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## IMPACT OF INSURANCE ACT 2015 ON UK LAW

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# INTRODUCTION

- Insurance Act 2015 - in force August 2016
- Marine Insurance Act 1906 – amendments – partial reform
- New statutory provision – fraudulent claims
- Law Reform Commissions – since 2006
- 2015 Act applies to non-consumer insurance contracts
- Consumer Insurance (Disclosure and Representations) Act 2012
- Applies to reinsurance contracts

# The content of the 2015 Act

- General principle of “good faith”
- Pre-contractual duties of assured
- Warranties and other terms
- Fraudulent claims
- Application to group insurance
- Right to contract out

GOOD FAITH PRINCIPLE

# PRINCIPLE OF GOOD FAITH

- MIA 1906 s.17-

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Words underlined are omitted

# PRINCIPLE OF GOOD FAITH

- MIA 1906 S. 17 amended – reference to remedy of avoidance deleted – s.14(1) & (3a)
- Principle of good faith modified to the extent provided by 2015 Act – s.14(2)
- Principle continues to apply to assureds and insurers
- Continuing duty of good faith – potential impact on the developing law

# PRE-CONTRACT DUTIES OF ASSUREDS

# PRE-CONTRACT DUTIES OF ASSURED

- MIA 18-20 (disclosure by assureds and brokers, and misrepresentations) repealed
- Replaced by “The duty of fair presentation” – Part 2 of 2015 Act
- Incorporates the three elements of the former law
- New Act applies to new contracts and to variations of existing contracts



# Duty to make fair presentation

- (a) disclose every material circumstance which the insured knows or ought to know

OR

- failing that, disclose sufficient information to put a prudent insurer on notice that it needs to make further enquires for the purpose of revealing those material circumstances
- (b) make the disclosure in a manner which would be reasonably clear and accessible to a prudent insurer
- (c) every material representation as to fact must be substantially correct, and as to expectation and belief must be made in good faith

# Duty to make fair presentation

- May be contained in more than one document or oral presentation
- “circumstance” includes any communication or information made to or received by the insured
- “material circumstance” – *if it would influence the judgment of a prudent insurer in determining whether to accept the risk and, if so, on what terms*

# Duty to make fair presentation

Examples of material circumstances – s.7(4)

- Special or unusual facts relating to the risk
- Particular concerns which led the insured to seek insurance for the risk
- Anything which the class of insurer and persons involved in the field of activity would generally understand to be an ingredient in a fair representation of the risk

# Duty to make fair presentation

## Representations

- Material representations as to fact must be substantially correct – test satisfied if a prudent insurer would consider the departure from what is correct not to be material
- Representation may be withdrawn or corrected before contract entered into

# Knowledge of Insured—individual

- What the insured actually knows
- Matters suspected and which would have been known had he not deliberately refrained for confirming or enquiring about them, - s. 6(1) – blind eye knowledge
- What he ought to know – what should reasonably have been revealed by a reasonable search of the information available to the insured – constructive knowledge
  - “information” – defined in s. 4(7)

# Knowledge of insured - individual

- What is known to any individual responsible for the insured's insurance - s. 4(2)(b)

“person responsible” - acts on behalf of the insured in the process of procuring the insurance – as agent, employee of the agent or in any other capacity

Knowledge of such person - includes that obtainable by a reasonable research & blind eye knowledge

# Knowledge of insured – not an individual - corporate

- Knows what is known to one or more of the individuals who are
    - (a) part of the insured's senior management, or
    - (b) responsible for insured's insurance
- “senior management” – individuals who play significant roles in decision making about the management or organisation of insurance –s.4(8)(c)
- “responsible for insured's insurance” - s. 4(8)(b)- same as for individuals who are insureds
- Individuals have actual, blind eye and constructive knowledge.

# CONFIDENTIAL INFORMATION

- Insured not taken to know
- (a) confidential information
- (b) known to the insured's agent or employee of the agent
- (c) acquired through a business relationship with a person not connected with the insurance contract



# What does not need to be disclosed – s. 3(5)

A circumstances which –

(a) diminishes the risk

(b) the insurer knows

(c) the insurer ought to know

(d) the insurer is presumed to know

(e) the insurer waives the right to be informed

# Knowledge of Insurer – s. 5

- Something known to individuals who on behalf of the insurer participate in the decision to take the risk and if so on what terms
- Insurer “ought to know” if –
  - (a) employee/agent knows it and ought reasonably to have passed the relevant information to an individual who participate in the insurance on behalf of the insurer, or
  - (b) the information is held by the insurer and is readily available to an individual who participates in the insurance

# Knowledge of insurer – s. 5

- Insurer is presumed to know -
  - (a) things which are common knowledge, and
  - (b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected know in the ordinary course of business

# Remedies for breach

## CAUSATION – s. 8(1)

- Remedy – only if insurer shows that, but for the breach, he
  - (a) would not have entered into the contract of insurance at all, or
  - (b) would have done so only on different terms
- Qualifying breach

# Remedies for causal breach – governed by the nature of the breach

- Causal breach of duty of fair presentation – qualifying breach – s.8(3)
- May be deliberate/reckless (defined s 8(5) or otherwise
- Burden of proof on insurer to show deliberate/reckless breach

# Remedies for breach – s.8(2) and Schedule 1

- Deliberate/reckless breach – may avoid the contract, refuse all claims, and refuse to return premiums

# Remedies for breach – s 8(2) and Schedule 1

- Other kinds of breach- if insurer,
- (a) would not have entered into the contract on any terms – may avoid the contract & refuse all claims, but must return premium
- (b) would have entered into the contract but on different terms – those terms are deemed to be included
- (c) would have entered into the contract (whether on the same or different terms) but at a higher premium rate, the amount payable on claims may be reduced proportionately - formula set out in Schedule 1 par 6(2).

# Remedies – Variation of Contract

- Deliberate or reckless qualifying breach

May by notice to insured terminated the contract from the time of the variation and need not return the premium paid



# Remedies re Variation of contract

Breach neither deliberate nor reckless and total premium increased or remains the same

- If insurer would not have agreed to the variation on any terms – may treat the contract as if the variation was not made but must return any extra premium paid
- If insurer would have agreed to the variation on different terms - variation to be treated as if made on those terms

- If the insurer would have increased the premium by more or, in the case where the premium was unchanged, increased it, the insurer may reduce proportionately the amount paid on claims arising out of events occurring after the variation

# Remedies re Variation of contract

Breach neither deliberate nor reckless and total premium reduced

- If the insurer would not have agreed the variation on any terms, the variation may be treated as if not made
- If the insurer would have agreed to the variation on different terms, the variation to be treated as if made on those terms

- If the insurer would have increased the premium or would not have reduced the premium or would have reduced it by less, the insurer may reduce proportionately the amount payable on claims

# WARRANTIES AND TERMS

# WARRANTIES AND OTHER TERMS

MIA 1906 amended

- S.33 amended – consequences of breach
- S.34 repealed – when breach may be excused
- Otherwise the new Act builds on the existing law relating to warranties

# BASIS OF CONTRACT CLAUSES ABOLISHED

- Pre-contract representations converted into warranties
- Rendered void – no longer effective
- Rule cannot be circumvented by the agreement of the parties - mandatory

# Amendment to s.33(3)

- A warranty, as defined above, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.
- Words underlined omitted



## BREACH OF WARRANTY – S. 10

- Automatic discharge from liability rule abolished
- Insurer not liable for losses occurring after a breach of warranty but before the breach has been remedied – liability suspended
- Insurer remains liable for losses occurring before the breach of warranty and after the breach has been remedied

# WHEN IS A BREACH OF WARRANTY REMEDIED – s.10(5) & (6)

- (a) Where the warranty requires that by an ascertainable time (i) something is to be or not done, or (ii) a condition is to be fulfilled, or (iii) something is to be the case, and is not complied with, if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties
- (b) In other cases, if the insured ceases to be in breach of the warranty

# EXCEPTIONS TO THE BASIC RULE

- (a) because of changed circumstances, the warranty ceases to be applicable to the circumstances of the contract
- (b) compliance with the warranty is rendered unlawful by any subsequent law, or
- (c) the insurer waives the breach of warranty

# OTHER TERMS NOT RELEVANT TO ACTUAL LOSS – s. 11

- Terms - compliance with which would tend to reduce the risk of loss (i) of particular kind, or (ii) at a particular location or (iii) at a particular time.
- If term not complied with and loss occurs insurer cannot rely on the clause if insured shows that non-compliance could not have increased the risk of loss which actually occurred in the circumstances in which it occurred

# OTHER TERMS NOT RELEVANT TO ACTUAL LOSS

- Applies to terms that may also be warranties
- Does not apply to terms or warranties which define the risk as a whole - e.g.
- (i) geographical limitation (ii) use of insured vessel
- The term must apply to particular risks within the cover

# APPLICATION OF THE NEW LAW

- Warranted no trading in Baltic Sea
- Warranted vessel will trade on a designated route
- Insured warrants that vessel will be surveyed within 30 days of the inception of the policy
- Warranted that a comprehensive and effective security system will be maintained on board the vessel. Vessel lost by fire at a time the insured was in breach of the security warranty

# FRAUDULENT CLAIMS

# FRAUDULENT CLAIMS – REMEDIES OF INSURERS

- Insurer –
- (a) not liable to pay the claim
- (b) may recover sums paid in respect of the claim, and
- (c) may by notice to the insured treat the contract as terminated, and may
  - (i) refuse all liability in respect of events occurring after the fraudulent act and
  - (ii) refuse to return any premiums paid, but
  - (iii) insurer remains liable for claims arising before the fraudulent act



PARTIES' RIGHTS TO CONTACT OUT

# CONTRACTING OUT OF THE STATUTORY PROVISIONS

- Abolition of basis of agreement clauses – mandatory rule
- Other provisions may be displaced or amended by the agreement of the parties subject to protective conditions.

# PROTECTIVE CONDITIONS

- Take sufficient steps to draw it to the attention of the insured before contract (variation) entered into
- Term must be clear and unambiguous as to its effect (insured cannot rely on this if he or his agent had actual knowledge of the term)
- In determining the above, take into account the characteristics of the insured and circumstances of the transaction