

Reform of English Insurance Law: The Insurance Act 2015

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A presentation by
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The Insurance Act 2015

(or Another Hard Day in the office
.....)

“All characters and firms appearing in this powerpoint are fictitious. Any resemblance to real persons, living or dead is purely coincidental.”

(1) After breakfast, an underwriter calls.....

Longstanding criticism of the 1906 Act

- The sole remedy for a breach by the insured of the duty of good faith in disclosing material facts is avoidance of the policy – the insurer is completely off the hook.
- If a clause in a policy is a “warranty” (and this may not be easy to decide), then even a trivial breach and/or a failure to comply with the “warranty” discharges the insurer’s liability under the policy. This is even if the breach of the warranty had nothing to do with the loss or was remedied before the loss occurred. Is this fair?

Longstanding criticism of the 1906 Act

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- “Basis of the contract” clauses: operate to turn the insured’s pre-contractual information (such as answers to questions in a proposal form) into “warranties” in the policy. More common in other markets such as construction.
- Pressure to update the 1906 Act and introduce “proportionate remedies”.

(2) Later in the morning, a fellow lawyer calls.....

- Under the new Act before a contract of insurance is entered into, the insured must make to the insurer a “fair presentation of the risk”.
- First limb.
- Disclosure of every **material** circumstance which the **insured knows or ought to know**. Potential insureds must provide insurers with the information insurers require to decide whether to insure a risk and on what terms.
- “Material” if it would influence the judgement of a prudent insurer in determining whether to take the risk and if so on what terms.
 - “Knowledge” of the insured organisation is that of anyone who is part of the insured’s “senior management”. Senior management defined as any individual who plays “a significant role(s) in the making of decisions about how the insured’s activities are to be organised or managed” or who is “responsible for the insured’s insurance” (for example a risk manager).

(2) Later in the morning, a fellow lawyer calls.....

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- “ought to know”: defined by reference to information that could be expected to be revealed by a reasonable search of information available to an insured within insured’s organisation or held by another person such as an agent to include an insurance broker.
- Includes “blind eye” knowledge.
- Second limb.
- Failing such disclosure, disclosure must give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.
- Insureds under a duty not to make misrepresentations.

(2) Later in the morning, a fellow lawyer calls.....

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- Insured does not have to disclose something which diminishes the risk, which the insurer knows or ought to know or is presumed to know, or information where the insurers have waived the disclosure requirement.
- Remedy for breach of the duty of fair presentation requires the insurer to demonstrate it would have acted differently if the insured had made a fair presentation of the risk.
- Remedy now depends on type of breach of duty of fair presentation by the insured.
- Breach deliberate or reckless: insurer can avoid contract and keep premiums.

(2) Later in the morning, a fellow lawyer calls.....

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- Breach not deliberate or reckless: insurers remedy depends on action it would have taken if the insured had made a fair presentation of risk.
 - not have entered into policy at all, can avoid contract, refuse all claims but must return premium.
 - entered into the policy but on different terms, can elect to treat policy as entered into on those different terms.
 - would have charged a higher premium, then can reduce coverage for claims by the same proportion by which premium is under-paid.

(2) Later in the morning, a fellow lawyer calls.....

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- But: the test of what the insurer would have done had it known the true facts is subjective. How will this work in practice? If the actual underwriter states he would never have written the risk or included an exclusion clause or have charged a much higher premium
- A radical departure from the previous, position of avoidance “ab initio” whatever the nature of the duty of non-disclosure.
- Other changes.
- Basis of contract clauses: Act prohibits “basis of the contract” clauses. However insurer is still entitled to incorporate specific warranties into the policy.

(2) Later in the morning, a fellow lawyer calls.....

Cont'd...

- Warranties: Rule that a breach of an express or implied warranty results in discharge of the insurers liability completely from the date of breach is abolished. Insurers' liability is suspended from the time of the breach of warranty until the breach is remedied. Insurers still liable for a loss before breach of a warranty and after it has been remedied.
- A link now has to be established between the breach of warranty and the type of loss suffered. N.B. also applies to terms which relate to a particular type of loss, or the risk of loss at a particular time or location. Not however necessary to show a direct causal link. Must have some bearing on the risk of loss actually occurred.
- For example, if there is a policy requirement that certain types of lock are used, but there is a loss by flooding then the failure to provide locks of the type required could not have increased risk of loss. Insurers still liable. If the loss is due to theft - even if the theft is not caused by the absence of particular types of locks, insurers can rely upon the breach of warranty and are not liable.

(3) Later in the morning, a shipowner from Europe calls.....

- Fraudulent claims: Act does not define “fraud” or “fraudulent claim”. Act now sets out the remedies where insured makes a fraudulent claim.

(4) A bit later that morning, a broker calls.....

- The new requirement to provide a “fair presentation of the risk” extends to brokers. Knowledge of the insured includes knowledge of a person who is “responsible for the insured’s insurance”.
- “Fair presentation” requires the insured through the broker to make disclosure *in a manner* which would be reasonably clear and accessible to a prudent insurer. “Data dumping” i.e. providing everything whether relevant or not, may not amount to a “fair presentation of the risk.”

(5) During lunch, a claims manager calls.....

- Knowledge of the insurer
- The Act includes detailed provisions as to what the insurer “knows”, “ought to know” and “is presumed to know” as well what is “readily available”.
- “readily available” is likely to include a search of the insurers electronic database.
- “Presumed to know” includes “common knowledge” and matters an insurer offering insurance of the class in question to insureds in the field in question would reasonably be expected to know in the ordinary course of business.
- Includes “blind eye” knowledge.
- There is no obligation on the insured to disclose circumstances which the insurer ought to know. This will include relevant information held by the insurer and which is readily available to the individual underwriter or which “ought reasonably to have been passed on” to the underwriter.

(6) After lunch, a cargo underwriter calls.....

- Clauses 15 and 16 covers the position on “contracting out”. The below applies to non-consumer business.
- It is not permitted to contract out of the prohibition on “basis clauses”.
- Clauses which seek to exclude relevant provisions in the new Act, are only valid if the insurer takes “sufficient steps” to draw the disadvantageous term to the insured’s attention before the contract is entered into. Can include drawing the term to the attention of the insured’s agent.
- The disadvantageous term must be clear and unambiguous as to its effect.
- In deciding whether sufficient steps have been taken the characteristics of the insured persons in question and the characteristics of the transaction have to be taken into account, i.e. whether a broker is involved.

(7) Later in the afternoon, a reinsurer calls.....

- The Insurance Act applies to contracts of reinsurance and retrocession.

(8) Towards the end of the day, a hull underwriter calls.....

- The new Act will apply to all contracts of insurance entered into after the middle of August 2016.
- At least one insurer has already indicated they will treat the Act as if it is already in force. Warranties removed from policies and claims handled as if 2015 Act applies.

(9) Whilst attending insurance networking drinks at “The Exchange” (a popular insurance watering hole), a young broker approaches

- No reason in principle why by agreement the parties cannot “opt in” to the new Act before it applies under English Law.
- Only logical where the policy provides for English law (and jurisdiction).
- Considerable uncertainty as to how certain provisions are to be applied. Will depend on the wording of individual clauses.
- On the face of it, specific provisions are advantageous to the Insured.

(9) Whilst attending insurance networking drinks at “The Exchange” (a popular insurance watering hole), a young broker approaches

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- For example:
 - breach of a warranty only suspends the policy whilst the warranty is breached
 - insurers cannot deny a claim on the basis that there has been a breach of warranty or other term (which includes conditions precedent and exclusion clauses) where the breach is irrelevant to the loss that was suffered.
 - potentially reduces the scope/ability of insurers to rely upon breaches of warranties to refuse to pay claims.

(9) Whilst attending insurance networking drinks at “The Exchange” (a popular insurance watering hole), a young broker approaches

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- Other provisions are less certain on who they may benefit.
- For example:
 - if insurers can show the breach of the duty of fair presentation was “deliberate/reckless”, insurer can avoid the policy and retain previous premiums paid.

(9) Whilst attending insurance networking drinks at “The Exchange” (a popular insurance watering hole), a young broker approaches

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- insurers now have a number of different remedies for breach of the duty of fair presentation. The “all or nothing” dilemma is avoided.
- an extra stage in the pre-contractual negotiations. The stage where the insurer is required to make further enquiries.
- from an insureds/their brokers perspective, it may be beneficial for certain elements of the 2015 Act to apply, whilst less clear on whether other changes ultimately benefit one party over another.

(9) Whilst attending insurance networking drinks at “The Exchange” (a popular insurance watering hole), a young broker approaches

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- Will the 2015 Act lead to more cases coming before the English Courts?
- Two schools of thought:
 - no applicable previously decided legal authorities then the parties will ask the Court to decide. More litigation.or
 - no one can give with any degree of certainty answers on how the 2015 Act will apply to the material facts. The parties will wish to seek a compromise rather than incurring costs on expensive lawyers with an uncertain outcome at the end of the day.

(10) And finally, just before leaving the office after a long day on the telephone answering questions, an internal call.....

THE END