ADDLESHAW GODDARD

INSURANCE ACT 2015 AND THIRD PARTY (RIGHTS AGAINST INSURERS) ACT 2010

- In August 2016 two major pieces of legislation, the Insurance Act 2015 (the **2015 Act**) and the Third Parties (Rights Against Insurers) Act 2010 (the **2010 Act**) came into force, effecting the first significant reforms of insurance law in over 70 years. Both pieces of legislation are of importance to construction-related insurance programmes.

Insurance Act 2015

The main driver of the 2015 Act is to provide additional protections for policyholders.

Key changes introduced by the 2015 Act include:

- Policyholders are now under a less onerous duty to make a 'fair presentation of risk' to insurers prior to the inception or renewal of cover. The Act sets out the circumstances in which an insured is deemed to 'know' certain facts for the purpose of disclosure. Construction policyholders will still need to maintain procedures to ensure that necessary information (including that held by subcontractors) is appropriately reported to insurers on the inception or renewal of cover;

- Failing due disclosure, a new, more proportionate system of remedies for non-disclosure will be available to the insurer. If a policyholder recklessly fails to comply, the insurer may avoid the policy, refuse all claims and retain the premium. However, in all other cases, the consequences will depend on what the insurer would have done if the risk had been fairly represented;

- 'Basis of contract' clauses (which have the effect of converting representations made in the course of a non-consumer insurance contract into contractual warranties) are abolished;

- Historically breaches of warranty (e.g. a failure to maintain an active burglar alarm system on premises where there is a warranty that such a system would be maintained) would have had the effect of discharging an insurer's liability under a policy. Under the 2015 Act, warranties are treated as suspensory conditions – so if the breach is remedied (e.g. the burglar alarm for the above property is reinstated) the insurer will be liable for losses attributable to something that happened before or after the breach; and

- Insurers can no longer rely on a breach of a term which would have reduced the risk of a loss of a particular kind, location or time to obviate cover for an unrelated loss. For example, an insurer could not rely on a breach of the burglar alarm warranty above in order to avoid paying for a loss caused by a flood at the same building site.

For further details, please see our detailed e-alert which is available here.

Third Parties (Rights Against Insurers) Act 2010

The 2010 Act reforms the Third Parties (Rights Against Insurers) Act 1930 (the **1930 Act**).

The 1930 Act was intended to ensure that where party A is insured for his liability in damages to party B, and where, before B's claim is satisfied, A becomes insolvent, B may take over A's entitlement against the insurer, preventing any insurance money from going instead into the funds available to A's creditors in general.

In a construction context, this would for example enable a claimant to recover directly from the all-risks, public liability or professional indemnity insurer of an insolvent contractor.

Unfortunately, in practice the 1930 Act was difficult to use. Its worst feature was that in practice B had to win his claim (either by admission or by obtaining judgment) directly against A before being able to go against the insurer, and until then would not necessarily be able to establish whether the policy existed or covered his loss.

The 2010 Act promises to be a much more effective piece of legislation, making third party claims against insurers simpler, quicker and cheaper. The key changes are:

- B is no longer required to establish the liability of the insured as a pre-condition of invoking the Act;
- B will be able to bring proceedings directly against such an insurer, removing for example the need to restore an insolvent company to make such a claim; and
- If B has a reasonable belief that A has incurred a liability to it, under the 2010 Act B may require any person in possession of relevant information about the existence of the policy (including A, the insurer and any intermediary) to provide that information.

The 2010 Act preserves the general principle that any defences available to the insurer as against its insured can be raised against third parties; however, it removes certain technical defences, and the third party is allowed to fulfil certain requirements of the policy as if it were the insured, including notification of the claim.

Further details regarding the 2010 Act are included in our detailed e-alert which is accessible here.

The team at Addleshaw Goddard LLP will be happy to discuss the above with you. Please contact Richard Wise or Laura Payne

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