

Insurance Act 2015 – overview of changes

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Introduction

Current law – underwriter friendly and court developed

Insurance Act 2015 to come into force on 12 August 2016

Intended to consolidate case law with main changes in the following areas:

- Disclosure
- Warranties
- Fraudulent claims

Contracting out is limited

Only applies to contracts entered into after

12 August 2016



Insurance Act 2015

Disclosure – Fair presentation

New duty to make a fair presentation of the risk by disclosing every material circumstance which the insured knows or ought to know (ss3 – 7)

Reflects the approach taken in case law

Underwriters no longer allowed to play a passive role

How to make a fair presentation:

1. Clear and accessible
2. Substantially correct and in good faith
3. Sufficient to put the underwriter on notice that it needs to make further enquiries
4. Known by people in senior management or people responsible for insurance
5. No need to disclose information the underwriter knows or ought to know



Disclosure summary

ISSUE	OLD LAW (pre 12.08.2016)		NEW LAW (post 12.08.2016)	
	Marine Insurance Act 1906		Insurance Act 2015	
	Approach	Section	Approach	Section
Disclosure (& Good Faith)	<u>Assured (owner)</u> Duty to disclose every “material circumstance” that he knows or ought to know	s.18 (& s.17)	<u>Assured (owner)</u> <ul style="list-style-type: none"> Duty to make a “fair presentation of the risk” Clear & accessible disclosure Sufficient information for prudent insurer to make enquiries 	ss.3-7
	<u>Insurer</u> May remain entirely passive		<u>Insurer</u> Must make enquiries if it would be reasonable/ expected of him to do so <u>General (for both parties to the contract)</u> Detailed provisions about “knowledge”	

Remedies for breach of fair presentation

Underwriter can no longer just avoid the contract (s8)

Remedies depend on whether the breach was deliberate / reckless or negligent / innocent:

- Deliberate / reckless – avoid the contract if it can show that but for the breach, it would not have entered into the contract at all or would have done so on different terms
- Negligent / innocent – remedy based on how the underwriter would have acted had there been a fair presentation of the risk, e.g.:
 - Refuse to pay and avoid contract, but return premium
 - Reduce pay-out proportionately to the higher premium that should have been charged
 - Treat the contract as agreed on different terms

Remedies – summary old/new

	<u>Assured (owner)</u>	1906	<u>Proportional remedies as follows:</u>	2015
Remedies	Avoidance (in theory but, in practice, no remedy whatsoever; remedy one sided)	s.17	<p>(1) Deliberate or reckless breach:</p> <p>Insurer can:</p> <ul style="list-style-type: none"> • avoid the policy; & • keep premium <p>(2) Non-deliberate or reckless breach:</p> <p>(a) Insurer can:</p> <ul style="list-style-type: none"> • refuse cover, i.e. avoid the policy; but • return premium. 	ss.8 & Shc.1
	<p><u>Insurer</u></p> <p>Avoidance in all cases (even in trivial non-disclosure)</p>	s.18 (& s.17)	<p>(b) Insurer can treat the contract as if it had been entered into on different terms but for the duty's breach (non-disclosure) by the assured (owner).</p> <p>(c) Insurer can reduce proportionately the amount to be paid on a claim on the basis of the proportion of the premium he would have charged but for the duty's breach (non-disclosure) by the assured (owner).</p>	

Warranties

Declaration of accuracy for all representations given by the insured no longer allowed

Specific warranties can be used however

Breach of warranties no longer discharges underwriter from all liability

Underwriter's liability can only be suspended – not liable only for the period after a warranty is breached and before it is remedied

(ss9 -11)



Warranties and Causation

Breach of a term that could not have increased the risk of the loss which actually occurred cannot be used to exclude or limit liability, unless it is a term defining the risk as a whole



Warranties - summary old/new

Warranties	<ul style="list-style-type: none"> • Breach of warranty put the insurer's risk to an end automatically as from the time of breach. • Strict compliance with warranty – Breach operative even if completely unrelated (non-causative) to the actual loss. • Representations converted to warranties (“abusive” use by insurers of the strict regime on warranties under the current regime). 	1906 ss.33-34	<ul style="list-style-type: none"> • Breach of warranty suspend cover until remedied. • There is no breach where the terms breached are not relevant to the actual loss. • The “basis of contract” clauses are abolished (this is the only provision in the Act that cannot be contracted out) 	2015 ss.9-11
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Fraudulent claims

Underwriter not liable for fraudulent claims

Sums already paid for fraudulent claims can be recovered

Contract can be terminated by notice and premiums can be retained

Cover of other non-fraudulent beneficiaries under the same contract will remain unaffected

(ss12 -13)



Fraudulent claims – old/new

Fraud	<p>Avoidance <i>ab initio</i>.</p> <p>&</p> <p>In any event, no liability to pay fraudulent claims in common law</p>	<p>1906</p> <p>s.17</p> <p>&</p> <p>Comm on Law</p>	<p>(1) Avoidance for breach of the duty of “utmost good faith” is abolished</p> <p>(2) Termination from the date of fraud:</p> <ul style="list-style-type: none"> Insurer remains liable in respect of relevant events arising before the fraudulent act; all subsequent claims will be invalid; & Insurer retain any premium paid before the fraud. <p>(1) In group insurance cover only the fraudulent company/ member is denied cover</p>	<p>2015</p> <p>Common Law</p> <p>&</p> <p>ss.12-14</p>
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Future changes



Enterprise Act 2016 – Late Payment of Insurance Claims

- Implied contract term that the underwriter must pay out any claim within reasonable time (depending on the circumstances)
- Remedy for breach is a right to enforce payment of the sums due, damages and to obtain interest
- Very limited provisions for contracting out
- These sections of the Act (s13A) come into force on 4 May 2017

Enterprise Act – May 2017

<i>Late Payment</i>	<i>Silent on Insurer's failure to pay on time – No damages and/or consequential losses and interest for the Insurer's delayed payment or failure to pay</i>	<i>1906</i>	<ul style="list-style-type: none"> • An implied term that the insurer must pay any sums due to the insured within “reasonable time”. • Detailed provisions about amounts to a “reasonable time” to pay a claim which includes a reasonable time “to investigate and assess” the claim • Breach of this implied term by the Insurer would give rise to payment of damages and interest on that sum to the assured (owner) 	<i>New s.13A Insurance Act (created by s28 Enterprise Act 2016)</i>
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Any questions?