AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

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Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.
Finally, your remarks and comments from your point of view will be appreciated.

QUESTIONNAIRE

1. The Insured's Pre-Contractual Disclose Duty

Question 1a: Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

Answer 1a:

1.a. English law does not impose a positive duty to answer questions put to the applicant/insured by the insurer. Nevertheless an applicant is unlikely to be insured if he or she does not answer questions posed by the insurer. A distinction is made between consumers and others:

(i) There is no obligation on a consumer to give disclosure to the insurer (see the Consumer Insurance (Disclosure and Representations) Act 2012 (hereafter referred to as the "2012 Act"). If questions are posed by an insurer to a consumer, he or she must take reasonable care not to make a misrepresentation in his or her answers to questions asked by the insurers (see section 2 and section 3 of the 2012 Act). Section 1 defines a consumer insurance contract for the purposes of the Act as follows:

> " a contract of insurance between—
> (a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and

(b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000);
"consumer" means the individual who enters into a consumer insurance contract, or proposes to do so."

(ii) Under the Insurance Act 2015 (hereafter referred to as the "2015 Act") the commercial insured has a duty to provide a fair presentation of the insured risk to the insurer (see 1b below).

Question 1b: Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?

Answer 1b:

Consumers

(i) As already stated, there is no duty on a consumer applicant/insured to disclose information on his or her own initiative. He or she has a duty to take reasonable care not to make misrepresentations when giving information to insurers.

Commercial insureds

(ii) As already stated, other applicants/insureds have a duty to provide a fair presentation of the risk to insurers and a key component of this is disclosure. The disclosure required is expressed as follows in section 3(4) of the 2015 Act:

"(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) 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".

The disclosure has to be in a manner which would be "reasonably clear and accessible to a prudent insurer " (see section 3(3)(b)). This is to guard against insureds and their brokers indulging in "data dumping", such as producing numerous files and references to multiple weblinks in their presentation to insurers.

The 2015 Act also refers to material representations that may be made in the course of an insured's presentation to insurers. Section 3(3)(c) states that:

"every material representation as to a matter of fact" has to be "substantially correct" and "every material representation as to a matter of expectation or belief" has to be made in good faith.

In the absence of enquiry by insurers, s. 3(5) of the 2015 Act makes it clear that there is no duty to disclose a circumstance if -

" (a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information".

Commentary

It is important to note that the 2012 Act and 2015 Act changed the law on disclosure as the traditional common law position was that all insureds had to disclose those circumstances which would be material in the sense that they would influence the judgment of a prudent underwriter/insurer when determining whether he will take the risk or when determining the premium (see the Marine Insurance Act 1906 which codified the pre-existing common law and, in particular, the case of *Pan Atlantic Insurance Co. Ltd v Pine Top* Insurance Co. *Ltd* [1995] A.C. 501, which reformulated the test for materiality and is referred to under Answer 6). Such disclosure was required as part of the duty of utmost good faith owed by an insured to an insurer and the relevant provisions are at sections 17 to 20 of the 1906 Act. As will be explained in Answer 6 under traditional common law insurers are not entitled to avoid the insurance unless there has been material non-disclosure or misrepresentation on the part of the insured.

The 2012 Act applies to consumers whose insurance was entered into, renewed or varied on or after 6 April 2013 and the 2015 Act applies to all other insureds in respect of insurance entered into, renewed or varied on or after 12 August 2016. The traditional common law applies to insurance entered into prior to those respective dates, so it will still be relevant in practice for some years to come.

It should be noted that the 2015 Act still retains the concept of materiality in relation to the insured's fair presentation of the risk in that section 7(3) of that Act states that:

"A circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms".

Section 7(4) gives some examples of things which may be material circumstances, such as special or unusual facts relating to the risk.

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective?

Question 2: Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information, which he or she should have been aware of?

Answer 2:

Consumer insurance

As already stated, there is no longer any duty of disclosure on the part of a consumer. The rest of this answer applies to commercial insurance.

Commercial insurance

The duty of disclosure is not limited to the applicant's/insured's actual knowledge but includes information, of which the applicant/insured should have been aware. This includes matters which should reasonably have been revealed by a "reasonable search". Section 4(6) of the 2015 Act makes it clear that an insured ought to know

> "what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means)".

Obviously the search may be more difficult to conduct where the insured is an entity with subsidiaries all over the world. Ultimately a court would have to decide whether an insured has made a "reasonable search" within the meaning of the Act.

Section 4 of the 2015 Act elaborates as to what is to be regarded as something that is known by an insured or ought to be regarded as known by the insured:

Individual insureds who are not consumers

Section 4(2) deals with individual insureds and states that:

> "An insured who is an individual knows only—
>
> (a) what is known to the individual, and
>
> (b) what is known to one or more of the individuals who are responsible for the insured's insurance".

Thus, the knowledge of those responsible for an individual's insurance, for example, that of a broker is attributed to the insured.

Other insureds who are not individuals

Section 4(3) deals with insureds who are not an individual, for example, a company, and states that:

> "An insured who is not an individual knows only what is known to one or more of the individuals who are—
>
> (a) part of the insured's senior management, or
>
> (b) responsible for the insured's insurance."

"Senior management" and someone "responsible for the insured's insurance" is further defined in section 4(8) of the Act. Where the insured is not an individual, there may be a specific person within a company or partnership who is responsible for the insurance, as well as an outside agent or broker.

The 2015 Act also deals specifically with a situation where an insured's agent may have gained confidential information through another business relationship with a person not connected with the contract of insurance and provides for such confidential information not to be attributed to the insured (see section 4(4) and section 4(5) of the Act). It may be, for example, that a broker acting for insured X has learnt some confidential information about a loss from Y, another client who is not connected with X. Knowledge gained by a broker in that way is not simply to be attributed to X.

3. The Insurers' Pre-Contractual Duties

Question 3a: Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?

Answer 3a:

The law does not impose on an insurer a pre-contractual legal duty to investigate the applicant's business in order to obtain the relevant information.

The applicant's disclosure may, however, give 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. In that event it may be that a court would find that the insurer ought to have known some material information about the business or waived knowing something material about the business. If a court were to

make such a finding, it may then decide that the insurer may not rely on a failure of the insured to disclose that information.

The insurer and any authorised intermediary are also required to treat their customers fairly (see Answer 3b below). In certain circumstances that duty may require them to make investigations.

Question 3b: Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?

Answer 3b:

Statutes and case law do not impose on an insurer a general positive legal duty to ascertain the insured's understanding of the scope of the insurance or to draw the insured's attention to exclusions and limitations.

However, some rules made by the Financial Conduct Authority (FCA), which is responsible for regulating the conduct of insurance business in the UK, may in practice have that effect. There are certain important core principles required of insurers, which include the principle that insurers should act with integrity (see PRIN 1) and treat their customers fairly (see PRIN 6). In particular, PRIN 7 states that:

> "a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".

Breaching these principles may result in the FCA imposing sanctions on insurers (or brokers). The FCA may regard some policy terms as not amounting to treating customers fairly, particularly in the consumer context.

Moreover, rules in Chapter 5 of the FCA's Conduct of Insurance Business Sourcebook ("ICOBS"), part of the FCA's Handbook, provide that, as regards non-investment contracts other than "contracts of large risks" where the risk is outside the EEA or the risk is inside the EEA but the contract is arranged for a commercial customer, an insurer has a duty to ascertain the insurance demands and needs of the customer before the conclusion of the contract. Originally restricted to such contracts where the insurer has given a personal recommendation to a consumer on a payment protection insurance or on a non-investment life policy, this will from 23 February 2018, implementing the EU Insurance Distribution Directive ("IDD"), extend to all categories of non-investment insurance sold to consumers (other than large risks

outside the EEA). The insurer will have to ensure that any contract proposed is consistent with the customer's insurance demands and needs, and the insurer's assessment of the customer's demands and needs will have to be provided to the customer before the conclusion of the contract.

Further, Chapter 6 of ICOBS requires that an insurer is to produce, and if there is no intermediary, to provide to the customer, appropriate information so that the customer can make an informed decision about the arrangements proposed, including mid-term changes and renewals. The level of information to be provided depends on such matters as the knowledge, experience and ability of a typical customer for the policy, and the policy terms, including its main benefits, exclusions, limitations, conditions and duration. From 23 February 2018 the requirements are enhanced to include the provision of specified insurance product information, to be communicated to consumers in a standardised document (an "IPID") in a form specified by an EU regulation implementing the IDD.

ICOBS Chapter 2 will also contain a new rule (extending also to large risks within the EEA where the insurance is arranged for a commercial customer) requiring an insurer (and any intermediary) to act honestly, fairly and professionally in accordance with the best interests of the customer ("the customer's best interests rule").

There are broadly equivalent rules in the FCA's Conduct of Business Sourcebook ("COBS") for the sale of investment-based insurance products.

A "private person" (as defined) who suffers loss from a breach by the insurer of any of the ICOBS or COBS rules, unless otherwise specified in relation to the particular rule, has a statutory right of action for damages against the insurer under section 138D of the Financial Services and Markets Act 2000.

Consumer insureds

There are certain other matters that assist the consumer who may not have adequately appreciated the process of taking out insurance or its terms. Apart from the Financial Ombudsman Service's ("FOS") regime (see below), some legislation and regulations protect the consumer to some extent as follows:

i. As previously explained, the consumer has a duty to take reasonable care not to make a misrepresentation. The standard of care is that of a reasonable consumer. In deciding whether he or she is in breach of that duty, one looks at all the circumstances and section 3(2) of the 2012 Act gives some specific example of relevant circumstances to be taken into account, namely:

" (a) the type of consumer insurance contract in question, and its target market,

(b) any relevant explanatory material or publicity produced or authorised by the insurer,

(c) how clear, and how specific, the insurer's questions were,

(d) in the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),

(e) whether or not an agent was acting for the consumer".

Section 3(4) of the 2012 Act makes it clear that if the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account. Thus, if for example, an insurer knows that the insurer was aware that the applicant was partially sighted and could not read properly, then that should be taken into account in deciding whether there was a breach of the duty of reasonable care.

ii. *The Consumer Rights Act 2015*

This statute transposes the European Directive on Unfair Terms in Consumer Contracts and applies to: "a contract between a trader and a consumer."

Standard terms of an insurance policy come within the scope of the Regulations. All written terms have to be in plain intelligible language, and if there is any doubt about their meaning, the interpretation most favourable to the consumer should prevail. An unfair term is defined in section 62(4) of the Consumer Rights Act 2015 as one which:

> "*contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."*

iii. The Financial Ombudsman Service ("FOS")

The FOS can deal with complaints about insurance from individuals (and businesses with a turnover below 2 million euros p.a. and less than 10 employees). The FOS has jurisdiction in relation to non UK EEA firms operating from a UK establishment or who have opted into the jurisdiction of FOS. The FOS may make decisions according to what is "fair and reasonable" rather than by applying the strict letter of the law. FOS may consider whether the scope of the insurance was clear and whether the insurer did sufficient to draw the insured's attention to exclusions and limitations. FOS may uphold an insured's complaint against an insurer or broker but its maximum award of compensation is limited to £150,000 in respect of a complaint.

Commentary

Although insurers generally have no legal duty to draw attention to exclusions and limitations, there are numerous cases where judges have been reluctant to construe a term as a warranty or a condition precedent unless it is clearly intended to be such a drastic term. An example of a court not finding a term to be a warranty though it appeared to be drafted as such is the case of *Kler Knitwear Ltd v Lombard General Insurance Co. Ltd* [2000] Lloyd's Law Rep. I.R.47. Similarly courts are generally reluctant to find that a condition is a condition precedent (see, for example, *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 K.B. 415).

Further, exclusions are generally read *contra proferentem* (i.e. against the insurers who are responsible for proposing the insurance policy or wording) if there is any ambiguity in the way they are expressed. Judges frequently construe insurance terms strictly against the insurers who are responsible for drafting them.

Contracting out of the 2015 Act

Consumer insureds

Certain provisions in the 2015 Act apply to consumers, such as those which alleviate the harshness of the effect of some terms in an insurance policy, for example, warranties (see sections 9 to 11 of the 2015 Act).

Provisions in the 2015 Act effectively do not permit insurers to exclude or contract out of certain sections of the 2015 Act which benefit consumers. Section 15(1) of the 2015 Act states:

> "A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Part 3 or 4 of this Act than the consumer would be in by virtue of the provisions of those Parts (so far as relating to consumer insurance contracts) is to that extent of no effect".

Other insureds

The 2015 Act does allow most of its provisions (save for two provisions) to be excluded or contracted out of in the case of "non consumers" provided the insurer satisfies the Act's transparency requirements which include bringing the disadvantageous term sufficiently to the insured's attention (see section 17 of the 2015 Act). Section 17(2) of the 2015 Act states that:

> " The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed"

Section 17 (3) states that:

> "The disadvantageous term must be clear and unambiguous as to its effect".

The Act provides that in determining whether the requirements in s.17(2) and s.17(3) have been met the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account (see s.17(4)). The effect of this is that if an insurer wishes to have a term in the insurance contract which would put the insured at a disadvantage as compared to the insured relying on a particular provision of the 2015 Act, it must comply with the transparency requirements.

4. The Insured's Post-Contractual Disclosure Duty

Question 4a: Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?

Answer 4a:

There is no duty at common law to notify the insurer of an increase in risk during the course of the insurance contract, provided that the nature of the risk remains in essence the same. If, however, the nature of the risk changes so materially as to become in effect a different risk from that which the insurer originally agreed to cover, the insurer is discharged from liability [*Law Guarantee Trust v Munich Re*, 1912]. If the change in the risk is sufficiently substantial so as to affect the very character (as opposed to the degree) of the risk, the insurer may be discharged such that the insured would - in practical effect – have to disclose the change to the insurer if the insured wanted insurance cover to be maintained (see *Kausar v Eagle Star* [2000] Lloyd's Rep.I.R.154). There would moreover be a duty to notify a material change on renewal of the insurance as that is treated as a new insurance contract.

It should also be noted that there is often an express term in an insurance policy that the insurer should be notified of a material change in risk. In consumer cases such a term may be subject to challenge under the Consumer Rights Act 2015 as being unfair. Such clauses are in any event scrutinised closely by the courts if relied upon by insurers, and there are a number of reported judgments dealing with the questions

whether, on the facts of the particular case, there was a change in the risk and if so, whether it was "material".

Question 4b: What is defined in your jurisdiction as a material change?

There is no set definition of what is a material change. If insurers have an express term regarding notification of a material change, then they may further define this in the policy but there is no obligation to do so. Ultimately it would be for a court to decide whether or not there has been a material change. A failure to define a material change in a consumer contract might be treated by the FCA or the court as rendering the relevant clause "unfair" for the purpose of the Consumer Rights Act 2015.

5. The Insurer's Post Contractual Duty

Question 5: Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

Answer 5

Statutes and common law

Statutes do not impose disclosure duties on insurers after the occurrence of an insured event. There is no positive duty in any UK statute or in English [or Scottish?] case law requiring an insurer to provide the coverage position in writing within a limited period or to disclose all reasons for declinature. They may, however, be compelled to disclose those reasons if the customer brings a suit alleging unfair discrimination under the Equality Act 2010. In practice, insurers do almost invariably provide reasons for declinature, because (inter alia) if they do not, they may have no defence to legal proceedings brought by a policyholder claiming indemnity under the policy or a declaration that the loss is covered by the policy, or no answer to a complaint made by the policyholder to the FOS in circumstances where the FOS jurisdiction applies.

General Regulatory position

As stated, insurers have to abide by certain core principles, such as treating customers fairly and can be sanctioned by the Regulator, the FCA, if they are in breach. In addition Principle 7 provides that "a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair

and not misleading". Non disclosure of information may in certain circumstances amount to a breach of this principle.

Further, Chapter 8 of the ICOBS Rules specifically deals with claims handling and states at paragraph 8.1. that:

> "An insurer must: (1) handle claims promptly and fairly; (2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; (3) not unreasonably reject a claim (including by terminating or avoiding a policy); and (4) settle claims promptly once settlement terms are agreed".

There are more detailed rules within ICOBS for certain types of insurance, such as employers liability insurance.

ICOBS also require insurers to provide certain information after the policy has been entered into. Most importantly ICOBS 6.4.11(1)R provides:

> "Throughout the term of a policy, a firm must provide a customer with information about any change to:
> (a) the premium, unless the change conforms to a previously disclosed formula; and
> (b) any term of the policy, together with an explanation of any implications of the change where necessary."

6. Remedies in Case of Breach of the Insured's Disclosure Duties

Question 6. What is the insurers' remedy in case an insured breached his/her pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?

Answer 6:

Common Law as codified in the Marine Insurance Act 1906 and as clarified in the cases

Prior to the coming into force of the 2012 Act and the 2015 Act the insurers' only remedy for an insured's breach of his/her pre-contractual disclosure duty was to avoid the insurance contract. Insurers were entitled to treat the insurance contract as void from inception if the insured had made a material non-disclosure or a material

misrepresentation to insurers. The House of Lords decided in the case of *Pan Atlantic* (*supra*) that the test of materiality was a two fold test, namely:

> (1) whether the circumstances which were not disclosed (or misrepresented) would have affected a prudent underwriter when making his decision whether to write the insurance risk or to write it on those terms ("the objective test"); and
>
> (2) whether the actual underwriter who wrote the risk was induced by the misrepresentation or non-disclosure ("the subjective test").

The insurance is treated as if it never existed: there is no obligation on insurers to pay any claims and, unless there has been fraud, the premium has to be returned. If the insured made a fraudulent misrepresentation or fraudulent non-disclosure then the insurers are entitled to keep all the premium under the insurance contract.

Consumer insurance

This common law position as outlined above is still the legal position in relation to "consumer insurance" entered into or varied prior to the coming into force of the 2012 Act. This strict reading of the law is of less importance in practice due to few of those cases being resolved through the courts and due to the regulatory restriction on insurers not being entitled to avoid the insurance where there has not been fraud on the part of such an insured. Further, the FOS would not allow insurers to avoid the whole insurance if the FOS did not regard that as being "fair and reasonable". The FOS generally took (and takes) a proportionate approach to the appropriate remedy that should be allowed to insurers. The FOS usually allows insurers to avoid the insurance where there has been fraud. Otherwise the FOS looks at what the insurer would have done if there had not been a particular misrepresentation by the insured. The FOS may not allow any remedy to the insurer if it considers the misrepresentation to be minor or not to have affected the terms of the insurance or the pricing of the premium.

Commercial insurance

The common law is still the legal position in relation to commercial insurance entered into or varied prior to the coming into force of the 2015 Act. This law will be relevant for many years to come.

Remedies under the 2012 Act

Insurers have no remedy if there has been non-disclosure by a consumer insured. Insurers have proportionate remedies if a consumer is in breach of his duty to use reasonable care not to make a misrepresentation to insurers. The remedy depends on what the insurer may be able to prove:

Remedies under the 2012 Act for deliberate or reckless misrepresentation by a consumer

If the misrepresentation was deliberate or reckless, the insurer –

(a) may avoid the contract and refuse all claims, and

(b) need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them.

This is the same position for deliberate or reckless misrepresentations under the Insurance Act except there is no qualification so far as retaining premiums are concerned. Insurers are entitled to keep the premium in any event so far as non consumer insurance under the Insurance Act is concerned.

Remedies under the 2012 Act where a consumer is in breach of his/her duty of reasonable care

If the consumer has made a misrepresentation in breach of the duty of reasonable care, one looks at what the insurer would have done if there had not been that misrepresentation:

- if the insurer would not have entered into the contract on any terms, the insurer can avoid the insurance and refuse to pay claims but must return any premiums paid;
- if the insurer would have entered into the contract, but on different terms, the contract is to be treated as if had been entered into on those different terms if the insurer so requires;
- in addition, if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.

Remedies under the 2015 Act

Insurers have to show that the insured is in breach of his/her/its duty of fair presentation (see answer to Question 1 above) and then Schedule 1 of the Act sets out a proportionate regime of remedies for commercial insurance. It is possible for the parties to contract out of this regime provided that there has been compliance with the transparency provisions set out in the Act (see section 17 of the 2015 Act which is set out under Question 3 above). The default position if parties have not contracted out is as follows:

Qualifying breach by the insured is deliberate or reckless

If the qualifying breach was deliberate or reckless, the position remains the same as under the traditional common law. The insurer is entitled to avoid the insurance and to refuse pay all claims and "need not" return any of the premiums paid.

Qualifying breach by the insured is neither deliberate or reckless

The remedy depends on what the insurer can prove the actual underwriter would have done. It may still be possible for an insurer to avoid the contract even if there has not been a deliberate or reckless breach. The following are the possible remedies:

- If the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid.

- If the insurer would have entered the contract but not on those terms, the contract is to be treated as if it had been entered into on those terms if the insurer so requires. By way of example, if the insurer would have imposed an additional exclusion then that exclusion is treated as a term of the insurance.

- If the insurer would have entered into the contract, but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim. By way of example, if the insurer would have charged a premium of twice the amount that was charged, then a million pound claim would be reduced to £500,000.

The proportionate regime is similar but not identical to the one established by the 2012 Act. It will have to be seen how this will work in practice but more costs may be incurred in instructing experts to support what the terms or premiums would have been.

Where the insurer resists a claim on the grounds of non-disclosure and it is subsequently established that it was unjustified in doing so it may be held to be in breach of Chapter 8 of ICOBS. ICOBS 8 requires insurers to treat customers fairly in claims handling (see Answer to Question 5 above).

Concluding Comments

The law in this area is not as straightforward as it was in the past. The strict legal position regarding insurers being able to avoid the insurance from inception due to material non-disclosure/misrepresentation by the insured has been qualified by ICOBS 8. The law has also undergone significant changes following the recommendations of the Law Commissions of England and Wales and Scotland.

BILA was influential in persuading the Law Commissions to consider reforming the law. The 2012 and 2015 Acts are based on draft Bills proposed by the Law Commissions.

The present situation is complicated as there are effectively different possible legal regimes when it comes to considering disclosure duties in relation to insurance contracts:

(1) The traditional common law position which may be applicable to:

(a) consumer insurance contracts entered into before the 2012 Act came into force, although as explained this does not have a great impact on insureds.

(b) commercial insurance contracts and reinsurance entered into before the 2015 Act came into force unless the parties had agreed that it should not apply.

(2) The 2012 Act which is applicable to consumer insurance entered into or varied on or after 6 April 2013.

(3) The 2015 Act which is applicable to commercial insurance and reinsurance entered into or varied on or after 12 August 2016, unless the parties have contracted out in accordance with the Act's provisions on contracting out.

The traditional "all or nothing" remedy of avoidance was perceived as a blunt instrument which could work unfairly. Nevertheless by reason of the regulatory environment and particularly the practice of FOS, this remedy has had little impact on most consumers unless there was fraud on their part.

In practice insurers have generally been reluctant to invoke the remedy of avoidance in relation to valued clients, particularly where major brokers act for those clients. Insurers have generally been more likely to rely on the drastic remedy of avoidance where they suspected fraud or dishonesty on the part of their clients. Nevertheless, there have been cases where insurers have relied on the remedy of avoidance where an insured may not have been a large or valued client and where the insured may have inadvertently or carelessly failed to disclose or misrepresented some material circumstances. Hence a proportionate regime should prove fairer.

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