the man then left. The Gardaí were called on the scene, were shown the footage of the incident, they had recognised the accused and later arrested him in the pub up the town".*

32. Having received the aforesaid email and incident report from Mr. Condon, the then manager of the Brian Boru Bar, Mr. Ryan of the insurer forwarded it to Commercial Claims Notification, stating "*Please see below, received from our Insured. I believe he also notified his insurance broker, but I will confirm this with him this morning*".

33. It is clear from the foregoing that, insofar as the incident which occurred on 1 May 2011 was concerned, the then-manager of the First Named Defendant's bar did, as a matter of

fact, ensure that an incident report was made in respect of the occurrence and the manager sent the incident report directly to the insurer within 48 hours of the incident. I am entitled to conclude that the manager was, firstly, aware of the importance of reporting incidents to the First Named Defendant's insurers and, secondly, knew whom to contact within the insurance company, namely Mr. Ryan, and was also aware that incidents should be reported promptly, something which plainly occurred in respect of the 1 May 2011 incident which Mr. Condon reported on 3 May 2011.

***"Received from our Insured"***

34. It is also clear that Mr. Ryan, of the insurer, regarded the email from the manager of the Brian Boru Bar as constituting notification "*received from our Insured".* In other words, there was no suggestion on the part of Mr. Ryan that the manager of the Brian Boru Bar, was other than in a position to alert the insurer to an incident which he, and therefore the insured, had knowledge. For example, there is no suggestion made by Mr. Ryan that, notwithstanding the knowledge possessed by Mr. Condon, as reported in the email and Incident Report, the insured could only be considered to know about an incident if, say, a "Director" or a "Secretary" or someone in "head office" of the Insured company knew of the incident and gave notification of it. Nor was any suggestion made, either by Mr. Condon, the then manager of the bar, or Mr. Ryan, the insurer's Regional Claims Manager, that, for example, the manager of the bar was too junior an employee to be considered to have relevant information constituting an appropriate notification by the insured and/or that a notification received from the manager was not, in fact, a notification properly made by the insured to the insurer.

**5 May 2011 email from insurer to broker**

35. On 5 May 2011 the insurer sent an email to the broker for the First Named Defendant referring to the recent notification and stating inter alia that: - *"We note that this incident occurred on 1 May 2011 at 16:45 and write to advise that Cashel Taverns Ltd. t/a Rock Bar insurance policy with our company expired on 30 April 2011 at 23:59. Please therefore redirect this claim to their current insurers that they may deal with same".*

36. Although nothing turns on it as regards the key issue before this court, the foregoing evidence concerning the fact that the then manager of the Brian Boru Bar, namely Mr. Condon, promptly reported the 1 May 2011 incident to the insurer suggests the possible existence of some reporting protocol within the First Named Defendant, which Mr. Condon followed. Even if this is not so, it is indisputable that Mr. Condon's predecessor in the same role, Mr. Horan, did not report the 8 May 2010 incident to the insurer and there is simply no evidence before the court to suggest (i) that it was not possible for Mr. Horan to report the incident to the insurer, or (ii) that he was unaware of the importance of reporting incidents, or (iii) that Mr. Horan did not know the insurer or whom to contact within the insurer. As to the latter point, the evidence is that Mr. Condon took over from Mr. Horan as manager of the Brian Boru Bar and Mr. Condon clearly knew to contact Mr. Ryan of Quinn Insurance, because the latter is precisely whom Mr. Condon sent his email to on 3 May 2011. This suggests that when Mr. Condon took over as manager, he gained access to information which Mr. Horan previously had as manager, including as to the identity of Mr. Ryan as the contact person in the insurer. I would emphasise that nothing

turns on whether Mr Condon obtained Mr. Ryan's name and contact details from his predecessor, Mr. Horan. It is an indisputable fact, however, that the then manager of the Bar premises did notify at least one other incident which occurred on the said premises, to the company's insurer and that the said notification, on 3 May 2011, was considered by the insurer to have been information received from the insured.

37. It will be recalled that the relevant insurance policy commenced on 1 May 2010 and expired on 30 April 2011. It is also a matter of fact that Mr. Eddie Condon, who succeeded Mr. Horan as manager of the Brian Boru Bar, started work in February 2011. Therefore, Mr. Condon took over during the currency of the relevant insurance policy. In other words, when Mr. Condon took over, in February 2011, the First Named Defendant's insurance policy with Quinn Direct still had over two months to run. As the evidence illustrates, Mr. Condon plainly knew the identity of Quinn as the First Named Defendant's insurers and also knew to contact Mr. Ryan, which Mr. Condon did in his email sent on 3 May 2011, with regard to the incident in the Brian Boru Bar on 1 May 2011. In the manner seen above, the First Named Defendant's broker was informed that the relevant policy expired the very day *before* the incident which Mr. Condon notified to the insurer on behalf of the First Named Defendant. This was not the incident involving the Plaintiff and it is to documentation specific to that incident that I now turn.

**14 October 2011 – email from Broker to the Insurer**

38. Mr. Terry Keaney was the Insurance Broker for the First Named Defendant. At 17:26 on 14 October 2011, Mr. Keaney sent an email to Quinn Direct Insurance Company entitled "*Incident – Stephanie Moloney, 8th May 2010" and the text of Mr. Keaney's brief email stated:- "I enclose letter received from my client in relation to the above incident. I would be obliged if you could contact our client to arrange immediate investigation. . ."*

Mr. Keaney provided contact details for Ms. Ciara Fox and Mr. Paul O'Grady. It will be recalled that Ms. Fox was a director of the First Named Defendant. The letter enclosed by Mr. Keaney comprised a 10 October 2011 letter from Messrs. Cian O'Carroll, solicitors for the Plaintiff, which letter was addressed to the secretary of the First Named Defendant. It was, in substance, what is often called a "letter before action" in that the letter, inter alia, called upon the First Named Defendant to admit liability for the relevant accident and to do so within ten days, failing which an application would be made without further notice to the Personal Injuries Assessment Board.

**17 October 2011 email from Insurer to broker**

39. At 16:19 on 17 October 2011, the insurer emailed Mr. Keaney to state, inter alia, that:-

> *"Further to your recent notification please note the reference number assigned to this is 6265941414/2011/003. A claims representative will be in contact with you . . ."*

The email attached an *"Accident report form – employer's liability"* and asked that it be completed and returned.

**17 months between 8 May 2010 and Broker's email of 14 October 2011**

40. It is common case that the insurer was not told about the Plaintiff's accident which occurred on 8 May 2010 until Mr. Keaney, the First Named Defendant's broker, sent the aforesaid email on 14 October 2011. It cannot be disputed that the aforesaid notification came over 17 months after the accident in question.

**17 October 2011 – letter from Insurer to First Named Defendant**

41. On 17 October 2011, Quinn Insurance also wrote to "Cashel Taverns Ltd. t/a Rock Bar, Cashel, Co. Tipperary". That letter made clear that the "Regional claims manager" was Mr. Liam Ryan and his telephone number was given. The letter acknowledged receipt of notification of the incident dated 08 May 2010 and made it clear that Mr. Ryan would be in contact. Among other things, the latter stated the following: -

> *"In accordance with standard practice, we would advise that until our investigations are complete, nothing done by Quinn Insurance should be construed as confirmation of a policy response and our rights under the policy and otherwise are hereby reserved".*

**The insurer's reservation of rights**

42. In light of the foregoing, it is a matter of fact that the initial response by the insurer included a reservation of its rights under the relevant insurance policy. In other words, the insurer did not respond to the notification by agreeing to provide cover. Rather, the insurer made clear from the outset that nothing done by the insurer should be construed as a policy response and that the insurer's rights were reserved.

**18 October 2011 – letter from Insurer to the Plaintiff's solicitors**

43. On 18 October 2011, the insurer wrote to the Plaintiff's solicitors, Messrs. Cian O'Carroll. This letter acknowledged the receipt of the 10 October 2011 letter which had been sent to the insured. The 18 October 2011 letter identified Mr. Liam Ryan as the regional claims manager and asked that certain details be provided namely: -

> "Date of birth, PPS number, injuries sustained, medical attendance and medical reports".
>
> The letter also invited the Plaintiff's solicitors to outline, on a without prejudice basis, any acts or omissions by the insured, their employees or agents, that constituted negligence. Among other things, the letter stated the following:- *"As our investigations into this matter are at an early stage, we are not in a position to comment on indemnity or liability at this point but we will update you in this regard in due course"*.

44. Thus, as of 18 October 2011, the insurer had made it clear that to all relevant parties, namely to the broker, to the First Named Defendant and to the Plaintiff's solicitors that, pending investigations, the insurer was not in a position to express a view as to whether it would indemnify the First Named Defendant in respect of the 8 May 2011 accident.

**17 October 2011 – Claims Progress Report**

45. It is not in dispute that on 17 October 2011, the insurer created a Claims Progress Report with a claims reference specified to be 62659414/2011/003. The date and time of the

incident was noted to be 8 May 2010 with the date of notification specified to be 17/10/2011 and the party who notified the claim being specified as "Broker Terry". On the left hand side of the form under the heading "Incident details" appears a typed question as follows: - "*If delay in notification > 5 day's reason why*" opposite which nothing appears to have been inserted in the report. Below that, the following details are given in relation to the incident: -

> *"Claim notified by Bkr via email. PH Cashel Taverns Ltd. t/a Rock Bar Tell Ciara Fox at 0866004219 or Paul O'Grady at 0863866039. Rsm Tbc. Doi 08 May 2010. Location: stairs at Brian Boru Bar. EE Stephanie Moloney Add Kingstown Windmill Cashel, Co. Tipperary. Sot Cian O'Carroll Solicitors, Add Friar Street, Cashel, Co. Tipperary, Tel 0527443933. Incident details as per Sot's letter EE lost her footing on the stairs at Brian Boru whilst employed as a waitress bar staff member. The fall caused or materially contributed to by the absence of a handrail. Injuries: Ligament injury on her right ankle as well as notable degenerative changes in her ankles. EE continues to be treated for this injury. Spoke to Ciara Fox in relation to this incident and she advised that EE was off work for a few days and resumed normal activities until she left PH's employment. No further information. LRF issued to Bkr via email".*

**18 October 2011 – 24-hour update report by insurer**

46. On 18 October 2011, Mr. Liam Ryan of the insurer sent an internal report to his colleague, Sarahanne Forde. It is clear from the contents of this report that Mr. Ryan was investigating matters. It is also clear that, whereas Mr. Patrick Horan was the manager of the Brian Boru Bar at the time of the accident, Mr. Horan had since left, the then – current manager being a Mr. Eddie Condon, with whom Mr. Ryan spoke. It is appropriate to quote Mr. Ryan's report in full as follows: -

> *"Hi Sarahanne,*
>
> *Please be advised that I contacted the current manager of The Brian Boru Bar in Cashel, Eddie Condon this morning. He has only been in place from around February of this year, however he reported that the claimant was let go some 3 – 4 months ago. He stated that she never made any complaints to him about an incident or injury at work. He asked me to contact Ciara Fox, the main contact for their offices. I confirm that I have spoken with Ms. Fox, who is waiting on the previous manager of The Brian Boru (Patrick Horan) to get back to her. She is going to contact me on Thursday/Friday this week with an update on why insurers were not notified of the incident at the time. She was able to tell me that the injured party had missed a week's work following the date of the alleged accident, and had returned to normal hours following that.*
>
> *I will update you further after I have spoken with Ms. Fox again.*
>
> *Trusting you find this in order.*

*Kind regards.*

*Liam Ryan".*

**2 November 2011 – updated report by insurer**

47. On 2 November 2011, Mr. Ryan sent a further report to Ms. Forde, the relevant claims handler, advising her that he called to the insured property in Cashel on the previous day to meet with Mr. Eddie Condon but the property was closed and that Mr. Condon's phone rang out, so the scheduled meeting did not take place.

**8 November 2011 – internal email between Mr. Ryan and Ms. Ford of the insurer**

48. On 8 November 2011, Ms. Forde, the insurer's commercial claims coordinator for "ROI South" sent an email to Mr. Liam Ryan, the Regional Claims Manager which stated, inter alia, that: *"The file is over 3 weeks old now & we have nothing, obviously not your fault, but we need to step up the pressure on the PH to meet you so you can carry your investigations . . ."*

The email suggested that Mr. Ryan might call the broker, Mr. Keaney, to see if he could help and Ms. Forde went on to state that that, if needs be, she could "*. . . write out to the PH. . . ROR non – cooperation"*. It is not in dispute that "PH" refers to Policy Holder and that "ROR" refers to Reservation of Rights, by the insurer. It is clear from the foregoing correspondence that the First Named Defendant was not moving as quickly as the insurance company expected insofar as cooperating with the insurer's investigations.

**15 November 2011 – Insurer's "Standard Review Template"**

49. It is not in dispute that on 15 November 2011, Ms. Ford of the insurer completed a review of the matter in accordance with a standard review template which has ten numbered headings. The fourth of these is entitled "Indemnity" and the said review contained the following information under that heading: -

***"4. Indemnity***

*There would appear to be LN on this claim. Incident is alleged to have occurred on 08.05.2010 so almost 18 months LN. This needs to be addressed with the PH immediately. We appear to be getting nowhere in trying to meet the PH to get further details on this claim, so at this point we need to ask the Broker to intervene and help us progress this matter. ROR letter will be issued to the PH. We will also list what we want for our investigation on this ROR letter".*

50. It is not in dispute that "LN" refers to Late Notification. Having regard to the contents of the 15 November 2011 review, I am entitled to conclude that as a matter of fact the insurer was anxious to get sufficient information so as to investigate the matter but had not agreed to indemnify the First Named Defendant and was of the view that there appeared to be late notification of the claim, in the context of which the insurer was reserving its' rights.

**November 15, 2011 letter from Insurer to insured**

51. On 15 November 2011, Ms. Sarahanne Forde, of the insurer's claims department, wrote to "*Cashel Taverns Ltd t/a Rock Bar, Cashel, Co. Tipperary*". The policy reference number

was quoted. The notification date was specified to be 17 October 2011. The incident date was noted to be 8 May 2010. The claimant was identified, as was the regional claims manager, Mr. Ryan. The letter began in the following terms: -

> *"Dear Sirs,*
>
> *We write in relation to the above dated incident involving your former employee, Stephanie Moloney.*
>
> *We wish to advise that our Regional Claims Manager, Liam Ryan, is currently carrying out an investigation into the above incident.*
>
> *We note that the above dated incident was notified to us on 17 October 2011, over 17 months after the actual date of the occurrence.*
>
> *Notification of all incidents is a condition of your Quinn – Insurance policy and in accordance with standard practice we hereby reserve our rights in relation to the cover being provided to you. We respectfully refer you to Sections 8.a.i and 2 of your General Policy Conditions where it states the following . . ."*

52. The letter quoted Sections 8.a to c, as well as Section 2 from the General Policy Conditions. It will be recalled that Clause 2 of the General Policy Conditions specified that fulfilment of policy terms on the part of the insured ". . . *shall be a condition precedent to any liability* . . ." of the insurer under the policy, whereas Section 8.a.i requires that any occurrence which may give rise to liability under the insurance policy "*shall*" be notified by the insured to the insurer "*immediately*" on the insured becoming aware of any incident or as soon as practically possible. Having quoted the foregoing sections in full, the letter concluded as follows:-

> *"Whilst we have not determined whether or not indemnity for this incident will be provided to you, we kindly request that you furnish us, within the next 14 days, with a written explanation for this late notification for our consideration.*
>
> *We will need you to provide the following to the Regional Claims Manager at the earliest possible juncture;*
>
> - *Roster of employees who were working on the date of the alleged incident*
> - *Training records for the claimant*
> - *Wage details for the claimant*
> - *Any sick certificates for the claimant*
> - *Any social welfare certificates for the claimant*
>
> *Meanwhile our Regional Claims Manager will continue to work closely with you to complete his investigations into the circumstances of this incident and your full co –*

*operation in line with your policy's terms and conditions is requested. However, please note that until such time as this process is completed we are not in a position to confirm whether or not we will be providing indemnity in this matter.*

*For the avoidance of doubt, this letter is without prejudice to any further issues that may arise in relation to the circumstances of this claim and/or your policy of insurance.*

*We trust you note our position accordingly and should you have any queries in relation to this or the incident generally, please do not hesitate to contact our Regional Claims Manager, Neil, on the above number.*

*Yours faithfully".*

53. It is clear from the foregoing that, as of 15 November 2011 the insurer put the insured squarely on notice of the fact that the incident on 8 May 2011 was notified to the insurer over seventeen months after it occurred. In the context of what was then an ongoing investigation by the insurance company, certain documentation was requested, but it was made plain that the insurer was not in a position to confirm whether, or not, it would be indemnifying the First Named Defendant.

**17 November 2011 – email from Mr. Ryan to Ms. Ford of the insurer, attaching statement of Mr. Eddie Condon**

54. On 17 November 2011, Mr. Ryan sent Ms. Ford an email which attached a statement of Mr. Eddie Condon c/o Brian Boru Bar, Main Street, Cashel, Co. Tipperary, as taken by Mr. Ryan of the insurer on 14 November 2011. In this statement, Mr. Condon says, inter alia, the following:-

*"I started working at Brian Boru Bar in February 2011. Stephanie Moloney was working at the time. She never complained of any injury or difficulty at work and never mentioned anything about have (sic) an incident at work . . . at the time of the alleged incident, Stephanie Moloney was an employee of Brian Boru . . . I wasn't aware of any issue at all until the solicitor's letter was received".*

**23 November 2011 – Update report by insurer**

55. On 23 November 2011 Mr. Ryan made a report to Ms. Forde explaining why he believes the letter, which we know to be dated 15 November 2011, needed to be re-sent. Mr. Ryan supplied an address at 23/25 Wexford Street, Dublin 2 and identified Ms. Ciara Fox as will be seen later, a letter in terms identical to that of 15 November 2011 was subsequently sent by the insurer on 14 December 2011 and it was sent using the name and address supplied by Mr. Ryan in his 23 November 2011 report to Ms. Forde.

**14 December 2011 – letter from insurer to the insured**

56. On 14 December 2011, Ms. Sarahanne Forde of the insurance company's claims department wrote to the First Named Defendant. This letter was identical, in terms, to the 15 November 2011 letter. The only difference relates to the addressee, in that the 14 December 2011 letter was sent to *"Ms. Ciara Fox, Cashel Tavern, t/a The Rock Bar, 23 – 25 Wexford Street, Dublin 2".*

**4 January 2012 – email from insurer to broker**

57. On 4 January 2012, Mr. Ryan, the insurer's Regional Claims Manager, sent an email to Mr. Terence Keaney, the First Named Defendant's insurance broker stating:

> *"Hi Terry, please see attached copy of a letter issued to the above policy holder. We have had no contact from the Insured for some time. Can you please communicate with the Insured as this claim could be declined. Many thanks, Liam Ryan, Regional Claims Manager, Quinn Insurance".*

**The possibility that the claim could be declined**

58. The aforementioned email attached a copy of the insurer's 14 December 2011 letter, to which I have already referred. It is plain from the contents of the 04 January 2012 email that the First Named Defendant's insurance broker was made aware of the fact that there was a possibility that the claim regarding the Plaintiff could be declined. It will be recalled that the insurer had previously reserved its rights and nothing in the 4 January 2012 email altered that position.

**11 January 2012 – Standard Review Template by insurer.**

59. On 11 January 2012 Ms. Forde of the insurer completed a further standard review template. Section 4, under the heading "*Indemnity*" contained the same information which was set out in the standard review template dated 15 November 2011 but an additional paragraph also appeared at section 4 which stated the following: -

> *"11.01.12 – ROR Letter to 14.12.2011 and we listed in this letter all the things that we need the PH to provide to us. We have had no response from the PH yet. RCM has contacted the broker re this and awaits his assistance in this matter. If we are not getting anywhere, we will issue the decline letter."*

60. It is clear from the foregoing that as of, 11 January 2012, the insurer had made no decision in relation to whether or not it would indemnify the insured and continued to reserve its rights. It is, however, fair to say that the insurer did not regard the insured as progressing matters speedily enough in terms of cooperation with investigation.

**17 January 2012 – email from broker to insurer**

61. On 17 January 2012, Mr. Keaney, the First Named Defendant's insurance broker, sent an email to Mr. Ryan, the insurer's Regional Claims Manager stating: -

> *"Dear Liam,*
>
> *I refer to your previous correspondence to our client in relation to this matter and enclose supporting documentation together with letter of explanation as requested. I would be grateful if you could confirm that Quinn Insurance Company will protect our client's interest in relation to this claim.*
>
> *Kind regards,*
>
> *Yours sincerely*
>
> *Terence J. Keaney".*

62. The enclosures with the said email comprised a printout headed "*Revenue Deduction*" in respect of the Plaintiff, giving certain information including gross pay and deductions on various dates between 6 January 2010 and 29 December 2010 as well as a "*Weekly Roster*" in respect of certain named individuals including the Plaintiff, together with a "*Sign in/out sheet"* which named nine individuals, including the Plaintiff, and the final attachment comprised a letter from Ms. Ciara Fox which was addressed to Mr. Liam Ryan, dated 11 January 2012. It will be recalled that in the insurer's letter dated 14 December 2011 to the insured (which was identical to the insurer's 15 November 2011 letter), the insurance company requested, inter alia, that the First Named Defendant provide a written explanation for the late notification. It is clear that the 11 January 2012 letter by Ms. Fox is intended to provide the First Named Defendant's explanation for the late notification. Given its significance, it is appropriate to set out its contents in full.

**The explanation offered by the First Named Defendant for the late notification of the Plaintiff's claim**

63. The 11 January 2012 letter from Ms. Ciara Fox, of the First Named Defendant, to Mr. Liam Ryan, of the insurer (which letter comprised an attachment sent by the broker, Mr. Keaney, to the insurer on 17 January 2012) stated the following: -

> *"RE: Claim no. 62659414/2011/003 FRD*
>
> *11th January 2012*
>
> *Dear Liam,*
>
> *I refer to your letter dated 14th December 2011 requesting a written explanation for the late notification of Stephanie Moloney's claim.*
>
> *I wish to advise that the manager, Patrick Horan, considered this as a minor incident and for this reason did not inform the head office. He gave Stephanie Moloney money to cover her doctor's fee. She was out of work for two days. When Stephanie returned to work, she was completely fine.*
>
> *The first notification we received in relation to this matter came in the form of a solicitor's letter from Cian O'Carroll Solicitors on the 10th October 2010.*
>
> *Yours sincerely,*
>
> *Ciara Fox".*

64. A number of observations can be made in relation to the foregoing letter as follows:

i. Mr. Patrick Horan is identified as "*the manager*" and it is not in dispute that the accident occurred in a bar owned by the First Named Defendant, of which Mr. Horan was, as a matter of fact, the manager;

ii. It is plain from the contents of this letter that, from the very outset, the First Named Defendant's manager, Mr. Horan, was aware that the incident had occurred;

iii. It is also clear from the contents of this letter that, at the very outset, the First Named Defendant's manager knew that the Plaintiff had sustained some injury, in that Mr. Horan is said to have given the Plaintiff money to cover her "*doctor's fee*";

iv. It is equally clear that the First Named Defendant's manager was aware that the injury was sufficiently serious that the Plaintiff was out of work for a period, reference being made in the said letter to the Plaintiff being "*out of work for two days*";

v. It is also clear that the First Named Defendant's manager conducted an assessment of the seriousness, or otherwise, of the incident and "*considered this as a minor incident*";

vi. It is stated that, by reason of this view which the First Named Defendant's manager formed, he did not "*inform the head office"* of the Defendant, but there is no suggestion in the letter that, by forming the view he came to and by not informing head office, that the Defendant's manager acted contrary to any instructions or in any way outside of his authority;

vii. On the contrary, assertions were made by Ms. Fox in support of the proposition that the incident and effect on the Plaintiff was minor, in that Ms. Fox refers to two days of absence from work and states "*when Stephanie returned to work, she was completely fine*";

viii. The statement by Ms. Fox that "*the first notification we received*" was in the form of a letter from the Plaintiff's solicitors dated 10 October 2010 (which I am satisfied should read 10 October 2011) appears to be an assertion that the first time "*head office*" of the Defendant learned about the incident was when the 10 October 2011 letter arrived, but there is no suggestion made by Ms. Fox that the First Named Defendant's manager, on the ground, was not aware of the incident from the very outset, on 08 May 2010;

ix. Nor is it suggested in the letter that, in circumstances where the First Named Defendant's manager knew about the incident from the very outset and dealt with it in a particular way, the First Named Defendant should be considered to be wholly unaware of the incident until some other unidentified party within the First Named Defendant was informed of it;

x. In addition, nothing in the 11 January 2012 letter evidences anything which prevented immediate notification of the incident to the insurer; (for example, it is not suggested that the First Named Defendant's manager, upon learning of the incident, passed away, was taken ill himself or moved jobs, thereby preventing immediate notification);

xi. Nor is any evidence provided to suggest that at any point during the 17 months which elapsed between the incident and the letter from the Plaintiff's solicitor, was

there anything which prevented notification to the insurer at any stage during that 17 month period;

xii. It will also be recalled that the insurance policy in question ran from 1 May 2010 to 30 April 2011, specifying a renewal date of 1 May 2011 and nothing in the 11 January 2012 letter from Ms. Fox suggests that there was anything which prevented the First Named Defendant, in the context of any insurance policy renewal, 12 months after the incident, from making enquiries within the First Named Defendant in the context of any such renewal;

xiii. Nothing in this letter suggests that there was anything preventing the First Named Defendant from having such systems in place as to ensure prompt notification by the manager "on the ground" in Cashel to "head office" in Dublin, and/or which prevented the First Named Defendant from making such enquiries were necessary to ensure that timely notification of claims was made;

xiv. Nothing in this letter suggests that there was any other manager employed by the First Named Defendant to run the business, day to day, which operated from the relevant premises in Cashel in which the Plaintiff sustained her accident and I am entitled to conclude that there was no other manager "on the ground".

**25 January 2012 – email from Mr. Tom Heneghan to Mr. Liam Ryan of Insurer**

65. At 09:21 on 25 January 2012, Mr. Tom Heneghan of the insurer, sent an email to his colleague, Mr. Liam Ryan. Mr. Heneghan is described as being CNM ROI SOT Self-Claim Process Manager of the insurer and it is not in dispute that Mr. Heneghan reviewed the claim and, having done so, expressed his views to Mr. Ryan as well as copying his email to Ms. Forde. As to his views, these included his statements that "*there is LN*", being a reference to late notification, as well as his view that there was "*Failure to co-operate"* and Mr. Heneghan also stated *inter alia, "we do not have any details of the incident. How did the PH come to the conclusion that it was a minor incident? He must have some knowledge/details of it in order to come to that conclusion*."

66. The foregoing question posed by Mr. Heneghan in his 25 January 2012 email plainly refers to the statement made by Ms. Ciara Fox in her 11 January 2012 letter that "*I wish to advise that the manager Patrick Horan considered this as a minor incident*…". Insofar as Mr. Heneghan askes "*how did the PH come to the conclusion that it was a minor incident?*", it is clear that the insurance company regarded the knowledge possessed by the manager, Mr. Horan, as the knowledge possessed by the "*PH*" namely the policy holder. This could hardly be said to be an unreasonable stance to take, given that Ms. Fox identified Mr. Horan as "*the manager*" and made it clear that the manager considered the incident to be a minor one.

67. Mr. Heneghan went on to express his view that the claim should be declined for late notification but it is equally clear that no final decision was made by the insurer at that stage and it is appropriate to quote the final paragraphs of Mr. Heneghan's 25 January 2012 email, which were in the following terms:

*"My feelings on this is that the claim should be declined for LN. We do not have to be prejudiced in order for LN to lead to a decline. However, we have clearly been prejudiced here. Furthermore, of the five o/s matters we asked the PH to furnish, she has only furnished one (i.e. the wage details). She has not responded regarding the others. We would also be justified in declining for non-co-operation. However, the PH might be able to justify this on the basis that she does not have any knowledge of the incident.*

*Before we make our final decision on LN, can you ask the PH to deal with items three to six above."*

It is common case between the parties to the present dispute that it is not necessary for the insurance company to prove that it has suffered prejudice but it is equally clear from the evidence that, as at 25 January 2012, the insurance company regarded itself as having, in fact, suffered prejudice arising from late notification.

**25 January 2012 – Email from insurer to insured.**

68. At 15:09 on 25 January 2012 Mr. Ryan of the insurance company sent an email to simona@mercantilegroup.ie which asked five numbered questions of the insured, in relation to whether training records existed, whether sick certs were received, whether the claimant was paid for her time out as a result of the injury, whether the claimant received social welfare and whether the reference to 10 October 2010 in the letter from Ms. Fox dated 11 January 2012 was a typo. Mr. Ryan's email also stated *inter alia:*

*"I understand Patrick Horan is no longer working for your company and had asked if he was still available for interview. Ciara Fox was to get back to me on this. Is it possible to meet with Mr. Horan at the pub so the incident locus can be determined and a statement taken from him?".*

It is clear from the foregoing, that, as of 25 January 2012, the insurance company had not yet been shown the locus of the incident and were still investigating matters, required additional information, had reserved their rights and had made no final decision in relation to indemnity. The insurer was clearly anxious to interview the manager at the time, Mr. Horan, but this had not yet been arranged.

**30 January – 7 February 2012 emails between insured and insurer.**

69. With regard to the five numbered queries raised by Mr. Liam Ryan of the insurance company with the insured in his 25 January 2012 email; on 30 January 2012, Ms. Mary O'Reilly, on behalf of the insured, confirmed that there were no training records for the claimant and that she did not receive any sick certs. On 31 January Ms. Simona Blodneice of the insured company confirmed that reference to 10 October 2010 in the letter from Ms. Fox dated 11 January 2012 was a typo and Ms. Blodneice also confirmed that Mr. Patrick Horan was available for an interview. On 1 February 2012 Mr. Ryan of the insurer asked the insured to confirm whether the claimant was paid by the company for her time out of work and if she was in receipt of social welfare. Mr. Ryan also asked for contact details to be provided in relation to Mr. Horan or for the insured to arrange for Mr. Horan to contact Mr. Ryan so that a meeting could take place. On 7 February 2012, Ms.

Blodneice responded to Mr. Ryan by email confirming that the complainant was not paid by the insured for her time out of work and that the First Named Defendant had no record of her claiming social welfare. Mr. Horan's mobile phone number was also provided.

**27 February 2012 – Statement by Mr. Patrick Horan, Bar Manager**

70. The discovery documentation in this case includes a Liberty Insurance document entitled "*Statement of Fact*" which comprises a statement by Mr. Patrick Horan who identified his occupation as "*Bar Manager*". The statement was taken at 9.30pm by Mr. Liam Ryan. This handwritten statement, consists of two pages each of which were signed by Mr. Horan. It is appropriate to set out that statement in full as follows:-

> *"I remember being in the Brian Boru Bar in Cashel on a Sunday at around 5pm. Stephanie Moloney was working that day. She was employed as a barmaid/waitress and a good employee. She was employed by the Brian Boru. I can't remember if I was working that day or not but I wasn't there when Stephanie had an accident. I came over to the pub @ around 5pm. I met Dessie Taylor barman who said Stephanie had fallen down the stairs. She told him she just fell down a couple of steps. She was sitting down when I went in. I told her to go home or doctor. She went to the hospital and it was confirmed she sprained her ankle. She was out of work for about a week before returning to normal duties. After the incident I went and checked the stairs. The steps weren't wet. I am nearly certain there was a handrail on the stairs. There wasn't one in 2008 when I started there but we put one shortly afterwards. She said she had tripped coming down the stairs. The stairs was only used for deliveries in the mornings. Stephanie would have been wearing sensible footwear. I believe the only reason there is a claim here is because she was unable to get her P45 when she was finished in Brian Boru. I reported the incident to our head office (Ciara Fox) when they called me about receiving the solicitor letter".*

Among other things, this statement evidences the fact that Mr. Horan, who started working in Cashel in 2008, was the manager and the only manager of the premises "on the ground" when the accident occurred in May 2010 and that he was the Plaintiff's superior. It evidences, also, the authority which Mr. Horan had, in that Mr. Horan both gave instructions to the Plaintiff (telling her to go home or to a doctor) and conducted his own examination of the incident locus (checking the stairs, finding that the steps were not wet etc). There is nothing in the then-manager's statement which would entitle the Court to conclude that he acted other than consistent with his authority as manager of the premises. There is nothing in Mr. Horan's statement which would allow the Court to conclude that there was anything which, in fact, prevented Mr. Horan from informing the Insurer at the time of the accident or, for that matter, which prevented Mr. Horan from informing anyone else within the First Named Defendant, such as a director, immediately upon the accident occurring. Why he did not notify the insurer immediately is not explained. That he could have done so and that he did not do so is beyond doubt.

**24 February 2012 – Update Report from Mr. Ryan to Ms. Forde of the insurer.**

71. On 24 February 2012, Mr. Liam Ryan, the Regional Claims Manager reported in writing to Ms. Sarahanne Forde, the Claims Handler. Mr. Ryan's report begins with the words: "*Please see attached statement from Patrick Horan who was the bar manager in Brian Boru Bar, Cashel, Co. Tipperary at the time of this incident*." The foregoing is a statement of fact which is not in dispute. It is self-evident that Cashel, Co. Tipperary, where Mr. Horan managed the Brian Boru Bar, is a very considerable distance from 23/25 Wexford Street, Dublin 2, the latter being the address of the First Named Defendant where, it appears, Ms. Ciara Fox, one of the two company directors, was based. Nowhere in the evidence is it suggested that Ms. Fox or her fellow director, Mr. Frank Gleeson, were based in Cashel and ran the Brian Boru Bar on a day to day basis. The only evidence before the court is that the day to day management of the bar in Cashel was entrusted to the relevant bar manager, namely, Mr. Horan who held that position at the time of the incident on 8 May 2010 and, later, Mr. Eddie Condon, who took over as manager in February 2011.

72. There is no evidence before the court that Mr. Horan and, after him, Mr. Condon, were other than the very most senior representatives of the First Named Defendant who ran the Brian Boru Bar in Cashel on a day in, day out, basis. I am entitled on the evidence to conclude that, as a matter of fact, when the incident occurred on 8 May 2010, there was no representative of the First Named Defendant who was involved in the day to day running of the bar in Cashel, who was present "on the ground" and who was more senior to Mr. Horan.

73. It is also clear from Mr. Horan's statement, and from Mr. Ryan's 24 February 2012 report which was produced in its wake, that Mr. Horan had authority over such staff as worked in the Brian Boru Bar, including the Plaintiff in these proceedings and Mr. Dessie Taylor, the barman whom Mr. Horan met when he called into the bar at around 5pm. In his 24 February 2012 report, Mr. Ryan goes through the information which Mr. Horan had given him and Mr. Ryan's report concludes with expressions of opinion on the part of Mr. Ryan including *inter alia*, the following which appears under the heading "*Indemnity*":

> *"…in my opinion there is a definite of late notification on this file. We now know that the bar manager of Brian Boru where the injured party was working was aware the incident had occurred and although he failed to report it to the Insured's head office, management were aware of the incident. Therefore, insurers are well within their rights to decline this case on the basis of late notification. Coincidentally, I received an email from the insured's insurance broker, Terry Keeney yesterday seeking confirmation that Quinn Insurance would provide indemnity to his client with regard to Ms. Moloney's claim. I have forwarded this to you along with this report and I confirm that I have not responded to Mr. Keeney's email yet.*
>
> *Insurers may wish to take a view on whether we have a strong enough case to decline for late notification and come back to me so that a response can be issued to the insured's broker. In the meantime, I will contact the insured's head office in*

*order to set up a meeting in which I intend to examine the staircase where the incident occurred."*

74. It is clear from the foregoing that, as of 24 February 2012, and having obtained a statement from the then manager of the Brian Boru Bar, Mr. Horan, Mr. Ryan of the insured was of the view that even though Mr. Horan had not reported it to the insured's head office, "*management were aware of the incident*". On the evidence before this Court, the foregoing statement is factually correct. Whatever else the company might own, it is incontrovertible that one of its assets was the Brian Boru Bar. For that asset to trade required management. Day to day management of the bar was the responsibility of Mr. Horan. There was no one else more senior to Mr. Horan insofar as the day to day management of the Brian Boru Bar was concerned. Ms. Fox was a director but there is no evidence that she was in Cashel running the bar. The evidence is that she was in Dublin and that day to day management was a matter for Mr. Horan. It is incontrovertible that Mr. Horan, being the manager of the bar, was aware of the incident and the evidence is consistent with there being no one more senior to Mr. Horan, in terms of a representative of the First Named Defendant, "on the ground" in Cashel running the bar business. In short, I am satisfied that Mr. Ryan was entirely correct when he stated that "*management were aware of the incident*" given that the manager of the business in the relevant premises was undoubtedly aware of the incident from the very outset.

**29 February, 2012 – email from insurer to insured.**

75. On 29 February 2012, Mr. Liam Ryan of the insurer emailed Ms. Simona Blodneice of the insured stating "*Can you advise who the current point of contact in Brian Boru is please? I want to set up a meeting to inspect the stairwell the claimant fell on*". In a reply of 1 March, 2012 Ms. Blodneice emailed Mr. Ryan to inform him that "*The general manager is on his annual leave. I will ask him to contact you on his return and facilitate the inspection as requested*". Before proceeding further, it is appropriate to observe that, when Mr. Ryan of the insurer, asked to be provided with the current "*point of contact in Brian Boru*", the insured's response was to refer to the "*general manager*". The position held by the general manager was plainly a senior one. The evidence demonstrates that, as of late February 2012 when Mr. Ryan was looking to speak to the appropriate point of contact in the Brian Boru, the manager was a Mr. Eddie Condon, whereas at the time of the Plaintiff's accident on 8 May 2010, Mr. Patrick Horan performed the role. Nothing turns on the fact that Mr Condon was described as general manager, whereas Mr. Horan, his predecessor was described as manager. Both were, in their turn, the manager, on the ground in Cashel, performing an obviously important and senior role. Nor is there any evidence to suggest that when Mr. Horan was manager, there was any general manager more senior to him in Cashel. There was none. Mr. Horan ran the business in Cashel day to day and this is not in dispute. Indeed, the Plaintiff herself was explicit about the fact that she reported her accident to Mr. Horan, being the manager.

**8 March 2012 – Email from Mr. Heneghan to Mr. Ryan of the insurer.**

76. On 8 March 2012 Mr. Heneghan sent an internal email to Mr. Ryan expressing his view that there was no reason, from a claims point of view, as to why the insurer should not decline indemnity and suggesting to Mr. Ryan that the matter be referred to underwriting

to see if they agreed with this course of action. Among other things, Mr. Heneghan pointed out in his 8 March 2012 email that the policy holder was the employer of the complainant at the time of the accident and the "*Bar Manager Patrick Horan was aware of the incident. It does not seem to me to be material whether he was working at the time or not. LN of over 17 months is not reasonable and a decline on those grounds would be justified.*"

**20 March, 2012 – PIAB Form A with medical report**

76. On 20 March, 2012 the Plaintiff completed an application for Assessment of Damages under s.11 of the Personal Injuries Assessment Board Act 2003. In it she indicated that the accident occurred on stairs between the ground and first floor at the Brian Boru Bar, Main Street, Cashel on 8 May, 2010 between 5pm and 6pm. The Plaintiff indicated that she sought medical attention immediately and named her doctor as Dr. Seán McCarthy, enclosing a report from Dr. Seán McCarthy dated 30 September, 2011. Dr. McCarthy's report states that the Plaintiff informed him that "…*she was working as a waitress at Brian Boru Licensed Premises/Restaurant in Cashel on the 08/05/2010 and she states that she was coming down the stairs of the Brian Boru premises from the kitchen and she fell as there was no handrail and she fell forward and injured her right ankle*." The report goes on to refer to treatment at South Tipperary General Hospital in Clonmel, to x-rays having been taken and to the treatment received. Among other things, the report states that the Plaintiff informed Dr. McCarthy that she was currently out of work and had been since 17 May 2011. In terms of the timeline, this indicates that the Plaintiff ceased working approximately one year after the accident.

**26 March, 2012 – email from insurer to insured.**

77. On 26 March, 2012 Mr. Ryan emailed Ms. Blodneice to say that he had not received any contact from the manager of the Brian Boru regarding the case and asking that the manager contact him. Mr. Ryan also made it clear that "*our underwriting department are currently reviewing this file with respect to the late notification.*"

**10 April 2012 – Internal email from Theresa McNabb to Tanya Murray of the insurer.**

78. Ms. Theresa McNabb is a commercial claims coordinator in the commercial department of Liberty Insurance. Mr. Dave Byrne was head of department. Ms. Tanya Murray was claims coordinator. On 10 April 2012 Ms. McNabb sent an email to Ms. Murray confirming that the matter was "*with Dave*". Ms. McNabb went on to refer to "*serious late notification on this claim*" as well as the insurer having many other similar claims with late notification and she also referred to Mr. Byrne expecting to revert that week.

**Consideration of the issue by a range of parties within the Insured**

79. It is clear from this communication that, prior to any decision which was ultimately taken by the insurer, the issue was considered by a range of persons, including senior representatives of the insurer. In short, the evidence demonstrates that, prior to ultimately taking a decision to refuse to indemnify on the basis of late notification, the insurer consulted widely both within its claims department and its underwriting departments. The evidence also demonstrates that, although expressing their individual views, a range of parties within the insurer were open to hearing a different view and

went to some considerable trouble to canvass opinion before any final decision was come to.

**19 April 2012 email from Ms. McNab to Ms. Murray of the insurer**

80. It is not in dispute that Mr. John Whelan and Mr. Gary Howard are both senior members of Liberty Insurance. On 19 April 2012 Ms. McNab sent an internal email to Ms. Murray confirming that the claim had been reviewed by both Mr. Whelan and Mr. Howard and that both were of the opinion that the insurer "*should decline indemnity due to the LN on file*". The email went on to say that Messrs. Whelan and Howard suggested that the regional manager should make an off the record approach to the claimant's solicitor to confirm whether they were prepared to accept a "*nuisance offer*" and that if this was the case a settlement for no more than €2,500 should be concluded and "*if the nuisance offer is not accepted then we should formally decline the claim*".

81. It is not in dispute that the Plaintiff's claim was not compromised. There is nothing in the 19 April 2012 email which evidences anything untoward. Rather, the evidence is that the insurer took a pragmatic approach and was, as a matter of fact, willing to make a payment of up to €2,500 in the context of an "off the record" approach and a "nuisance offer". Nothing in the insurer's 19 April 2012 email is inconsistent with the stance adopted by the insurer prior to or subsequent to that date.

**26April 2012 - email from insurer to broker**

82. On 26 April 2012, Ms. Tanya Murray, claims coordinator of Liberty Insurance, emailed Mr. Terry Keaney, insurance broker, stating: - "*Please be advised that indemnity is still under review on this one and we would hope to have a decision made within the coming week*". It is clear from the foregoing that the insurance company was keeping the First Named Defendant's broker updated. It is equally clear that Ms. Murray's email reflected the then – position, no final decision having been come to.

**30 April 2012 – update report from Liam Ryan to Tania Murray**

83. On 30 April 2012, Mr. Ryan responded to Ms. Murray's 19 April 2012 email and expressed the view that it was highly unlikely any form of nuisance offer would be accepted even if it was possible to contact the claimant's solicitor. Mr. Ryan was of the view that the case would be pushed as far as possible "*regardless of whether indemnity is available to the Insured or not*".

**8 – 10 May 2012 – Liam Ryan to Tania Murray**

84. On 08 May 2012, Mr. Ryan sent an internal email to Ms. Murray of the insurer which stated:- *I understand we are proceeding with the decline for late notification. I would suggest that the broker is kept fully informed of this decision and that he is written to as well as the Insured*". On the same day, Ms. Murray send an internal email to Ms. McNab, referring to Mr. Liam Ryan's response of 8 May to Ms. McNab's 19 April email. Ms. Murray asked Ms. McNab, inter alia, "*are you happy for claim to be formally declined?*" On 10 May 2012, Mr. Ryan sent and internal written report to Ms. Murray of the insurer in which Mr. Ryan stated inter alia:-

*"I made contact with Terry Keaney, the insured's insurance broker at 2:50 p.m. I confirmed to him that we would decline this case on the grounds on late notification and advised that letters would be drafted and issued shortly. Mr. Keaney was disappointed with this decision, and gave me the impression that previous claims were declined on him in the past. He was unhappy and advised that he would never deal with Liberty Insurance again. Could you please advise our commercial department of this and delay sending out the decline letters until the commercial department have reviewed this matter".*

85. It is clear from the foregoing that on or about 8 May 2012, and after a range of parties within the Second Named Defendant had considered the issue and expressed their views, the insurer made a decision to decline indemnity on the basis of late notification by the First Named Defendant. It should also be said that there is no evidence that any one of the various parties who reviewed the matter within the insurer came to the view that either late notification had *not* occurred or that indemnity should not be declined on that basis. It is equally clear from the evidence that the First Named Defendant's insurance broker was informed of the insurer's decision on 10 May 2012 and that his immediate reaction was unhappiness and to advise that he would never deal with Liberty again, in response to which Mr. Ryan requested that the insurer's commercial department review the matter.

86. On receipt of Mr. Ryan's report, Ms. Murray sent an email to Ms. Sharon Campbell of Liberty, alerting the latter to the broker's disappointment and to his having advised Mr. Ryan that he would never deal with Liberty again. Ms. Murray made it clear to Ms. Campbell that she would hold off issuing decline letters for now and she asked Ms. Campbell to revert at her earliest convenience.

**June 20, 2012 – letter from Ms. Ciara Fox to the Injuries Board**

87. On 20 June 2012, Ms. Ciara Fox, on behalf of the First Named Defendant, wrote to the injuries board "*re: PL 032221283487*", being the reference number concerning the Plaintiff's claim and stated the following: -

*"We acknowledge receipt of your March 30, 2012 letter, which contains a Formal Notice of the claim from Stephanie Moloney, of Kingstown Windmill, Cashel, Co. Tipperary in response to this notice, Cashel Taverns Ltd. do consent to an assessment being made by injuriesboard.ie".*

**First Named Defendant dealing with the Plaintiff's claim**

88. The foregoing correspondence demonstrates that, as of 20 June 2012, the First Named Defendant was, as a matter of fact, handling the Plaintiff's claim itself and was doing so without reference to the insurer. There is no evidence before the court that Ms. Fox sought the views of the insurer before consenting, on behalf of the First Named Defendant, to an assessment and I am entitled to conclude that she did not. To consent to an assessment of a claim is on any analysis a significant decision and one with the potential to give rise to significant financial liability. That is undoubtedly a decision which the Insured took. It is a fact that it was a decision taken at a time when no "cover" had

been confirmed. On the contrary, the backdrop to the decision was that the Insured had explicitly referred to late notification and had reserved its rights. The fact that the First Named Defendant, without reference to the insurer, was dealing directly with PIAB and was making decisions in relation to the Plaintiff's claim was, in my view, consistent with the insured knowing that it had notified the incident too late to expect to be indemnified by the insurer and, in that context, making decisions in what it felt was its best interest at the time, specifically being to agree to assessment of the Plaintiff's claim, with the prospect, therefore, of having to pay the Plaintiff the assessed amount, inevitably flowing from that decision to agree assessment.

**26 June 2012 – letter from insurer to broker**

89. On 26 June 2012, Ms. Tania Murray of Liberty's claims department wrote to the First Named Defendant's insurance brokers to state inter alia: - "*Please find enclosed letter which will be issued to our mutual client within 5 days from the date on this letter*". The 26 June 2012 letter to Keaney Insurance Brokers enclosed an unsigned letter of the same date from Liberty to the First Named Defendant. This draft letter referred to previous correspondence from Liberty, namely the 14 December 2011 letter and stated inter alia that Liberty was advised of the claim on 17 October 2011, over seventeen months after the incident date. The letter went on to state that this late notification is contrary to specific policy requirements. The letter advised that Liberty's investigations into the claim were now complete and that Liberty will not be indemnifying the insured due to a breach of the general terms and conditions, specifically ss. 8 and 2, both of which were quoted.

90. The letter went on to state that, from Liberty's investigations, the insurer determined that the First Named Defendant failed to notify the insurer when the insured became aware of the incident. The First Named Defendant's attention was drawn to the arbitration clause in the general policy conditions and the letter concluded by respectfully advising the First Named Defendant to engage legal representation to protect their interests in respect of their possible liability arising from the incident.

**13 July 2012 – letter from insurer declining indemnity**

91. On 13 July 2012, the insurer issued a letter to the First Named Defendant in precisely the same terms as the unsigned version which had been furnished to the broker on 26 June 2012. It is not necessary to set it out verbatim. Of particular importance, however, are the following statements:-

> *"As you are aware Liberty Insurance was advised of this claim on 17th October 2011, over 17 months after the incident date. This late notification is contrary to specific policy requirements in relation to informing Liberty Insurance of incidents that may give rise to a claim.*
>
> *We wish to advise that our investigations into your claim are now complete and we will not be indemnifying you due to a breach of the general terms and conditions of your policy of insurance.*
>
> *We would respectfully refer to your policy booklet, namely sections 8 and 2, where it states the following . . ."*

92. Section 8 from the General Policy Conditions was set out in full, as was s. 2. Having set these sections out, verbatim, earlier in this decision, it is not necessary to repeat them here. At the setting out of Sections 8 and 10, the letter concluded as follows: -

> *"From our investigations we have determined that you failed to notify us when you became aware of the incident. Having considered this matter fully, we are satisfied that you are in breach of the above conditions and therefore we will not be providing you with indemnity in respect of this claim.*
>
> *We draw your attention to the Arbitration clause in the General Policy Conditions which states as follows: -*
>
> ***10. ARBITRATION***
>
> *Any dispute between the Insured and the Company on our liability in respect of a claim or the amount to be paid shall, in default of agreement, be referred within nine calendar months of the dispute arising, to an arbitrator, appointed jointly by the Insured and the Company in agreement, or failing agreement, appointed by the President for the time being of the Incorporated Law Society of Ireland or Northern Ireland and the decision of such Arbitrator shall be final and binding on both parties. If the dispute has not been referred to arbitration within the aforesaid nine-month period, then the claim shall be deemed to have been abandoned and not recoverable thereafter.*
>
> *We respectfully advise you to engage your own legal representation in order to protect your interests in respect of your possible liability arising from this incident.*
>
> *We trust you note our position.*
>
> *Yours faithfully".*

93. A number of observations can be made in relation to the foregoing. Firstly, the insurer's 13 July 2012 letter was very clear as to the reason why the decision had been taken not to indemnify the First Named Defendant in respect of the incident which occurred on 8 May 2010, namely, late notification over seventeen months after the incident date. The insurer was also clear as to its view that sections 2 and 8 of the General Policy Conditions had been breached by the First Named Defendant. In addition, the insurer drew the First Named Defendant's specific attention to Clause 10 of the General Policy Conditions which constitutes an Arbitration clause. The 13 July 2012 letter accurately set out that arbitration clause, verbatim. The existence and contents of the said Arbitration clause are not in dispute in the present proceedings. Among other things, it is plain that the Arbitration clause uses the mandatory term "*shall*", in that it requires any dispute between the First Named Defendant and the Second Named Defendant in relation to the latter's liability concerning a claim to be referred to arbitration within nine calendar months of the dispute arising. It is common case between the parties that the said nine-month period commenced on 13 July 2012 and ended nine calendar months later on 13 April 2013.

**No dispute between Insured and Insurer was referred to Arbitration**

94. At this juncture it is appropriate to point out that no dispute between the First and Second Named Defendant as to the latter's liability in respect of the Plaintiff's accident was referred to arbitration, in the manner which Clause 10 of the General Policy Conditions requires, during the relevant nine – month period. It is also important to note that no such dispute was *ever* referred to arbitration, even outside the nine-month period which expired on 13 April 2013. Nor did the First Named Defendant ever make an attempt to have the matter referred to arbitration, even outside the nine – month period. It is, therefore, an undisputed matter of fact that there was no reference to arbitration.

***"the claim shall be deemed to have been abandoned and not recoverable"***

95. The final sentence in the arbitration clause found in the General Policy Conditions is explicit as to the position when a dispute has not been referred to arbitration, namely ". . . *the claim shall be deemed to have been abandoned and not recoverable thereafter*". In other words, the evidence before the court demonstrates that, not having invoked Clause 10 of the General Policy Conditions in respect of mandatory arbitration, any claim concerning an entitlement to be indemnified by the Second Named Defendant in respect of the Plaintiff's accident is a claim which has long since been "*deemed to have been abandoned and not recoverable"*, insofar as the First Named Defendant is concerned. This can have come as no surprise to the First Named Defendant. The arbitration clause plainly comprised s. 10 of the General Policy Conditions relating to the insurance policy in question and I am entitled to conclude that, at all material times, the First Named Defendant was aware of the nature and effect of the arbitration clause.

**The First Named Defendant's attention was drawn to the Arbitration clause on 13 July 2012**

96. Moreover, the evidence demonstrates conclusively that the First Named Defendant's particular attention was drawn to the arbitration clause on 13 July 2012. Thus, the position is that the First Named Defendant, effectively abandoned its claim to be indemnified in respect of the Plaintiff's accident and did so as of 13 April 2013 (nine months after 13 July 2012). This abandoning by the First Named Defendant of its claim to be indemnified by the Second Named Defendant in respect of the Plaintiff's accident occurred *before* the First Named Defendant gave instructions to Messrs. Kingston & Co. Solicitors who filed an appearance on behalf of the First Named Defendant on 23 May 2013, in respect of the Plaintiff's personal injuries summons which was issued on 25 February 2013.

**Instructions to solicitors given by the insured in May and June 2013**

97. It is a matter of fact that by notice of change of solicitor dated 27 June 2013, Martin C. Ryan & Co. Solicitors came on record for the Defendant, having served a notice of change on that date. As mentioned earlier, Messrs Kingston & Co. solicitors initially filed an Appearance on behalf of the First Named Defendant on 23 May 2013. It is also a matter of fact that this notice of change of solicitor in respect of the Defendant's legal representation took place over two months *after* the expiry of the nine months' period which is specified in the arbitration clause appearing at s. 10 of the General Policy Conditions. The fact that the insured gave instructions to firms of solicitors is further evidence, in my view, that the First Named Defendant accepted the fact that indemnity

had been validly refused by reason of their late notification and, against this background, made decisions at various points, consistent with what that company felt to be in its then best interest insofar as the Plaintiff's claim was concerned. The evidence demonstrates that these decisions, such as giving instructions to solicitors, were made in the knowledge that the company did not have insurance cover regarding the Plaintiff's claim.

**7 March 2013 – insurer's report regarding telephone conversation with Broker**

98. I referred earlier in this judgment to the contents of the insurer's 13 July 2012 letter which made it clear to the First Named Defendant that indemnity was being refused. No evidence was put before the court to the effect that, in response to the 13 July 2012 letter, either the First Named Defendant or its broker claimed that the decision to refuse indemnity was flawed in any way or was not valid. The court has no evidence of any objection made by the First Named Defendant to the decision was communicated in the insurer's 13 July 2012 letter and that remained the position throughout the remainder of 2012.

99. I am entitled to conclude that if the First Named Defendant or its broker regarded the insurer's 13 July 2012 decision as being wrong, misconceived, flawed, invalid or in any way infirm or unlawful, the First Named Defendant and/or its broker would have set this out in writing, detailing the facts on which they based the view that insurance cover was not validly refused. Neither the First Named Defendant, nor its broker did so and it is a matter of fact that some eight months passed after the 13 July 2012 letter, until Mr. Keaney, the First Named Defendant's insurance broker, spoke by phone with Mr. Liam Ryan of Liberty Insurance on 7 March 2013. That phone call was detailed in a report of 7 March 2013 by Mr. Ryan to Ms. Murray and it is appropriate to recite its contents verbatim as follows:-

> *"Hi Tania,*
>
> *I had a long telephone conversation with Terry Keaney this afternoon at 4:20 PM. He advised that his client was now between a rock and a hard place with regard to this claim. He reported that his client had purchased an expensive insurance policy and felt that it was unreasonable that cover was withheld in this particular instance. He advised that he had a meeting with the managing director of Cashel Taverns, a couple of days ago regarding the claim. The MD couldn't understand how insurers had walked away from the claim and he said there was no intention to hide or withhold information from insurers. If he felt that his company had maliciously withheld or deliberately withheld information, then he could understand insurer's decision. He was of the view that this was the first claim where there was any real issue in all the incidents that were reported to insurers during the period of cover.*
>
> *Towards the end of our conversation I asked Mr. Keaney what he hoped to achieve by our telephone call. He said that he was looking to have a meeting with Liberty Insurance to discuss the claim and the decision to decline cover to see if there was any way of reaching a compromise. He was of the view that if Liberty agreed to deal with the claim even on the basis that his client was penalised for the delay,*

*this would be something. I told Mr. Keaney that I would certainly relay his comments back to insurers, but that I didn't know what response I would get. I had already asked Mr. Keaney why his client simply doesn't simply look to arbitrate the matter and mentioned this to him again when he discussed a possible meeting with insurers. His response was that he wanted to see if the matter could be resolved amicably before it went down that route.*

*I don't know if you want to refer this matter to senior management or underwriters for their review, or if you are happy to stick with our decision to decline to deal with the claim. Perhaps you could let me know how you wish to proceed so I can report back to Mr. Keaney.*

*Trusting you find this in order,*

*Regards,*

*Liam Ryan".*

**"Between a rock and a hard place"**

100. Several comments can be made in relation to the foregoing. The broker's description of the First Named Defendant being "*between a rock and a hard place with regard to the claim*" and feeling that it was "*unreasonable*" that cover was withheld, is materially different to an assertion by the broker that the insurer's 13 July 2012 decision was invalid or unlawful. I am satisfied that, as a matter of fact, the broker, on behalf of the First Named Defendant, did not suggest that the insurer was not within its rights to refuse indemnity and did not suggest that the insurer's 13 July 2012 decision was invalid or wrong, much less provide any reasons on which to base any such assertion that the insurer's decision to refuse indemnity was invalid. No such assertion was made.

**An acknowledgement that notification was "*withheld*"**

101. I am also satisfied that, as a matter of fact, the First Named Defendant, through its insurance broker, explicitly acknowledged that the First Named Defendant failed to notify the claim in sufficient time, in that the broker explicitly acknowledged that the company "*withheld*" information from the insurer, but suggested that this was not done "*maliciously*" or "*deliberately*".

**Absence of malice**

102. It is clear from the evidence that, as of 7 March 2013, the First Named Defendant's broker felt that, if the company had "*maliciously withheld or deliberately withheld information*", there could be no question of asking the insurer to revisit its decision but where the company had withheld notification, but not maliciously or deliberately, the broker felt that the company should look again at the refusal of indemnity. It need hardly be pointed out that, nowhere in the general policy conditions governing the relevant insurance contract between the first and Second Named Defendant is any distinction drawn between an insured's failure to notify, where that failure is deliberate or malicious, as opposed to a situation where the failure to notify an incident is for any other reason. Clause 8.a.i. requires the insured to notify the insurer *immediately* on becoming aware of

any incident or as soon as practically possible thereafter and. In light of the contents of the 7 March 2013 report, I am entitled to find as a fact that the First Named Defendant's insurance broker acknowledged that the company "*withheld*" information, namely, failed to notify on time, albeit without malicious or deliberate intent.

**The suggestion that the insured be "penalised for the delay" in notification**

103. Far from denying late notification, it is clear from the contents of the 7 March 2013 report that the broker openly acknowledged the delay in notification on the part of the insured and, without claiming that the insurer's 13 July 2012 decision was wrong or invalid, proposed a compromise involving his client being "*penalised for the delay*". The suggestion which was made by the broker that the insured be penalised for the delay is consistent, and only consistent, with the fact that the delay in notification was acknowledged.

104. There is no evidence that the report of 7 March 2013 is other than entirely accurate and a careful consideration of its contents shows that, far from being any suggestion by or on behalf of the First Named Defendant that the insurer had not validly refused cover, it constituted an acknowledgment of late notification and an appeal to the insurance company that something might be done notwithstanding the late notification.

105. Earlier in this judgment I looked at the arbitration clause, which the insurer's 13 July 2012 letter quoted, verbatim. As well as plainly appearing at Clause 10 of the general policy conditions of the First Defendant's insurance contract, and as well as having been cited in the 13 July 2012 letter, arbitration was referred to a third time, namely in the 7 March 2013 conversation between Mr. Ryan and the First Named Defendant's broker, Mr. Keaney. The contents of the report, which I have quoted above, are entirely consistent with the fact that the First Named Defendant was well aware of the arbitration clause and had not invoked the arbitration clause. It is not in dispute that the First Named Defendant never invoked the arbitration clause. Nor is it in dispute that, despite the appeal made by Mr. Keaney on 7 March 2013, the insurance company did not alter its position.

**12 March 2013 – email from broker to insurer**

106. Shortly after their conversation on 7 March 2013, having referred to the recent telephone discussion, the First Named Defendant's broker stated the following: -

> *"As confirmed to you by phone, our client is not in a financial position to defend the High Court proceedings and if Liberty Insurance Company do not provide indemnity for the claim, this may result in the closure of the Public House which will cause serious financial problems for my client.*
>
> *As you are aware from your investigations of this claim, my client first received the solicitor's letter on the 10th October 2011 and immediately notified the matter to you.*
>
> *The client provided you with all relevant information in relation to the accident and the position of Liberty Insurance Company has not been prejudiced because of the delay in notifying the initial incident.*

*In the circumstances and due to the very serious consequences that will arise if Liberty Insurance Company do not indemnify our client, I would like to arrange a meeting with you with a view to finding a satisfactory solution to the matter.*

*My client has also confirmed that they will immediately forward to you, the cheque for €5,500 in relation to the policy excess.*

*I urgently await your advices.*

*Kind Regards,*

*Yours Sincerely,*

*Terry Keaney A.C.I.I Director.*

*Keaney Insurance Brokers Ltd".*

**12 March 2013 – an appeal to the insurer**

107. The "subject line" of the broker's 12 March 2013 email was stated to be "*Cashel Taverns Ltd. – employer's liability claim – Stephanie Moloney*" and I am entitled to find, as a fact, that what the broker said on behalf of his client was said with authority and represented the First Named Defendant's position. Just as was the case regarding the conversation between Mr. Keaney and Mr. Ryan on 7 March 2013, the broker's 12 March 2013 email is, in substance, an appeal to the insurer. Far from being an assertion that the insurer had invalidly refused or rescinded cover, this was a plea to the insurance company which was squarely based on what was said to be the company's financial difficulties and the consequences for the company if the insurer did not provide indemnity. Nowhere is there a suggestion that the company did not breach general conditions 2 and 8 of the policy. Nowhere is it suggested that the First Named Defendant had not failed to notify the insurer on time. On the contrary, the appeal to the insurer includes the suggestion that the latter has not been prejudiced "*because of the delay in notifying the initial incident*". In other words, the fact of the delay in notifying the incident to the insurer is openly acknowledged but is said not to have caused prejudice.

108. Whether or not prejudice arose in the present case is not an issue which this Court is required to determine in the context of the present application. I have, however, noted earlier the fact that within the insurer the view was certainly taken that prejudice had arisen by reason of the late notification. I would also observe that 12 March 2013 was still within the nine-month period specified in the arbitration clause, which nine-month period commenced on 13 July 2012 and did not expire until 13 April 2013, yet the First Named Defendant never referred any dispute to arbitration. In my view this is because there was in reality, no dispute, in that the position as of 12 March 2013 can fairly be said to be as follows: -

(i) The insurance company refused indemnity by letter of 13 July 2012;

(ii) Neither the First Named Defendant nor its broker made any objection to that and some eight months passed;

(iii) On 7 March 2013 and again on 12 March 2013, the First Named Defendant, through its broker, made an appeal to the insurance company, essentially asking that the insurance company might do something for the First Named Defendant, notwithstanding an openly acknowledged delay on the part of the insured with regard to notification of the Plaintiff's accident;

*(iv) Neither on 7 March 2013, nor on 12 March 2013, was there any suggestion that the insurer's decision to refuse cover was invalid, unlawful, or could be challenged on its merits. Rather, the appeal was based on the pure financial position of the First Named Defendant and the consequences for the First Named Defendant if the insurer did not provide indemnity.*

**No dispute between the insurer and the insured that there was late notification**

109. In light of the foregoing, the evidence reveals that, as of 12 March 2013, there was no dispute about the fact that the First Named Defendant had been late in notifying the Plaintiff's accident to the Second Named Defendant and it is incontrovertible that no dispute was ever referred to arbitration. That being so, it can fairly be said that in the proceedings before this Court, arguments were made on behalf of the Plaintiff in an effort to suggest that there was no delay by the First Named Defendant with regard to notifying the 8 May 2010 incident to the insurance company, despite the fact that the First Named Defendant, through its broker, openly acknowledged the delay in notifying that incident.

**27 March 2013 – email to Liam Ryan from Justin O'Brien of the insurer**

110. On 26 March 2013, Mr. Keaney sent a further email to Liam Ryan, following up on his email of 12 March and Mr. Ryan contacted Mr. Justin O'Brien, the insurer's claims process manager in the commercial department of Liberty Insurance, in relation to the matter, Ms. Tania Murray having also alerted Mr. O'Brien to the broker's 12 March 2013 communication. On 27 March 2013, Mr. O'Brien emailed Mr. Ryan and copied, inter alia, Ms. Murray to say:-

> *"Thanks all, satisfied we should maintain our position of not providing indemnity. PH management fully aware of the incident at the time. Approx. 17 months LN. Liam, please feel free to respond to the broker confirming same, alternatively, we can send a letter etc. – thanks".*

**Policy Holder management fully aware of the incident at the time**

111. A number of things can be said in relation to the foregoing. Firstly, it is clear that, as a matter of fact, the insurance company gave consideration to the appeal made by Mr. Keaney, the First Named Defendant's broker, in particular, to the contents of his 12 March 2013 email. The statement by Mr. O'Brien that "*PH management fully aware of the incident at the time*" is an accurate statement of fact, having regard to the evidence before this Court ("PH" being a reference to Policy Holder). In the manner previously examined, there was no more senior manager who was running the Brian Boru Bar, on a day to day basis, than Mr. Horan.

112. In my view, it would offend common sense, ignore the facts and do violence to language if the First Named Defendant's *manager* could not be considered to be a member of the First Named Defendant's *management*. It was not as if Mr. Horan was a low-level employee with the title of "manager" but with a number of more senior managers present in Cashel tasked with responsibility for running the business on a day to day basis. The fact is that he was the most senior manager on the ground and, on the evidence before the court, I am satisfied that it is a matter of fact that the insurer's management, in the form of Mr. Horan, the manager of the Brian Boru Bar, was fully aware of the incident at the time it occurred. To reach a different finding, on the evidence before this Court, would be perverse.

**The Plaintiff's argument that the manager's knowledge did not amount to knowledge on the part of the insured**

113. Notwithstanding the arguments made so skilfully on behalf of counsel for the Plaintiff in an effort to suggest, inter alia, that because Ms. Fox, a director of the company, was not informed of the incident, Mr. Horan's intimate knowledge of it did not constitute any knowledge on the part of the insured, it has to be pointed out that Mr. Keaney, the insured's broker, adopted no such stance. On the contrary, it is a matter of fact that the broker acknowledged that the First Named Defendant had withheld information, albeit not maliciously or deliberately, and had delayed in notifying the incident in question. This attitude by the insured's broker was, of course, entirely consistent with the indisputable fact that the insured's manager was aware of the incident from the very day it occurred and, therefore, the insurer was aware of it and it could not plausibly be said that the insured did not have knowledge of the incident in those circumstances.

**27 March 2013 – letter from insurer to broker**

114. On 27 March 2013, Ms. Murray of the insurer's claims department wrote to Messrs. Keaney Insurance Brokers Ltd. as follows: -

> *"Dear Sirs,*
>
> *We are writing in relation to the above and your recent communication with our regional claims manager, Liam Ryan.*
>
> *Please be advised we have reviewed this file again in relation to indemnity. We are satisfied that the client was in breach of their General Policy Conditions and we will therefore not be providing our mutual client with an indemnity in relation to this matter.*
>
> *Should you have any further queries in relation to the above, please contact our regional claims manager, Liam, on the number above.*
>
> *Yours faithfully".*

115. The foregoing letter was plainly sent after Mr. O'Brien's 27 March 2013 email. Several things can be said in relation to it. It is a matter of fact that a further review had taken place. That was a review which was carried out in response to what can fairly be called an

appeal or a plea made by the First Named Defendant's insurance broker, Mr Keaney, by means of a 7 March 2013 phone call with Mr. Liam Ryan of the insurer, and in a 12 March 2013 email sent by the former to the latter. The result of the review was that the insurer's decision, which had been communicated to the First Named Defendant on 13 July 2012, remained unchanged. In the manner examined earlier in this judgment, the review was not based on any assertion by or on behalf of the First Named Defendant that the insurer's refusal of cover was invalid or unlawful. On the evidence, I am entitled to find as a fact that, if the First Named Defendant's position was that the Second Named Defendant's decision to refuse indemnity constituted an invalid or unlawful decision, it could and would have said so: firstly, on receipt of the 13 July 2012 letter; secondly, in the context of the March 2013 request that the insurance company reconsider its position and, thirdly, in the context of arbitrating a dispute, if one actually existed. The evidence demonstrates that the First Named Defendant did none of these things.

**No action by the insured or the broker following the 27 March 2013 letter**

116. It is also a matter of fact that, following receipt by the broker of the insurer's 27 March 2013 letter, neither the broker nor the First Named Defendant said or did anything further. No evidence was put before the court that the First Named Defendant claimed, in response to the Second Named Defendant's 27 March 2013 letter, that the refusal to indemnify was invalid or unlawful or disputed. It will be recalled that the second paragraph of the 27 March 2013 letter was very explicit about the insurer's position and the reason for it, namely that the "*client*" (meaning the First Named Defendant) "*. . . was in breach of their General Policy Conditions and we will therefore not be providing our mutual client with an indemnity in relation to this matter*". At no stage post the 27 March 2013 letter did the broker or their client claim that the reason for the foregoing decision was invalid or disputed same.

117. It is also a fact that the 27 March 2013 letter was sent within the nine – month period provided for in the arbitration clause. The First Named Defendant never referred the matter to arbitration, either in the aftermath of receiving the 13 July 2012 letter from Liberty, or following the 27 March 2013 letter. Having carefully considered all the evidence, I am satisfied that, quite apart from any financial difficulties affecting the First Named Defendant, the arbitration clause was not invoked because there was no dispute as to the lawfulness of the stance adopted by the insurance company. In short, the First Named Defendant knew the insured's decision (to refuse cover) and knew the reason for that decision (breach of the General Policy Conditions due to late notification) and did not challenge the foregoing. They did not challenge same because, as the evidence reveals, the insured acknowledged that there had, as a matter of fact, been late notification.

**Judgment obtained by the Plaintiff over 4 years after the expiry of the Arbitration period**

118. Earlier in this Judgment, I referred to certain pleadings in this case. It is appropriate, at this juncture to refer to the pleadings again, as follows. When, on 19 June 2017, Messrs. Martin C. Ryan Solicitors came "off record" and when, on 20 June 2017, the High Court assessed damages in favour of the Plaintiff in the absence of any appearance by the Defendant and when, on 29 June 2017, an order was made joining Liberty as the Second

Named Defendant in the proceedings, over four years had already passed since the expiry of the 9 - month period specified in the Arbitration clause governing the relevant insurance contract, as between the first and Second Named Defendants.

119. For the sake of completeness, it is appropriate to point out that the First Named Defendant did not, on 19 June, 20 June or 29 June 2017, suggest to the insurer that the First Named Defendant had any entitlement to insurance cover or that the insurer's decision to refuse indemnity was flawed or invalid or unlawful or could be revisited, whether by way of arbitration, or otherwise. Rather, the evidence illustrates that the First Named Defendant allowed a situation to arise whereby, having initially had legal representation, it no longer had same by the time of the hearing and permitted a situation to arise whereby judgement was obtained by the Plaintiff, against the company, without any appearance before the Court on behalf of the company.

120. Whatever about any financial difficulties with which the First Named Defendant faced, I am entitled to conclude on the evidence that the First Named Defendant permitted a situation to arise whereby judgment was obtained against it, knowing and accepting that the company did not have insurance cover from the Second Named Defendant and knowing and accepting the fact of, and the validity of, the reason for indemnity having been refused and knowing and accepting that there was no dispute between the First and Second Named Defendant as to indemnity.

**The Plaintiff was not party to the Insurance contract**

121. It need hardly be pointed out that the Plaintiff is not a party to that insurance contract, but it is of considerable significance to note that the First Named Defendant who was in privity with the insurer did not pursue arbitration of any dispute, be that at the time of refusal of indemnity or when judgment was obtained against the company and, on the evidence before me, I am entirely satisfied that the First Named Defendant has long since abandoned any entitlement to claim that the Second Named Defendant is obliged to indemnify it in respect of the Plaintiff's accident and has long since accepted that the fact of late notification resulted in a valid refusal of indemnity.

**Dispute abandoned**

122. These proceedings are not, of course, an arbitration and at the heart of the claim which this Court has to resolve is whether the insurer was entitled to refuse to indemnify the First Named Defendant when it made the decision it came to. It must be said however that if, at the relevant time, the First Named Defendant was of the view that the Second Named Defendant was wrong to refuse indemnity and/or that such a refusal was invalid, the First Named Defendant could, and indeed was required under the policy, to arbitrate that issue, otherwise it would be deemed abandoned.

123. From a careful consideration of the evidence, I can see clearly that the First Named Defendant, in particular its broker, was *unhappy* with the decision which the insurer came to. The evidence does not, however, suggest that the First Named Defendant, or its broker, claimed at any stage that the insurer was not *entitled* to take the decision it took, nor were reasons proffered as to why the insurer's decision to refuse indemnity was

incorrect or invalid and it is an indisputable fact that the First Named Defendant did not invoke the Arbitration clause in respect of the insurer's decision to refuse indemnity and has no right to invoke the said clause now, the claim to indemnity having been abandoned by the First Named Defendant who, as a matter of fact, accepted both the refusal of indemnity and the reason for same.

**Witness evidence**

124. It is appropriate to observe that the Plaintiff made a decision not to call any witnesses, whether as to fact or any expert witness. It is entirely true to say that the onus rested on the insurance company, namely the Second Named Defendant, to prove that it was entitled to repudiate liability in respect of the relevant insurance policy. It is, however, fair to say that neither the insurance broker nor any representative of the insured was called to give evidence. That being so, there was no witness for the Plaintiff who gave evidence that there was not, in fact, late notification and/or that the insurer's decision to refuse indemnity was invalid. Having regard to the contents of the documents before the court, it is plain that, at the relevant time, neither the broker nor the First Named Defendant made the case to the insurer that the decision not to indemnify was unlawful or invalid, so it is perhaps unsurprising that no such witnesses were called by the Plaintiff.

**Expert witness**

125. The sole witness who gave evidence was Mr. Peter Sreenan, who is a gentleman with very considerable experience and expertise in the insurance field. He was called by the Second Named Defendant as an expert and I will presently refer to the evidence which he gave to the court. Before doing so, however, it is appropriate to refer to the basis upon which an expert is permitted to give opinion evidence. In short, testimony from experts is permissible given that, as Mr. Justice Kingsmill Moore put it in *A.G. (Ruddy) v. Kenny* [1951] 94 ILTR 185:

> *"The nature of the issue may be such that even if the tribunal of fact had been able to make the observations in person he or they would not have been possessed of the experience or the specialised knowledge necessary to observe the significant facts, or to evaluate the matters observed and to draw the correct inferences of fact."*

126. Mr. Sreenan's evidence was undoubtedly helpful to the Court, but before examining same, it is appropriate to say that the correspondence and documents which I have analysed in this judgment did not require specialised knowledge or assistance from an expert in order for the court safely to evaluate that evidence and make the findings of fact and to draw correct inferences of fact from same, in the manner which I have detailed in this Judgment. In other words, facts found by this Court from a careful examination of the evidence demonstrates, beyond doubt, that there was late notification as a matter of fact and that this is something the insured and the insured's broker explicitly acknowledged. The Court did not need the assistance of expert evidence to reach those findings safely. That is not to suggest for a moment that Mr. Sreenan's testimony was not of assistance. It was undoubtedly of assistance, insofar as he offered views on issues which he was uniquely qualified to comment upon and I will presently deal with the views provided by

him. It can also be said that the opinion evidence tendered by Mr. Sreenan is also consistent with the findings of fact reached by this Court from an analysis of the documentary evidence and it is to Mr Sreenan's testimony I now turn.

**Evidence by Mr. Peter Sreenan**

127. It is not in dispute that Mr. Sreenan is someone with very considerable experience and expertise in the insurance sector. He is an associate of the Chartered Insurance Institute, a chartered insurance practitioner and a certified mediator. He commenced his insurance career in 1977 with the Sun Alliance & London (now RSA) where he worked for some years. He spent most of his insurance career in the broking sector with Coyle Hamilton Willis, (now part of the Willis Towers Watson Group), where he handled a portfolio of large corporate clients including in the retail, education, manufacturing, construction and contracting sectors. During this time, Mr. Sreenan dealt with many large and complex claims under various personal, business and construction insurance policies. As of 2012, he held the position of Director and Head of Regions within Willis. Having retired from Willis in 2012, Mr. Sreenan has acted as an insurance consultant and has been engaged by insurers, brokers, loss adjusters and solicitors, part of that work relating to the provision of reports as an expert witness and giving evidence in respect of various insurance matters, including disputed claims.

128. It is not in dispute that Mr. Sreenan was retained on the instructions of the Second Named Defendant to review documentation relating to the present dispute and to offer his professional opinion as to whether the Second Named Defendant was correct to decline indemnity to the First Named Defendant on the grounds of breach of General Policy Conditions 2 and 8. Mr. Sreenan's sworn evidence was that, in his professional opinion, the First Named Defendant insured was in breach of General Policy Conditions 2 and 8 and that this entitled the Second Named Defendant to deny policy indemnity to the First Named Defendant in respect of the claim by the Plaintiff arising from the incident on 8 May 2010. This view was also reflected in the contents of his written report dated 7 September 2020 which was furnished to the court.

129. Among other things, Mr. Sreenan gave the following evidence, all of which was uncontroverted: -

- The purpose of General Policy Condition no. 2, insofar as it relates to the notification of claims, is to enable the insurer to investigate the potential claim at the earliest opportunity so that the insurer can decide what steps to take to reduce or manage their exposure;

- Breach of a claims notification condition precedent means that the insurer is not liable to meet the claim and it is not necessary to prove that the insurer has been prejudiced;

- With regard to notification obligations, there are variations between different insurance policies, in that some require notification of incidents "*likely*" to give rise to a claim, but the majority of insurers require notice of anything which "*may*" give

rise to a claim, regardless of likelihood (being the obligation placed on the insured under the relevant policy in the present proceedings);

- Insurers do not want policy holders to make an assessment as to the likelihood, or not, of a claim and insurance companies want to exercise their own judgment based on their experience;

- Insurers want to get involved straight away, at a time when the accident locus is unchanged and while memories are fresh;

- Other good reasons for early notification include the fact that an insurance policy is typically reviewed on an annual basis and an insurer will want to have a full picture of those incidents which may give rise to claims in the context of renewing a policy;

- In the present case, the relevant insurance policy was renewable on 1 May 2011, but the incident which occurred on 8 May 2010 was not notified to the insurer until several months after the May 2011 renewal date;

- Insurers have to put a reserve on claims notified to them, in the context of solvency requirements and year – end accounts;

- Early notification is also key in terms of managing exposure. For example, an insurer may suggest to the policy holder to offer to pay wages and/or physiotherapy and/or medical treatment on the basis that the potential claimant may be less likely to make a claim and may be happier with their employer, the policy holder being reimbursed by the insurer;

- The incident on 8 May 2010 was handled well by the insured's manager, Mr. Horan, insofar as interaction with the claimant was concerned, but it could have been handled better - Mr Sreenan giving the example of an offer to pay wages while out sick;

- The incident was not handled well by the insured insofar as investigation was concerned;

- A delay of seventeen months with regard to notification was extremely long and extremely late in Mr. Sreenan's experience;

- It might be understandable, even in circumstances where immediate notification was required under the policy, that a short delay might arise, for example, people may be ill or on holidays;

- Mr. Horan was the insured's local manager and in Mr. Sreenan's experience, policy holders will have procedures in place whereby incidents must be reported and the local manager ought to be the designated person with regard to reporting incidents as they are the senior manager on the ground;

- The Second Named Defendant handled matters extremely well and Mr. Sreenan contrasted what Liberty did with the example of an insurer "jumping the gun" and declining cover without appropriate investigation;

- Liberty carried out an extensive and appropriate investigation;

- It is always better that an insurer does due diligence and give an insured the chance to offer an explanation in respect of the late notification and this is precisely what the Second Named Defendant did;

- Based on Mr. Sreenan's may experience, the repudiation was made in a timely manner after everything had been considered by Liberty;

- In the letter declining cover, the arbitration clause was specifically referred to and, in Mr. Sreenan's experience, it was somewhat unusual that the policy holder did not reply at all;

- In Mr. Sreenan's experience, cases have been arbitrated after the expiry of the relevant time limit referred to in an arbitration clause and often long after, the time limit not being a "hard and fast rule" in his experience;

- The fact that the insured briefed their own solicitors indicated, in Mr. Sreenan's experience, that the repudiation of cover was accepted by the policy holder;

- It was very unusual that the policy holder waited nearly a year before raising the matter again in 2013 and, once raised again, Liberty's response was appropriate, namely to reconsider the matter;

- There was no doubt in Mr. Sreenan's mind that a decision was made by the Second Named Defendant in this case to decline liability and that this was a valid repudiation of cover made by the Second Named Defendant;

- In circumstances where notification of the incident came seventeen months after the event, any insurer would have repudiated cover, according to Mr. Sreenan and having regard to his many years of experience;

- Mr. Sreenan did not accept the proposition that knowledge of the incident on the part of Mr. Horan, the manager, did not constitute knowledge on the part of the insured;

- All Mr. Sreenan knew about Mr. Horan's role is that he was the manager but, based on his experience in insurance practice, directors of a company have to rely on others, such as employees, to insure that incidents are notified promptly;

- The condition precedent, as per policy General Condition 2, applies to the policy holder which is the insured, being a limited liability company;

- The board of directors or the officers of a company cannot know everything and have to make arrangements to ensure that claims against the company are notified;

- In Mr. Sreenan's experience, sometimes directors are not involved in the day to day management of a company or business and directors of a limited company would not always be aware of what goes on at the business or day to day level;

- Mr. Sreenan took no issue with the extract from "*Buckley on Insurance Law*" which was put to him in cross-examination by the Plaintiff's counsel (i.e. para 7.16 entitled "*Insurer's Knowledge*") and, in the context of addressing it, Mr. Sreenan contrasted the difference between where, for example, a line-manager knew of an incident, in which case knowledge is attributed to the insured, as opposed to a situation where nobody within the insured was told of an incident, in which case no knowledge could be attributed to the insured;

- Mr. Sreenan did not claim to know how many bars were under the management of the insured, or how many employees the insured might have, but gave clear evidence that, based on his experience and having conducted a review of the documentation briefed to him, Mr. Sreenan was satisfied that the insured was aware of the incident which occurred on 8 May 2010, in circumstances where Mr. Horan, the manager of the premises in which the accident occurred, was aware of it;

- Mr. Sreenan also gave evidence, based on his expertise in the insurance sector, that the relevant insurance policy would lack business efficacy if knowledge on the part of the director of an insured was the only way an insured would be deemed to have knowledge;

- In Mr. Sreenan's opinion, there was nothing unusual about the relevant insurance policy, nor was there anything unusual in relation to the obligation in respect of reporting incidents;

- Mr. Sreenan stressed the importance of early notification of incidents;

- Mr. Sreenan also gave evidence in relation to what he would expect a manager's role and responsibility to entail and his evidence was that part of a manager's role would be in relation to the timely reporting of incidents.

130. There is no suggestion made on behalf of the Plaintiff that Mr. Sreenan was other than an insurance expert. There was no suggestion that any of the foregoing evidence which he gave constituted evidence which he was not qualified to offer an expert opinion upon, insofar as it touched on issues relating to the insurance policy, in particular questions of knowledge of an incident and the reporting of same. I accept Mr. Sreenan's evidence, which was not controverted. No expert was called by the Plaintiff and, that being so, and in addition to the findings of fact which I have detailed earlier in this decision, I am

entitled to take account of evidence from an insurance expert, the thrust of which was that: firstly, the knowledge possessed by the First Named Defendant's manager constituted knowledge on the part of the insured concerning the incident; secondly, there was a clear breach of Clauses 2 and 8 of the relevant policy; thirdly, the Second Named Defendant dealt with the matter thoroughly and properly; fourthly, the Second Named Defendant was entitled to refuse indemnity on the basis of late notification and a breach of Clauses 2 and 8 of the General Policy Conditions; fifthly, that the seventeen – month delay in respect of notification was extreme and that in Mr Sreenan's expert view, every insurer would have refused indemnity on the facts of this case.

**Legal submissions by the Plaintiff**

131. During his comprehensive and very sophisticated oral submissions, counsel for the Plaintiff made it clear that the Plaintiff's case relies on the proper interpretation of the relevant insurance contract in light of contract law and insurance law principles. It was submitted that this court cannot ignore the fact that the insurance contract clearly defines who the "Insured" is and gives what was described as a clear and separate definition in respect of an "Employee". This, it was submitted, constitutes a crucial matter which the Second Named Defendant ignores, the clear inference which was raised on behalf of the Plaintiff being that if the "Insured" and "Employee" are separately defined, it means the former had notification obligations, not the latter. It was said on behalf of the Plaintiff that there is "clear blue water", in the contract, in terms of the difference between an employee and the insured and it was submitted that the contract is explicit that the insured and the employee are two separate entities entirely. What flowed from that, according to the Plaintiff's counsel, was that the company did not fail to notify because the company, being the insured, did not know about the accident. Rather, an employee, specifically Mr. Horan, knew about the accident, but not the company. On behalf of the Plaintiff it was argued that for the court to find in favour of the Second Named Defendant would be to affix the insurer with a duty to notify when the separately defined employee of the insurer knew about the accident, but did not notify and was not under an obligation to notify. Counsel submitted that if the contract defined the "Insured" as including its employees servants or agents, it would be the end of the matter, but where two separate definitions exist insofar as "Insured" and an "Employee" is concerned, the plain meaning of the contract, according to the Plaintiff's counsel meant that the insured did not fail to notify the insurer. Counsel also made clear that the Plaintiff was not arguing that the insurance contract contained any ambiguity, submitting that the definition section is clear that an employee is not the insured and that the insured is not an employee. Counsel made clear that the Plaintiff's case is not about attribution of knowledge on the part of an employee to the insured company, but rather, the Plaintiff's case was about the meaning of the contract. Counsel for the Plaintiff submitted that, even if the court was against him on an argument based on contractual interpretation, it was submitted that there is a spectrum of knowledge and the awareness of an accident is awareness required by the insured itself. It was submitted that knowledge of the accident could not be attributed to the insured company when that knowledge was by a manager employed over a hundred miles away from the company's registered office and the two directors of the company. It was, however, accepted that it was not appropriate to describe Mr. Horan as a junior

employee and it was acknowledged that he was in a management position and that he had, for example, more junior staff for whom he was responsible. Notwithstanding this, it was submitted that if a very junior employee is at one end of the spectrum and a company director is at the other, Mr. Horan was, in fact, closer to the former than the latter. The Plaintiff also submitted that if what was described as the "directing mind and will" of the company was not aware of the accident, the insured entity could not be said to have become aware, such as would give rise to any notification obligation under clause 8 of the insurance contract. It was further argued that, relying on the decision of Ms. Justice Denham (as she then was) in *Superwood Holdings Plc. v. Sun Alliance & London Insurance plc* [1995] 3 IR 303, Mr. Horan was a "servant or agent" and could not, therefore, be said to be someone whose actions or knowledge constituted that of the insured company. Although submitting there was no doubt about the proper interpretation for the contract, counsel for the Plaintiff also argued that whatever doubt might exist over the ambiguity of the word "Insured" in clause 8 would have to be resolved, given the terms of the *contra proferentem* rule, by construing it more harshly as against the Second Named Defendant, regardless of the consequences. It was urged on the court that the plain meaning of the insurance contract meant that the insured, on the facts of the case, did not fail to notify, having regard to the respective definitions of "Insured" and "Employee" and it was argued that Mr. Horan's knowledge of the accident could not be attributed to the insured to the extent that it would give rise to any obligation to notify under clause 8. Reliance was also placed on *obiter* statements by Mr. Justice Collins in the recent decision by the Court of Appeal in *Mythen Construction Ltd. v. Allianz plc*. [2020] IECA 148. In that case, the insurer was seeking discovery of documents in an action pursuant to s. 62 of the 1961 Act. The motion for discovery was defended in the High Court and the Court of Appeal on the basis that the underlying claim was bound to fail to such an extent that the documents sought could not be said to be necessary. One argument centred on the failure of the insured, a company known as Bidcon, to arbitrate within the time limit specified under the relevant contract. As Mr. Justice Collins stated from para. 58 onwards:

*"58. Of course, these proceedings are court proceedings rather than arbitral proceedings and the claimant is not Bidcon but Mythen. But if, in principle, Section 62 gives persons in the position of Mythen a cause of action against an insurer – and that is of course another issue in these proceedings - how might such a claim be pursued otherwise than by proceedings in court, brought by a person other than the insured? In truth, Allianz's complaint is not that it is sued in court by Mythen or that it has been deprived of the advantages of arbitrating its 'differences' with Mythen. Its complaint is that it is being sued by Mythen at all.*

*59. Furthermore, on what basis might an arbitration clause in a contract of insurance to which Mythen is not a party operate to exclude such proceedings? Given Allianz's insistence that Section 62 does not have the effect of putting Mythen into the shoes of Bidcon, its contention that Mythen is nonetheless bound by the provisions of the arbitration clause in the Policy is arguably inconsistent (though Allianz denies that). Furthermore, to permit a Section 62 claim to be defeated by an arbitration clause in*

*insurance policies might be said to frustrate the operation of Section 62 and undermine the 'special statutory protection' which, according to Finlay CJ in Dunne v PJ White, the section was intended to confer on persons in the position of Mythen here."*

132. For the Plaintiff it was submitted that the requirement to establish the extent of liability means that the dispute between the Plaintiff and the Second Named Defendant could only have arisen when the Plaintiff obtained judgment against the First Named Defendant on 20 June 2017. It was submitted that the amended personal injuries summons joining the Second Named Defendant was issued on 14 July 2017 and could not have been issued before the decree was obtained by the Plaintiff against the First Named Defendant. It was further submitted that it would be manifestly unfair and unreasonable for the Second Named Defendant to seek to rely upon an arbitration clause which was available only to the First Named Defendant and available only within a period which had expired before the Plaintiff claimed judgment. It was also submitted that, were such an argument to be accepted, it would completely neuter the provisions of s. 62. It was also submitted that the Second Named Defendant failed, in good time or at all, to apply to stay proceedings, pursuant to s. 5 of the Arbitration Act, 1980 and, for the Plaintiff, it was argued that it would be unjust to permit the Second Named Defendant now to rely on the failure of the First Named Defendant to arbitrate in time, as a defence to the present proceedings. It was also submitted that it is apparent from the face of the order made by Mr. Justice Barr in July 2018 that the relevant motion was refused. For the Plaintiff it is argued that the motion has been dealt with, and insofar as the Second Named Defendant maintains that the motion was adjourned to the hearing of the action, it is submitted that the Second Named Defendant advanced no basis as to why the order is incorrect on its face or why the court should now look behind it. In short, the Plaintiff submits that the Second Named Defendant has failed to discharge the burden of proving that the policy of insurance was validly refused and, on that basis, it is submitted that the Plaintiff is entitled to succeed.

**Legal submissions by the Second Named Defendant**

133. Among the submissions made on behalf of the Second Named Defendant was with regard to the relevant legal principles which apply to the construction of insurance policies and reliance was placed on extracts from the 14th edition of "*MacGillivray on Insurance Law*" (hereinafter "*MacGillivray*"). Counsel for the Plaintiff acknowledged, without reservation, that *MacGillivray* represented a definitive and authoritative setting out of the applicable legal principles. It is appropriate, therefore, to set out at this juncture certain verbatim extracts from *MacGillivray* under the heading "Ordinary Meaning of Words", which I now do as follows:

**"*General Principles*.**

*Insurance policies are to be construed according to the principles of construction generally applicable to commercial and consumer contracts. The task of a tribunal endeavouring to interpret a contract of insurance is to ascertain and give effect to the intention of the parties in relation to the facts in dispute. Their intention is, however, to be gathered from the wording chosen to express their agreement in*

*the policy itself and from the wording of any other documents incorporated in it, so that –*

> *'the methodology is not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. The intention is determined by reference to expressed rather than actual intention. The question resolves itself in a search for the true meaning of language in its contractual setting.' (Deutsche Genossenschaftsbank v. Burnhope [1995] 1 W.L.R. 1580 at 1587)*

*More recently the process of interpretation has been described by law at Hoffmann as,*

> *'the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract'. (Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 896 at 912)*

…

***Ordinary Meaning***

*There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. This presumption can be rebutted in certain circumstances which are examined later in this chapter, but it is frequently the case that there is no reason to depart from the ordinary meaning of the words in question. Thus in Starfire Diamond Rings Ltd v Angel [1962] 2 Lloyd's rep. 217, the court had to determine the scope of an exclusion clause in a jewellers' Block Policy accepting liability for theft when the insured's car was "left unattended". The driver had gone thirty seven yards from the car in order to relieve himself, and a suitcase containing jewellery was stolen by a thief in that short period of time. It was held that in the circumstances the car had been "left unattended", and Upjohn LJ commented:*

> *'I deprecate any attempt to expound the meaning or further to define words such as these which are common words in everyday use, having a perfectly ordinary and clear meaning.'*
>
> …

*There are many examples of the application of this presumption in the reports. Similarly, the words in the policy will be construed on the footing that the parties intended the ordinary rules of grammar to apply to them.*

***Business-like Interpretation*.**

*It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that it's provisions receive a fair and sensible application. Several consequences flow from this principle. The literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, as, for example, where it would unwarrantably reduce the cover which it was the purpose of the policy to afford. Thus, in a policy of which the main purpose was to insure against damages arising from negligent acts by the insured, it was held that a condition that 'the insured shall take reasonable precautions' could not be so construed that every negligent act was a breach of it. It is probably by virtue of this maxim also that the court should be prepared to overlook obvious grammatical errors, such as an inadvertent negative obviously out of context, and will interpret for the purposes of the particular cover in appropriate phases in a standard printed policy primarily intended for other sorts of insurance, or else disregard them as matters of surplusage to the covering question. A further result of this maxim is that a court may imply into the express words granting cover an extended scope beyond their strictly literal meaning in order to give effect to the only sound interpretation of the contract.*

…

***Commercial Object***

*It follows that in interpreting any clause of a policy, it is correct to bear in mind: (1) the commercial object or purpose of the contract; and (2) the purpose or function of the clause and its apparent relation to the contract as a whole. It may become apparent that the literal meaning of the clause must yield to business sense or that an ambiguity in the wording can be resolved, or that the ordinary meaning of the words may need to be modified.*

***Construction to Avoid Unreasonable Results***

*If a literal reading of the wording leads to an absurd result or one manifestly contrary to the real intention of the parties, it should be rejected in favour of a more reasonable alternative interpretation if that can be adopted without doing violence to the words used. It is to be presumed that the parties, as reasonable persons, would have intended to include reasonable stipulations in their contract, and this presumption may assist either party depending on the circumstances.*

…

***Implied Terms***

*Where a policy does not by its expressed terms cover a situation which has arisen, it is permissible to apply a term which does cover those facts if either the proper inference from the reading off the policy as a whole is that the parties would have so expressed themselves if they had addressed their minds to the possibility of those facts arising, or on the grounds that it was necessary for the business efficacy of the contract. A court will not imply a term into a contract merely because the*

*contract might be considered more reasonable as a result, but no term will be implied unless it is reasonable.*

…

***Ambiguity and the Contra Proferentem Rule …***

*The common law rule of construction that verba chartarum fortius accipiuntur contra proferentem means that ambiguity in the wording of a policy, or slip, is to be resolved against the party who prepared it. In the majority of cases this means the insurer …*

***Ambiguity Must be Real***

*The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. 'One must not use the rule to create the ambiguity – one only must find the ambiguity first' (Cole v Accident Insurance Co. (1889) 5 T.L.R. 736) the words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy, or possibly by extrinsic evidence of surrounding circumstances. If the meaning of the words used is reasonably clear it should be followed even if it is unreasonable or operates harshly against the insured, although the more unreasonable the result the clearer the words must be in order to lead to it. The courts may be less ready to reach an interpretation of the terms of a consumer insurance contract which is unfavourable to the insured."*

134. The foregoing principles guide this court in interpreting and construing the contract of insurance at the heart of the present proceedings. Counsel for the Second Named Defendant also submits that general principles as to how companies conduct their business are relevant and the court's attention was drawn to the decision in *Meridian Global Funds Management Asia Limited v Securitas Commission* [1995] 2 AC 500, where Lord Hoffman stated as follows:

> *"These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.."*

135. Counsel for the Second Named Defendant submits that, in the modern world, companies must carry on their business by suitable instructions to their servants and agents tasked with performing the company's duties. In the context of this case, it is pointed out the

Brian Boru Public House where the accident in question occurred is situated in Cashel, County Tipperary, whereas the head office of the company is in Dublin where, it appears, the directors also live. It was submitted on behalf of the Second Named Defendant that knowledge on the part of Mr. Horan about the accident which occurred was clearly within the scope of his employment. Among the submissions made, it was argued on behalf of the Second Named Defendant that if knowledge on the part of Mr. Horan, the company's manager in Cashel could not be imputed to the company unless and until the directors were aware of it, it would deprive this and every similar contract of business efficacy, reliance being placed on the expert opinion evidence of Mr. Sreenan to that effect.

136. It was submitted that the undisputed facts in the case establish *inter alia* that: (i) Mr. Horan was the bar manager and a senior employee at the First Named Defendant's premises in Cashel; (ii) Mr. Horan was aware of the incident involving the Plaintiff immediately on its occurrence; (iii) Mr. Horan did not report the accident either directly to Liberty or to the company's head office because he considered the matter to be a "*minor incident*", that phrase being used in the 11 January 2012 letter from Ms. Ciara Fox, director of the insured company to Mr. Liam Ryan of the insurer; (iv) the first notification received by the directors was on or about 11 October 2011, following the letter from the Plaintiff's solicitors dated 10 October 2011; (v) by letter of 11 January 2012, Ciara Fox, director of the insured company attempted to explain the reason for the failure to notify; (vi) when applying to renew insurance for the Brian Boru pub in May 2010, the First Named Defendant indicated that there were thirteen employees working at the premises and, in the proposal form, Liberty specifically asked had any convictions been incurred by the company and/or its directors and/or its senior managers in the last five years; (vii) on 3 May 2011 the new manager of the Brian Boru, Mr. Eddie Condon, promptly notified to Mr. Liam Ryan, of Liberty Insurance a claim which had occurred two days previously on 1 May.

137. It was submitted that the evidence discloses what was, as a matter of fact, a failure on the part of the insured company to notify. It was submitted that the evidence establishes that the First Named Defendant had a system in being for the reporting of accidents but through human error or for whatever other reason that system broke down in relation to the Plaintiff's accident. It was submitted that it was simply untenable that the knowledge on the part of the manager of the premises in which the accident occurred could not be imputed to the company which owns the premises, in circumstance where the premises in question is located over 100 miles away from the headquarters of the company. It was submitted that, as the bar manager of the Brian Boru premises, it was the duty of Mr. Horan to report incidents either directly to the company's head office or directly to the insurer. It was submitted that, in light of the legal principles such as those identified at para. 7-16 of *Buckley on Insurance Law* (4th ed.), the knowledge on the part of Mr. Horan must be attributed to the First Named Defendant. As regards the Plaintiff's reliance on *Superwood Holdings plc*, it was submitted that the said decision was a particular case concerning the tort of fraud and the liability of a company in that context. Counsel for the Second Named Defendant directed the court's attention to the following extract from p. 328 of the decision by Denham J. (as she then was):

**"*Directing Mind and Will***

*The company itself has no mind or will. However, a company can be vicariously liable for fraud. In El Ajou v Dollar Land Holdings plc [1994] 2 All E.R. 685, the Court of Appeal held that the directing mind and will of a company was not necessarily that of the person or persons who had general management and control of that company since the directing mind and will could be found in different persons in respect of different activities. It was necessary to identify the person who had management and control in relation to the act or omission in point.*

**Discussion and Decision**

138. As regards the interpretation of insurance contracts, it is clear from the decision of Keane J (as he then was) in *Rohan Construction Ltd v Insurance Corporation of Ireland Ltd* [1986] ILRM 419 at para. 19 that "*…policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments."* The learned judge went on to state that:-

> *"…the primary task of the Court is to ascertain their meaning by adopting the ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is to be construed more strongly against the party who prepared it, i.e. in most cases against the insurer. It is also clear that the words used must not be construed with extreme literalism but with reasonable latitude, keeping always in view the principal object of the contract of insurance."*

The foregoing principles and those detailed by the learned authors in MacGillivray, have guided my approach to the interpretation of the insurance contract in the present case.

139. It is incontrovertible that, under the relevant insurance policy contract, the "*Insured*" is "*Cashel Taverns Ltd*." being a limited liability company (No. 390479) and which is referred to in the insurance policy schedule as "*Cashel Taverns Ltd. t/a Rock Bar*". It is equally incontrovertible that the General Policy Conditions place mandatory obligations on the Insured, of particular relevance to the present proceedings being the obligations placed on the insured by s. 2 "*Compliance with conditions*" and s. 8 which relates to "*Notice and claims procedure for claims under liability insurance section(s) (applicable if liability insurance cover has been provided)*". It is not in dispute that liability cover was provided.

140. There is no ambiguity in the language used in the insurance contract before this Court. In my view, there is simply no role for the *contra proferentem* rule which, as Buckley on Insurance Law (4th Ed. 2016) makes clear, at para. 8-54, is a rule which "*…can only be applied in cases of genuine ambiguity in interpretation of the agreement*" - a proposition emphasised in various authorities, including by Clarke J. (as he then was) in *Danske Bank A/S t/a National Irish Bank v. McFadden* [2010] IEHC 119. Both s. 2 and s. 8 contain mandatory language, specifying that "*the Insured shall*" comply with certain obligations or do certain things. These were obligations placed upon the insured when the First Named Defendant entered into the insurance policy contract. Of fundamental relevance to the present dispute is the obligation placed upon the insured to notify claims promptly. The facts demonstrate that the insured failed in this obligation. Section 8 could have said, but

plainly does not say, that a "director" of the insured has the obligation to notify claims or could have said that only knowledge on the part of a director of the insured constitutes knowledge for the purposes of the notification obligations. It would be to do violence to the wording actually used in the insurance contract for this Court to interpret section 8 to mean that only a director is obliged to, or can, give proper notification to the insurance company of claims. A critical element of the Plaintiff's case is that, because "Employee" is defined separate to the "Insured", this Court should hold that knowledge on the part of an employee does not constitute knowledge on the part of the Insured for the purposes of notification obligations. There are indeed two separate definitions of "Insured" and "Employee" in the insurance contract but nowhere does that contract state that knowledge on the part of an employee cannot or shall not constitute knowledge on the part of the Insured. The contract could have said so if that is what the parties intended but the contract plainly does not say so.

141. At this juncture it is appropriate to make reference to certain key principles in relation to the proper approach to the interpretation of a contract which, I am satisfied, are entirely consistent with the principles set out in *MacGillvray on Insurance Law*, which I have quoted earlier in this decision. In *Investors' Compensation Scheme v. West Bromwich Building Society* [1998] 1 All ER 98, (a case mentioned specifically in MacGillivray) Lord Hoffman gave the following analysis:-

*"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;*

*(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

*(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this not the occasion on which to explore them.*

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are*

*ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…*

*(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude form the background that something just have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said…"…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense""*

142. In the Supreme Court decision in *Law Society of Ireland v Motor Insurers' Bureau of Ireland* [2017] IESC 31, the five rules of contractual construction set out by Lord Hoffman in *Investors Compensation Scheme Limited* were cited with approval. Commenting on them, O'Donnell J. gave the following analysis of the modern approach to contractual interpretation: "*These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus*…" O'Donnell J. gave the following guidance at paragraph 9 of his Judgment:-

> *"A contract is a form of communication intended to convey the meaning agreed upon by the parties. Words are the vehicle through which that meaning is conveyed but the meaning of a document is much more than the meaning of the words. It is what the parties would reasonably have been understood to mean from a consideration of all the available guides to the meaning of the agreement. Words are an important and very often the only necessary guide to discerning the meaning, but they are only a guide, and as recognised by Lord Hoffman, they can be ambiguous, and sometimes even, as happens in real life, it may be apparent the parties have for whatever reason used the wrong words or syntax. In those circumstances, the words must give way."*

143. In the present case, the meaning of the insurance contract is plain from the ordinary meaning of the words used. Guided by the principles of construction outlined in *Investors Compensation Scheme Limited*, I am satisfied that the contract does not mean what the Plaintiff contends. It does not mean, according to the words used by the parties, that knowledge by an employee cannot constitute knowledge on the part of the Insured. Nor does the contract mean that only a director of the Insured can ever have knowledge of an incident which might be notifiable and that until a director has actual knowledge one must ignore the actual knowledge by all other parties, including employees regardless of their role and seniority. Conscious of the guidance given by Mr. Justice O'Donnell in *Law Society of Ireland*, it is appropriate to say that there is no ambiguity in the contract and there is no question of the words having to give way. It would in my view be wholly unreasonable to extract a meaning from the contract as contended for by the Plaintiff and

doing so would be in the teeth of the plain meaning of the words used in the insurance contract.

144. The approach which this Court must take is to ascertain the objective meaning of the contract having regard to the words used and the principles of construction of contracts to which I have referred above. This was stated by Laffoy J. in UPM v BWG, (High Court, Unreported, 11 June 1999 at p 24) as follows:-

> *"The Court's task is to ascertain the intention of the parties and the intention must be ascertained from the language they have used considered in light of the surrounding circumstances and the object of the contract…in attempting to ascertain the presumed intention of the parties the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties."*

Doing so in the present case does not produce the interpretation contended for by the Plaintiff. The only reasonable interpretation is that the Insured company had the obligation to notify and that this obligation was not circumscribed in any way by reference to who, within the Insured, possessed the knowledge in relation to a notifiable incident. It is hardly surprising that the insurance contract contained a definition of "Employee" given the fact that part of the cover provided under the policy was for "Employers' Liability". Indeed the definition of "Employee" is specifically set out at para. 5 of the section of the policy entitled "Employers' Liability Insurance".

145. As explained, the definition of "Employee" can be seen in the section of the policy entitled "Employers' Liability Insurance". It is common knowledge that directors of companies can also be employees. Although not definitive about whether the directors in the present case are employees, the "Employers Liability Insurance Schedule" refers to "Endorsements Applicable", the first of these being "Working Directors Exception".

In the present case there is no evidence from which this Court could conclude whether or not Ms. Fox and her fellow director, Mr Gleeson, are or are not employees of the Insured company. Nothing turns on whether they are, or not, but it is appropriate to look at what the consequences of the interpretation contended for by the Plaintiff, in the event that the directors were employees of the Insured. If the fact that "Employee" is defined in addition to "Insured", means that knowledge by an employee is not notifiable knowledge, what is the inevitable consequence of a director, who is employed by the company, learning of an incident? On the Plaintiff's case, the incident is simply not reportable at all. The foregoing is simply an illustration of the fact that the interpretation contended for by the Plaintiff robs the contract of business efficacy and is not the natural and obvious meaning of the contract.

146. It is incontrovertible that the interpretation which the Plaintiff contends for is not explicitly stated anywhere in the contract and I am satisfied that the plain meaning of the contract, interpreted as a whole and against the relevant principles of construction does not produce the interpretation contended for by the Plaintiff. That being so, can this court

properly imply a term or terms of the type argued for? In the seminal case of *the Moorcock* [1889] 14 PD 64 at p. 68, Lord Justice Bowen, addressed situations where it would be legitimate for a Court to imply a term into a contract, stating:- "…*the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have*." It is clear from this and a long line of authority since, that where a contract is apparently complete, the court may be prepared in appropriate circumstances to add a term if that term is reasonable and, without it, the contract will not operate. In *Trollope and Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, at 609, the court made is clear that any term to be implied into a contract must be *both* so obvious as to have tacitly formed part of the contract, as well as being necessary to give the agreement business efficacy. The statement, later approved in Ireland by the Supreme Court in *Carna Foods Ltd & Anor v Eagle Star Insurance Company (Ireland)* [1997] 2 IR 193 was in the following terms:-

> *"An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."*

As the House of Lords emphasised in *Liverpool City Council v Irwin & Anor* [1977] A.C. 239 insofar as the question of implying a term into a contract is concerned "*the touchstone is always necessity and not merely reasonableness*". The insurance contract before this court operates without the addition of any new term. In the present case, I am entirely satisfied that it is neither necessary, nor reasonable, to imply a term or terms into the contract, for example, to the effect that *only knowledge by a company director constitutes knowledge of a notifiable incident or that knowledge of a notifiable incident on the part of an employee of the Insured does not constitute knowledge by the Insured*. The insurance contract in question functions without such terms. Indeed, in the manner discussed presently, to imply such terms or to interpret the wording of the contract in the manner argued for so skilfully by counsel for the Plaintiff would render the contract wholly unworkable and defeat the plain objectives of same.

147. It is the Insured which has obligations to notify under Clause 8 and it is not in dispute that the Insured is clearly and unambiguously stated to be the company. The notification obligations are not stated to apply to a "director" or, for that matter, an "employee" or a "servant" or an "agent" of the company. It is the Insured with the relevant obligations and the Insured is the company. The fact that the definition of the Insured and the obligations under Clause 8 apply exclusively to the Insured does not avail the Plaintiff, regardless of the fact that "Employee" is separately defined. The Insured in this case is a creation of statute, being a distinct legal personality in the form of a limited liability company. It is plainly not a natural person. Of course, the only way any Insured

company can comply with obligations is if natural persons do and this judgment examines what was, or was not, done by natural persons insofar as the reporting obligations of the Insured was concerned.

148. With great skill, Counsel for the Plaintiff urges the Court to take the view that, because "Employee" is separately defined elsewhere, the meaning in General Condition 8 of the obligation on the Insured to report incidents is that, unless the Directors of the company know of an incident, the Insured does *not* know and has no notification obligation. The contract says no such thing. Nor is that the plain meaning which emerges from an objective and reasonable interpretation of the contract as a whole.

149. The contract places notification obligations on the Insured. The contract has business efficacy as currently drafted. It is nether reasonable nor necessary to imply into a contract which is perfectly workable as it is, any additional term or wording (still less, a proviso that, *for the purposes of knowledge on the part of the Insured and regardless of actual knowledge on the part of any other employee, be they a manager or otherwise, it is the Directors of the company who must have actual knowledge and it is only when the Directors have actual knowledge of an incident that the reporting obligations on the Insured company insured arise).* The court cannot legitimately interpret the contract before it in that fashion, nor can it legitimately import or imply into the contract terms which are not there and which do not need to be there to make the contract operable, regardless of the fact that "Employee" is separately defined, as is "Insured". This is for the simple reason that there is no doubt about the obligation to report and no doubt about who is under that obligation, namely the Insured. The Insured is a separate legal entity and is distinct from its directors. The Insured is also distinct from its employees. It is also uncontroversial to say that it is not at all uncommon for directors of a limited liability company to be employees themselves. Nothing turns, for the purposes of this Court's decision, on whether or not the Directors of the First Named Defendant were or were not employees of the Insured company. They are plainly not the Insured and it is the Insured which has the notification obligations. The question then becomes one of fact, namely, did the Insured notify on time in the present case? That is a question of fact and having examined the facts very closely in this decision, I am satisfied that the Insured did not in fact notify the Insurer on time.

150. It would be entirely impermissible for this Court to interpret the insurance contract to mean that, even if the manager running the business of the insured on a day-to-day basis is fully aware of an incident which may give rise to a claim, the insured shall be considered to be wholly unaware of that incident until such time as a director of the insured is informed. That is not what the contract says. Yet this is, in essence, what the Plaintiff urges on the court and the Plaintiff bases that argument on the fact that there is a definition of the "Insured" and a definition of "Employee" in the contract. The fact that both terms are defined does not allow the court to interpret the contract in the manner contended for by the Plaintiff. This court simply cannot interpret the Insured as meaning other than the Insured and cannot restrict the definition of Insured to "Directors" of the Insured. Regardless of the undoubted skill with which the argument is made, it is simply

impermissible for this Court to interpret the contract as a whole, including the plain meaning of the General Policy Conditions, in the way contended for by the Plaintiff. The directors are not in privity of contract with the insurance company, nor are the company's employees. The parties to the contract are the Insurer and the Insured. It is the latter which has the notification obligations and it is uncontroversial to say that it is for the latter to put such processes in place, internally, so as to ensure that it complies with notification obligations. The insurance contract does not specify what these are and this is wholly unsurprising. How an insured company complies with its notification requirements is not a matter for the Insurer, but for the Insured, being a matter exclusively within the Insured company's control.

**Buckley on Insurance Law – the "Insured's Knowledge"**

151. On day two of the hearing, in the context of cross-examining Mr. Peter Sreenan, counsel for the Plaintiff referred to para. 7.16, entitled "Insured's Knowledge", as found in the 4th Edition of Buckley on Insurance Law. Paragraph 7.16 states the following: -

> *"An insured cannot notify a loss or circumstance unless he is aware of it. The relevant knowledge is that of the insured or any person whose knowledge is to be attributed to the insured. Where an agent of the insured is in possession of information but does not have a duty to report it, such information is not attributed to the insured and insurers cannot rely on a plea that the insured should have implemented a system of reporting such information. The awareness required is the awareness of the insured itself. Where the insured is a corporate entity or a partnership, difficult issues of attribution can arise. If a junior employee of a company receives a letter of complaint from a client but tells no-one about it then, as a general proposition, his knowledge is unlikely to be attributed to the insured company for the purposes of such a clause. At the other end of the spectrum, knowledge by the board of directors will clearly suffice, and knowledge of one director alone may also be sufficient. Where the knowledge is held by an individual in between these two extremes, difficult questions of attribution can arise, which are very fact-sensitive."*

152. On the facts of this case, the most senior representative of the insured, "on the ground" so to speak, was the manager of the Brian Boru Bar in Cashel, being the premises in which the accident occurred. There is no evidence whatsoever to the effect that there was either another manager in Cashel at the time of the incident or that there was any other manager more senior to Mr. Horan who was managing the relevant business in Cashel premises at the time of the accident. Thus, I am entitled to find that Mr. Horan was both the manager and the most senior employee of the First Named Defendant who was running the Insured's business, in the Insured's Cashel premises at the relevant time. On the facts, Mr. Horan could not fairly be considered to have been a "*junior employee*" of the type referred to by the learned author in s.7.16 of Buckley on Insurance Law. Mr. Horan was the insured's manager. He ran the business on a day to day basis. There appear to have been two directors of the company and both seem to have been located elsewhere, Ms. Fox being in Dublin which is over a hundred miles away from

Cashel. Counsel for the Plaintiff freely acknowledged that Mr. Horan was a manager and that he could not fairly be described as a "junior employee". If knowledge on the part of the insured's manager, on site, being the person to whom the Plaintiff reported the accident at the time, is *not* sufficient to constitute knowledge on the part of the insured, it is difficult if not impossible to conceive of any situation where the insured would *ever* be considered to have knowledge of an accident which occurred at the Brian Boru Bar. It will be recalled that the Plaintiff argues - with reference to the existence of separate definitions for the "Insured" and "Employee" in the insurance contract - that the Insured company did *not* fail to notify on time because, although the company's manager (an employee) knew of the incident, the company's directors (presumably not employees according to the logic of the Plaintiff's case) did not know. The inescapable logic of that argument is that notification of an incident, however serious, by a junior employee to their manager is not notification of an incident and that knowledge on the part of an employee, regardless of how senior, is not knowledge on the part of the company. That proposition is not supported by the common sense meaning of the words used in the insurance contract itself and runs contrary to the principles set out in para. 7.16 in Buckley on Insurance Law.

153. The inescapable logic of the Plaintiff's argument that the Court should ignore the knowledge on the part of Mr. Horan is that, regardless of how many accidents the insured's manager was told about, and regardless of how serious they might be and how likely the prospects of claims, none of this knowledge by the company's manager would or could ever amount to knowledge on the part of the insured company. Thus, regardless of how many months or years elapsed before the manager informed someone else in the company's management of these accidents (be that "head office" or a "director") it would only be at that point in time, i.e. months or years later, that the company could be considered to know anything whatsoever about the accidents. The foregoing argument is wholly undermined by the facts which emerge from a careful analysis of the evidence in this case.

154. In short, the facts in this case entirely support the proposition that knowledge by the insured's manager, Mr. Horan, is to be attributed to the insured. The evidence proves without a doubt that the person entrusted by the insured with responsibility for managing the Brian Boru Bar was well aware, from the very outset, of the fact of the accident and of the fact that the Plaintiff had sustained an injury. Not only that, they took a view as to the seriousness or otherwise, of the incident and acted accordingly.

155. In my view, nothing said in the *Superwood Holdings plc* decision can avail the Plaintiff, having regard to the facts in the present case. The Supreme Court's decision in that case is certainly not authority for the proposition that the "directing mind and will" of a limited liability company can only be found in the person or persons of that company's directors. On the contrary, Denham J. (as she then was) observed that same "…*could be found in different persons in respect of different activities*." The overwhelming evidence in the present case is that the day to day activities of the Brian Boru public house, in which the Plaintiff fell, were under the management of the Insured's manager, Mr. Horan, who knew

of the incident immediately after it occurred. Indeed, he made what could be called value judgments and choices on the very day he found out about the incident and he plainly did so as the insured's manager (e.g. considering the incident to be minor, telling the Plaintiff to go home or to hospital, agreeing to pay the Plaintiff's doctor's bills etc). There is simply no evidence whatsoever that Mr. Horan lacked the authority, as the Insured's manager, to make such decisions. The choices Mr. Horan made clearly bound the company, there being for example, no evidence that the company did *not* pay the medical bills because Mr. Horan allegedly lacked authority to bind the company in respect of that liability. On the contrary, the evidence demonstrates that Ms. Fox, a director of a company, later stood over the views Mr. Horan came to and the decisions Mr. Horan took, when she corresponded with the Insured. In fact, she used same in the context of trying to explain the delay in notification but at no stage suggested that he lacked any authority to make any of the choices Mr. Horan made. One thing he plainly chose not to do, of course, is to notify Ms. Fox or the Insurer at the time he learned of the incident. That is a fact, but it does not mean that this choice made by the Insured's manager carries no consequences for the Insured company. To use the phraseology which appears in *Superwood Holdings*, the evidence demonstrates that, when he made a variety of decisions upon hearing about the incident (including the choice not to tell Ms. Fox or the Insurer) it was Mr. Horan who embodied the "directing mind and will" of the Insured company.

156. In a skilled submission, Counsel for the Plaintiff argues that the act or omission in point was the failure, as the Insurer sees it, of the company to notify the Insurer and he submits that it was the directors alone who had the directing mind and will for that purpose. That, however elegantly put, is submission which, in my view, ignores both the evidence as to the choices made by Mr. Horan and the explicit wording and plain meaning of the insurance contract itself. There is no evidence whatsoever that Mr. Horan could not have, had he so chosen, notified the Insurer and or Ms. Fox on the day or soon after he learned of the incident. He did not do so and that continued to be the position thereafter until Mr. Horan's departure from the role. Insofar as the notification requirement is concerned, it cannot be disputed that General Condition 8 places the obligation on the Insured i.e. on the company. In my view, the plain meaning of the insurance contract, as conveyed to a reasonable person having the requisite background knowledge reasonably attributed to them, is that the Insured has the obligation to notify. The plain meaning of the words do not naturally produce a much narrower definition or limit the scope of what is meant by the Insured in the manner contended for by the Plaintiff, with reference to authorities or otherwise. In its own terms, the contract is clear. It does not require to be interpreted to mean that the obligation on the Insurer to notify is subject to an internal analysis of who amongst the company's directors and/or managers and/or senior employees, within the internal structure of the company, had, at any given point, what could be called the company's directing mind and will.

157. If this Court were to hold on the evidence before it that knowledge on the part of the most senior manager on the insured's premises did *not* constitute knowledge on the part of the insured, it would; (i) do violence to the plain meaning of the relevant insurance

contract, interpreted as a whole, including the obligations therein as to notification which are placed on the "insured" which term refers to the First Named Defendant, not to an "employee" of same, or to a "director" of same, or to the insured's "head office"; (ii) it would also render the relevant insurance contract entirely unworkable and deprive it of the business efficacy which it currently has; (iii) it would be wholly inconsistent with the evidence which demonstrates that the insured acknowledged that there had been, as a matter of fact, late notification and ultimately did not dispute the fact of indemnity having been refused by Liberty, or the validity of the reason for that refusal.

158. It is also true to say that the arguments canvassed on behalf of the Plaintiff in the present proceedings (to the effect that, by reason of definitions in the insurance contract, the Insured did not fail to notify the incident on time and the closely - related proposition that only knowledge on the part of the Insured's directors constituted knowledge by the Insured company for the purposes of notification to the Insurer), are arguments that were never made by the First Named Defendant who, unlike the Plaintiff, was in privity of contract with the Second Named Defendant insofar as the insurance policy was concerned. Equally, it is the case that the First Named Defendant referred no dispute to arbitration. The foregoing observations, while correct, do not seem to me to be something I should rely upon in the context of this court's decision. I take that view, very conscious that the Plaintiff is seeking to pursue what is a distinct statutory remedy and, having regard to the observations made by Mr. Justice Collins recently in the Court of Appeal's decision in *Mythen Construction*. I believe it is appropriate to disregard, for the purposes of this court's decision, the fact that no arbitration took place. It seems to me that, were a Court's finding in favour of an Insurer to hinge on the fact that an Insured chose not to pursue arbitration, it could potentially deprive a Plaintiff (who had no hand, act or part in such a decision) from pursuing, effectively, the statutory remedy under section 62.

159. There have been a number of Superior Court decisions in which section s.62 of the Civil Liability Act, 1961, has been referred to. In the Supreme Court's decision in *Michael Dunne v. P.J. Construction Co. Ltd* [1989] ILRM 813, the then Chief Justice Finlay made it clear that, in the context of an action brought by a Plaintiff under s.62, the onus of proof rests on the insurance company to establish a right to rescind or repudiate the relevant policy. As to the role played by s.62 of the 1961 Act, Finlay C.J. opined that it was specifically designed to protect an injured Plaintiff "…*so as to ensure that monies payable on a policy of insurance to an ensured who is dead, bankrupt and, in the case of a corporate body, who is gone into liquidation, will not be eaten up by other creditors, but will go to satisfy his compensation, and with that purpose the Section must, it seems to me, give to the Plaintiff a right to have that right enforced and protected by the courts and that means he has got a right to sue, as he has sued in this action*".

160. It was accepted from the outset that the burden rests on the Second Named Defendant in the present proceedings to demonstrate that they were entitled to and did repudiate the contract and refuse indemnity. The findings of fact which emerge from a careful examination of the evidence demonstrate that there was, as a matter of fact, late notification by the insured to the insurer. The evidence undoubtedly demonstrates the

fact that the insured did not notify the insurance company immediately on becoming aware of the 8 May 2010 incident, nor did the insured notify the insurance company as soon as practically possible thereafter. The most senior manager running the Brian Boru Bar in Cashel in which the incident occurred on 8 May 2010 was well aware of the accident from the very outset. Indeed, he formed a view as to its seriousness and took certain steps, no doubt entirely in good faith, including giving the Plaintiff money to pay a doctor's bill. The step which was not taken and which was required to be taken under General Policy Condition 8 was for the insured to have notified the insurance company and such notification did not happen for some seventeen months. The evidence demonstrates beyond doubt that indemnity was not provided by the Second Named Defendant to the First Named Defendant by reason of the fact that the First Named Defendant was in breach of the General Policy Conditions governing the insurance contract between those parties, specifically conditions 2 and 8. That was a valid decision which, on the evidence before the Court, the insurer took and was entitled to take.

161. Among other things, the evidence reveals the fact that the First Named Defendant withheld, albeit not deliberately or maliciously, relevant information from the insurer, in that the insured company delayed in relation to notifying the incident. It also has to be said that at no stage did the insured or its broker make the argument that the information which was from the very outset known to the insured's manager in Cashel could not be attributed to the insured, thereby meaning that there was no late notification. On the contrary, it was acknowledged by and on behalf of the insured that there was, in fact, late notification. Thus, as well as being an argument which is not supported by, but is fatally undermined by, the evidence in this case, the Plaintiff' attempts to challenge the validity of the insurer's decision to refuse indemnity is on the basis of an argument never made by the insured. The argument advanced on behalf of the Plaintiff, that knowledge by the First Named Defendant's manager did not constitute knowledge by the First Named Defendant, is not one which was ever made by the insured, or by the insured's broker, and is not an argument which can succeed in light of the evidence before the court.

162. It is not in dispute that it is only when moneys are actually payable under a policy of insurance that a claimant can benefit from the provisions of s.62 of the 1961 Act. This was made clear by the High Court in a decision by Mr. Justice Peart in *Yun Bing Hu v. Duleek Formwork Limited (in liquidation) & Anor*. [2013] IEHC 50 in which the learned judge cited a passage from the decision of Laffoy J. in *Power v. Guardian PMPA Insurance Limited* [2007] IEHC 105 in which Laffoy J. stated at p.9: "*For the protection to come into play moneys must have become payable to the insured under the policy of insurance*."

**Conclusion**

163. As the wording in section and the relevant authorities make clear, s. 62 refers to moneys *payable* on foot of a policy of insurance. In the present case the facts prove that the insurance company was entitled to and validly repudiated liability and the Second Named Defendant has undoubtedly discharged the burden of proof in that regard. Therefore, no moneys were, or are, *payable* on foot of the relevant policy of insurance. Notwithstanding the undoubtedly skilled and sophisticated submissions made by Mr.

Treacy, Senior Counsel, on her behalf, the evidence demonstrates that the Plaintiff has no entitlement to recover from the Second Named Defendant. For the reasons detailed in this judgment, I am satisfied that the Second Named Defendant was without doubt justified in refusing to indemnify the First Named Defendant. Thus, no moneys were or are payable by the Second Named Defendant to the Plaintiff under the relevant insurance policy and, accordingly, I must dismiss the Plaintiff's claim against the Second Named Defendant.