ADDLESHAW GODDARD

INSURANCE ACT 2015

A new landscape?

The Insurance Act 2015 ("**Act**") came into force in August 2016. This marked the end of a long process to reform insurance law in the UK that was initiated in 2006 by the Law Commission and the Scottish Law Commission ("**Law Commission**") and has involved numerous consultations with a range of stakeholders.

The result is, inevitably, a compromise and some of the more ambitious changes proposed by the Law Commission are not in the Act. Nevertheless, its impact cannot be overestimated, if only because the Act represents the first major overhaul of the law of business insurance since the Marine Insurance Act of 1906.

The Act applies to all business insurance that incepts on or after 12 August 2016.

The Act also made amendments to the Third Parties (Rights against Insurers) Act 2010 ("**2010 Act**"), which came into force on 1 August 2016.

Rather than a detailed narrative description of those changes, we set out below our "Visual Guide" to the new landscape of insurance law under the Act, focussing on key changes concerning business insurance law[1].

TAKING OUT (OR RENEWING) INSURANCE: THE NEW DUTY

Duty of Fair Presentation of the Risk

What?

- every **material circumstance** which the insured knows or ought to know OR
- **sufficient information to put a prudent insurer on notice** that it needs to make further enquiries for the purpose of revealing those material circumstances.

How?

- in a manner reasonably clear and accessible to a prudent insurer.
- in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

Material Representation

- is substantially correct if a prudent insurer would not consider the difference between the representation and the truth to be material.
- A representation may be withdrawn or corrected before the contract is entered into.

A Circumstance is

- any communication made to or information received by the insured.
- material if it would influence the judgment of a prudent insurer in determining whether to take the risk and on what terms.

No Need to Disclose

(assuming no enquiries from insurer)

a "circumstance" if:

- it diminishes the risk
- the insurer knows it
- the insurer ought to know it
- the insurer is presumed to know it
- it is something as to which the insurer waives information.

IN PRACTICE?

Guidance for policyholders:

- Liaise with brokers early to identify material circumstances.
- If in doubt, err on the side of disclosure.
- Think carefully about the format of disclosure (clear and accessible).
- Be prepared to answer detailed questions from underwriters who have been "put on notice".
- Ensure representations are correct/given in good faith and kept under review to make corrections before the contract is entered into if need be.

[1] Some of the changes effected by the Act will also apply to consumer insurance contracts (e.g. the new rules concerning fraudulent claims and warranties and other terms).

KNOWLEDGE: WHO KNOWS WHAT?

Insured's Knowledge

An **individual knows**:

- what is known to the individual, and
- what is known to one or more of the individuals who are responsible for the insured's insurance.

An insured who is not an individual (e.g. **corporation**) **knows** what is known to individuals who are:

- part of the insured's senior management ("individuals" who play significant roles in the making of decisions about how the insured's activities are to be managed or organised") OR
- responsible for the insured's insurance.

An insured (whether individual or not) is not taken to know confidential information known to its agent (or an agent's employee) and acquired by the agent/employee through a business relationship with a *"person who is not connected with the contract of insurance"*.

Insurer

- knows what is known to the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms ("Underwriters").
- ought to know relevant information its employees or agents knows and ought reasonably to have passed to the Underwriters OR relevant information that is held by the insurer and readily available to the Underwriters.
- is presumed to know things which are common knowledge and things which an insurer offering insurance of the class in question would reasonably be expected to know.

Insured Ought to Know

- what should reasonably have been revealed by a **reasonable search** of information available to the insured.
- includes information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided).

Knowledge: "turning a blind eye"

- in all the above, reference to an "individual's knowledge" includes matters which the individual suspected and of which he would have had knowledge but for deliberately refraining from confirming them of making enquiries.
- this does not affect the common law rule that knowledge of a fraud perpetrated by an individual is not to be attributed to the insured or the insurer in the circumstances set out in the Act.

IN PRACTICE?

Guidance for policyholders:

- Consider what is a "reasonable search" and keep an audit trail.
- Clarify who is responsible for the insurance and who belongs to "*senior management*".
- Check what relevant knowledge broker and other agents may have.

WARRANTIES AND OTHER TERMS

Basis of Contract Clauses that turn representations in proposal forms into warranties are abolished.

Breaches of warranties
An insurer has **no liability** whilst there is a breach of warranty unless:

- the warranty ceases to apply because of a change in circumstances
- compliance with the warranty is rendered unlawful or
- the insurer waives the breach of warranty.

Breaches of warranties = treated as breaches of suspensive conditions

The insurer is **still liable** for losses attributable to:

- something happening before the breach or
- after the breach has been remedied.

Terms not relevant to the actual loss

- terms (i.e. any terms, whether express or implied - not just warranties) that are designed to reduce the risk of loss of a particular kind or at a particular location or time.
- insurer may not exclude, limit or discharge its liability when there is a breach but the insured shows that the non-compliance could not have increased the risk of loss which actually occurred in the circumstances in which it occurred.

CONTRACTING OUT (NEW CONTRACTS AND VARIATIONS)

- The prohibition on the use "Basis of Contract" clauses cannot be contracted out.
- A clause to contract out of the other provisions of the Act which would put the insured in a worse position (the "**disadvantageous term**") will only be effective if (i) the insurer takes sufficient steps to draw the disadvantageous term to the insured's attention before it is agreed and (ii) the term is clear and unambiguous as to its effect (the "**transparency requirements**").
- The above will be determined by reference to the particular insured and the circumstances of the transaction BUT if an insured (or its agent) had actual knowledge of the term then he may not argue that the insurer failed to take the sufficient steps describe above.

MAKING CLAIMS: A NEW WORLD OF REMEDIES

Breach of the Duty of Fair Presentation (= a "qualifying breach")

- An insurer only has a remedy if he can show that, but for the breach he would not have entered into the contract at all, OR he would have done so only on different terms.

A qualifying breach is "**deliberate or reckless**" if: (a) the insured knew it was in breach of the duty of fair presentation OR (b) did not care whether or not it was in breach of that duty.

- Burden is on insurer to prove the above.

New Proportional Remedies

If the qualifying breach was **deliberate or reckless** the insurer (a) may avoid the contract and refuse all claims and (b) retain the premium.

If the qualifying breach was **neither deliberate nor reckless**, the remedies depend on what the insurer can show he would have done had there been no breach:

- If the insurer would not have entered into the contract at all, he can **avoid** and refuse all claims but he must also repay the premium back to the insured.
- If the insurer can show that he would only have imposed different terms, the insurance contract is to be treated as if it had been entered into on those **different terms**.
- If the insurer can show that he would have charged a higher premium, he may **reduce proportionally the amount to be paid** on a claim.

Fraudulent Claims

If the insured makes a fraudulent claim:

- the insurer is not liable to pay the claim and he may terminate the contract from the time of the fraudulent act whilst retaining the premium.
- this does not affect the liability of the insurer prior to the fraudulent act.

IN PRACTICE? Guidance for policyholders:

- Look out for contracting out clauses and consider the transparency requirements.
- Take note of the warranties, keep a record of compliance and, if there has been a breach, the date when it was remedied.
- If a claim is rejected, bear in mind the new remedies when negotiating with the insurers.
- Remember that burden is on insurers to prove that there was a "qualifying breach".

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