



The Insurance Act 2015

Brokers Beware



Insurance Act 2015

The duties of the broker

- act in best interests of insured
- reasonable skill and care
- act with reasonable speed



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The duties of the broker

Background – assumption of knowledge of ordinary well settled rules of insurance law



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The duties of the broker

Specifics

- match insurance to insured's business needs
- claims handling
- ensure insured does not become uninsured including explanation of terms



Marine Insurance Act 2015

Warranties – The Previous Law

33.— Nature of warranty.

(1) A warranty..... means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

.....

(3) A warranty, as above defined, 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.

34.— When breach of warranty excused.

.....

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.



Marine Insurance Act 1906

Summary of Responses to Third Consultation Paper

The Business Insured's Duty of Disclosure and the Law of Warranties;
Chapter 2: The Law of Warranties

John Habergham from Myton Law Ltd thought that for an underwriter, the subject of a warranty goes to the root of the contract. If it is not as the assured has said or promised it will be, it is simply not the bargain that the underwriter thought he was getting and, in these circumstances, is entitled to walk away from that contract.



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See the House of Lords in The Good Luck,

"If a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer. This, moreover, reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risks provided the warranty is fulfilled".



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Basis of contract clauses abolished

9. - Warranties and representations

- (1) This section applies to representations made by the insured in connection with —
 - (a) a proposed non-consumer insurance contract, or
 - (b) a proposed variation to a non-consumer insurance contract.
- (2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).



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Suspensive only

10. - Breach of warranty

- (1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.
- (2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.



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Special terms – loss of certain kind/incurred at certain time and place

11. - Terms not relevant to the actual loss

- (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following —
 - (a) loss of a particular kind,
 - (b) loss at a particular location,
 - (c) loss at a particular time.

Special terms – loss of certain kind/incurred at certain time and place

- (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
- (3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.



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Main impact: Time & period of duty applying





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Broker's duties in relation to disclosure

- advise client scope of disclosure obligations
- explain consequences of failing to comply with obligation
- indicate sort of matters needing to be disclosed
- take reasonable care to elicit matters which ought to be disclosed which the client might not think it necessary to mention



Marine Insurance Act 1906

Broker's duties in relation to disclosure

18.— Disclosure by assured.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.



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3. - The duty of fair presentation

- (1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.



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3. - The duty of fair presentation

- (4) The disclosure required is as follows, except as provided in subsection (5) —
 - (a) disclosure of every material circumstance which the insured knows or ought to know, or



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- 3. - The duty of fair presentation continued ...
 - (4) The disclosure required is as follows, except as provided in subsection (5) —
 - ...
 - (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.



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7. - Supplementary

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



Insurance Act 2015

7. - Supplementary

- (4) Examples of things which may be material circumstances are —
 - (a) special or unusual facts relating to the risk,
 - (b) any particular concerns which led the insured to seek insurance cover for the risk,
 - (c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.



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3. - The duty of fair presentation continued ...

(3) A fair presentation of the risk is one—

...

(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.



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3. - The duty of fair presentation continued ...

(3) A fair presentation of the risk is one—

...

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer



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4. - Knowledge of insured

- (3) 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.

- 8(c) “senior management” means those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised.



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4. - Knowledge of insured

- (6) Whether an individual or not 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 other means).



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5. - Knowledge of insurer

- (3) ... An 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 to know in the ordinary course of business.



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4. - Knowledge of broker

- (4) An insured is not taken to know confidential information known to an individual if —
 - (a) the individual is, or is an employee of, the insured's agent; and
 - (b) the information was acquired by the insured's agent (or by an employee of that agent) through a business relationship with a person who is not connected with the contract of insurance.



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Schedule 1 INSURERS' REMEDIES FOR QUALIFYING BREACHES

If a qualifying breach 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.



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- (5) A qualifying breach is deliberate or reckless if the insured —
 - (a) knew that it was in breach of the duty of fair presentation, or
 - (b) did not care whether or not it was in breach of that duty.
- (6) It is for the insurer to show that a qualifying breach was deliberate or reckless.



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- (6)(1) 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.



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- (2) In sub-paragraph (1), “*reduce proportionately*” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of [paragraph 5](#)), where —

$$X = (\text{Premium actually charged} / \text{Higher premium}) \times 100$$



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(5) If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.



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Other breaches

(4) If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.



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**Non-disclosure
(Not enough)**

**Data Dumping
(too much)**



Insurance Act – case law developing?

Broker

I refer to your email of []. In the penultimate paragraph you assert that our client has been "deliberate and reckless" in failing to provide a fair presentation of its risk. That allegation is an allegation of fraud; it is a very serious allegation, tantamount to an accusation of a crime of dishonesty, and should not be made without very good grounds. As such it is a material fact that our client will have to disclose when it renews its insurance programme in the near future – by the end of this week. That will inevitably cause our client considerable difficulties.

Response

"In IP1 we described dishonest disclosures and misrepresentations as "fraudulent". However, many insurers associated that term with criminal standards of proof, and thought that they would only very rarely be in a position to prove that an insured had acted fraudulently in preparing its presentation. It is not our intention that the insurer's task of proving that a breach of the duty of fair presentation was made deliberately or recklessly should be unduly onerous, or require an exceptionally high standard of proof."



Insurance Act – case law developing?

DETAILS OF COVER	SUM INSURED STG	PREMIUM STG
Hull & Machinery	380,000	11,507.00
Less 35.00% No Claims Bonus		4,027.45
Net Hull & Machinery Premium		7,479.55
War Risks	380,000	190.00
Protection & Indemnity Incl. Crew Liability for 4.00 crew	USD 500 MILLION	3,000.00
Defence	50,000	50.00
Additional Liabilities Incl. Crew Liability for 2.00 crew	250,000	500.00
TOTAL PREMIUM		11,219.55



Marine Insurance Act 1906

17. Insurance is uberrimae fidei.

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.~~



Amended Section 17 – role?

Aid to interpretation

Implication of term

Judicial flexibility



Damages for late payment in insurance policies

13A - Implied term about payment of claims

(1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.



Damages for late payment in insurance policies

(2) A reasonable time includes a reasonable time to investigate and assess the claim.



Damages for late payment in insurance policies

(3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account—

- (a) the type of insurance,
- (b) the size and complexity of the claim,
- (c) compliance with any relevant statutory or regulatory rules or guidance,
- (d) factors outside the insurer's control.



Damages for late payment in insurance policies

- (4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable)—
- (a) the insurer does not breach the term implied by subsection [\(1\)](#) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but
 - (b) the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.



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16.— Contracting out: non-consumer insurance contracts

(1) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which [section 9](#) applies than the insured would be in by virtue of that section is to that extent of no effect.

(2) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in [Part 2, 3 or 4](#) of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of [section 17](#) have been satisfied in relation to the term.

(3) In this section references to a contract include a variation.

(4) This section does not apply in relation to a contract for the settlement of a claim arising under a non-consumer insurance contract.



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17. - The transparency requirements

- (2) 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.
- (3) The disadvantageous term must be clear and unambiguous as to its effect.



Contracting out - examples

Warranties and disclosure

“The unamended Marine Insurance Act 1906 to apply”



Contracting out - examples

Warranties

“Note clause X is a term which, if breached, relieves us of all liability, even if the breach wasn't causative of the loss and even if the breach has been successfully remedied before any loss.”



Contracting out - examples

Fraudulent claims

Fraud

We will at **Our** option avoid the policy from the inception of this insurance or from the date of the claim or alleged claim, or avoid the claim:

- (a) if a claim made by **You** or anyone acting on **Your** behalf to obtain a policy benefit is fraudulent or intentionally exaggerated, whether ultimately material or not, or
- (b) a false declaration or statement is made or fraudulent device put forward in support of a claim.



Damages for late payment in insurance policies

16A - Contracting out of the implied term about payment of claims: consumer and non-consumer insurance contracts

(2) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects deliberate or reckless breaches of the term implied by section 13A than the insured would be in by virtue of that section is to that extent of no effect.

(3) For the purposes of subsection [\(2\)](#) a breach is deliberate or reckless if the insurer-

(a) knew that it was in breach, or

(b) did not care whether or not it was in breach.



Broker liability

17 The transparency requirements

- (5) The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.



Contracting out

Lose - lose



Any questions