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The Insurance Act 2015: an outline of the main changes

Rhys Clift, Partner, Hill Dickinson LLP

HILL DICKINSON

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APPLICATION AND IMPLICATIONS?

- Will the contract you use to cover maritime and transport risks be impacted by reform to English insurance contract law?



OUTLINE

- Path to reform
- Placement
- Warranties and other conditions
- Fraudulent insurance claims
- Damages, a new remedy
- Contracting out
- Conclusions



PATH TO REFORM

- **Marine Insurance Act, 1906**
 - Twelve year project
 - A codification of the law, developed by Judiciary (over about 150 years)
 - Originally designed to apply to marine insurance business only



PATH TO REFORM

■ Insurance Act 2015

- Ten year project (following at least 30 years of discussions/proposals)
- Radical.
- First attempt by Legislature to amend the law (rather than evolution in hands of Judiciary)
- Designed to apply to all classes of insurance (marine and non-marine), variations, reinsurance and retrocessions

■ Enterprise Act 2016

- Radical.
- A wholly new remedy



PATH TO REFORM

- Joint Law Commission Review 2006. Products:-
 - **1. Consumer Insurance (*Disclosure and Representations*) Act, 2012** (a driver for change)
 - **2. Insurance Act, 2015** (incepted **12th August 2016**), principally for business insurance, marine and non marine (and reinsurance)
 - **3. Enterprise Act, 2016** (incepts 4th May 2017)
- Likely effect(s)?



PATH TO REFORM

- Four main changes:-
 - 1. Amendment to the law on Placement (duties and remedies)
 - 2. Amendment to the law on Warranties and other terms
 - 3. Amendment to the law on Fraudulent claims
 - 4. Amendment to the law on Damages
- But note: contracting out (in some respects)
- And note: amendment of the Third Parties (Rights Against Insurers Act 2010 – but not for today)
- Talk focusses on business insurance
- Summary?: Changes said to be largely insured/member friendly. But are they?



PLACEMENT: DUTIES

- **Is burden on insureds on placement now lighter?**
Much is familiar (but avoidance rare anyway?)
- **Old duty: onerous**
 - Insured must disclose every material circumstance which is known by the insured, or which ought to be known by him (actual and constructive knowledge)
- **New Duty: to make fair presentation of the risk (DFP)**
 - Disclosure made in a manner “*reasonably clear and accessible to a prudent insurer*” (no data dumping)
 - Material representations of facts: **substantially correct**
 - Material representations of expectation or belief: **good faith**



PLACEMENT: DUTIES

- **What disclosure is now required?**

- Disclosure must be of every material circumstances which the **insured knows or ought to know** (same as before)

Or

- ***“failing that, disclosure which gives 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”***
- Balance on placement has clearly shifted against insurers. This places a new burden **on insurers**



PLACEMENT: DUTIES

- An aside from the Joint Law Commission:
- ***“We think it would be helpful for insurers, brokers and policyholder bodies to work together to develop guidance and protocols setting out what a standard presentation of the risk should include in particular circumstances about what should be disclosed, to put flesh on the bones of this structure”***
- Unlikely?



PLACEMENT: DUTIES

- **No need to disclose circumstances which, in the absence of enquiry**
 - Diminish the risk
 - The insurer knows
 - The insurer ought to know
 - The insurer is presumed to know
 - Are something as to which the insurer waives information



PLACEMENT: DUTIES

- **What does the insured know? – Deeper?**
 - Actual knowledge (what he knows) and
 - **New:** that which “*should reasonably have been revealed by a **reasonable search** of information available to the insured”*”
- But what is **reasonable**? (search is required for info held within the insured’s organisation or by any other person).
- A new and potentially burdensome obligation for **insureds**



PLACEMENT: DUTIES

- **Insured: Whose knowledge? – Wider?**
 - **Previously** test was knowledge of senior management of insured (alter ego, controlling mind)
 - **Now:** Individuals who are part of the insured's **senior management** (those who play a significant role in making decisions about how the insured's activities are managed and organised); **and**
 - Individuals who are responsible for the **insured's insurance** (one who participates in the process of procuring insured's insurance), and
 - Brokers (except that coming to brokers through confidential third party source (if genuinely confidential))



PLACEMENT: REMEDIES

- **Insurers remedies for breach of DFP are now less severe, in some cases** (so avoidance now more likely?)
- Now two classes of breach: either deliberate or reckless, or neither deliberate or reckless
- **Deliberate or reckless breach?**
 - Avoid the contract, refuse to pay all claims, keep premium (old law)
- **Neither deliberate or reckless?**
 - If, but for the breach, the insurer would not have entered the contract at all
 - Avoid the contract, refuse all claims, return premium



PLACEMENT: REMEDIES

- **Where breach of DFP neither deliberate or reckless**
- **Radical new remedy:** if, but for the breach, the insurer would have entered the contract on **different terms**, contract is treated as if those different terms applied
 - *Scope for dispute? Proof?*
- **Radical new remedy:** if insurer would have **charged higher premium**, insurer can proportionately reduce the amount it pays
 - *Scope for dispute? Proof?*



WARRANTIES AND OTHER CONDITIONS

- **First: “Basis clauses”:**
 - Provisions that convert representations or information in proposal forms into warranties (considered harsh and unjust). **Abolished.**
- **Second: automatic discharge and suspensive terms:**
 - Failure to comply strictly and literally with terms of warranty resulted in ***automatic discharge of liability***. Later compliance or remedy to the breach; irrelevant. (Considered harsh and unjust)
 - **Now**, suspensory terms. ***No liability if loss occurs before a breach of warranty is remedied*** (unless warranty has ceased to apply, new law makes compliance unlawful or insurer waives breach).
 - Cover **reinstated** when insured remedies breach
 - (If the breach is capable of remedy (some breaches incapable of remedy))



WARRANTIES AND OTHER CONDITIONS

- **What counts as remedying the breach?**
- If warranty is no longer breached; or
- If warranty (typically) requires:-
 - Something to be done/not done by an ascertainable time
 - A condition to be fulfilled
 - Something to be/is not to be the case
- ... if this is complied with, nonetheless breach is remedies if risk becomes “***essentially the same as that originally contemplated by the parties***”
- *What does that mean? Likely uncertainty and huge scope for dispute*



WARRANTIES AND OTHER CONDITIONS

- **Third:** Where there are terms (express or implied), **other than terms defining the risk as a whole**, where compliance would tend to reduce risk of loss:
 - **Of a particular kind**
 - **At a particular location, or**
 - **At a particular time**
- If loss occurs, and term not complied with, insurer may **not** exclude, limit or discharge liability, if insured can prove that breach could not
- **Have increased the risk of the loss that:**
 - **Actually occurred**
 - **In the circumstances in which it occurred**



WARRANTIES AND OTHER CONDITIONS

- This latter is not limited to warranties
- Also applies to conditions precedent and exclusions
- **Problems, for example:**
- Likely to be complex to apply
- What will be terms defining risk as whole?
- How will this provision work with new “suspension” provision?



FRAUDULENT INSURANCE CLAIMS

- **Amendments largely to clarify the law** (old law said to be confused and contradictory)
- **Now**
- No liability to pay the fraudulent claim/can recover sums already paid
- Can by notice treat contract as terminated from the date of the fraud
- No need to return the premium
- Claims pre-fraud still covered
- For group insurance, fraud by a person covered by, but not party to, the contract gives insurers the right to terminate as against the fraudster only



DAMAGES FOR LATE PAYMENT

- **Damages for late payment**
- **Radical:** A wholly new remedy (cf damages previously irrecoverable). Compensatory not punitive.
- Requires insurers to pay claims within a **reasonable time** (including time to investigate and assess claim)
- **What is reasonable?** Depends on all circumstances, including the size and complexity of the claim, regulatory compliance issues etc.



DAMAGES FOR LATE PAYMENT

- **No action:** if the insurer *merely denies claim* or *disputes quantum* (alone); but conduct in handling the claim will be relevant to deciding if the term has been breached
- **One year time bar** (counting for the date of payment of the claim)
- **Contract out?** Yes, but only for business insurance, if not deliberate/ reckless
- **Effect:** An explosion of disputes and litigation?



CONTRACTING OUT: DISADVANTAGEOUS TERMS

- **Permissible** (business insurance) in respect of some obligations
 - New DFP including new remedies
 - New rules on warranties (not basis clauses)
 - New right to damages for late payment (unless deliberate/reckless)
- **Provided**
 - **Transparency:** Insurers must take *sufficient steps* to draw *disadvantageous terms* to attention of customer/insured, before the contract or variation is made
 - **Clarity:** terms are clear and unambiguous



CONCLUSIONS

- What must underwriters, brokers and insureds do:
 - Review guidance to insureds
 - Review placing procedures
 - Review internal procedures (searching) within companies (insureds)
 - Review underwriting and claims guidelines
 - Amend the proposal forms
 - Review contracts/policy wordings



CONCLUSIONS

- **Placement duties:** modest changes, avoidance was in any event rare, but new uncertainties
- **Placement remedies:** significant and a welcome change
- **Warranties:** basis clauses, a welcome change
- **Warranties:** otherwise good in parts, but likely difficulties
- **Fraudulent claims:** clarifies the law
- **Damages on late claims:** a recipe for litigation
- **Contracting out:** certain P&I Clubs have contracted out (but not of new placing remedies). Who (if any) will follow?





RHYS CLIFT, PARTNER

HILL DICKINSON LLP

Tel: + 44 (0) 207 283 9033

rhys.clift@hildickinson.com

rhys.clift@seamediation.com

www.hildickinson.com

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