

# Insurance Act 2015

Seminar for the Insurance Institute of Leicester

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## the big picture

- o *Changes to the insured's duty of disclosure*
- o *Reform of remedies for breach of duty/misrep*
- o *Reform of remedies for breach of warranty*

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## history

- o Marine Insurance Act 1906 – codifying common law since the mid-C18
- o Proposals for reform – starting in 1957!
- o The English & Scottish Law Commissions' project – 2006 to date
- o Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA")
- o And now the Insurance Act 2015

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## duty of disclosure 1

- o The insured's core duty: to make a fair presentation of the risk (s.3(1) IA 2015)
- o That requires the insured to disclose "every material circumstance which the insured *knows or ought to know*" (s.3(4)(a))
- o Failing that, disclosure which "puts a prudent *insurer* on notice that it *needs to make further enquiries*" (s.3(4)(b))

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## duty of disclosure 2

- o Materiality – that which would “influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms” (s.7(3) IA 2015)
- o For example, special or unusual facts relating to the risk, particular concerns leading the insured to seek cover and that which is “generally understood” to be something dealt with in a fair representation (s.7(4))

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## knowledge of the *insured*

For a corporate insured, what is known to:-

- o Its senior management; and
- o Those responsible for the insured’s insurance

And for an individual insured what is known to the individual and those responsible for the insured’s insurance

All are obliged to make a “reasonable search”  
(s.4 IA 2015)

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## knowledge of the *insurer*

Important because the insured is not obliged to disclose what is known to the insurer or ought to be (s.3(5) IA 2015).

“An insurer knows something only if it is known to... the individuals who participate... in the decision whether to take the risk and if so on what terms...” (s.5(1))

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## so what is new?

In fact, much remains unchanged:-

- o The duty to disclose material information
- o The definition of misrepresentation
- o The definition of materiality.

**But** there are some changes:-

- o The knowledge of the insurer and insured is now codified
- o And the insured is obliged to present its disclosure in a “reasonably clear and accessible manner” (s.3(3)(b) IA 2015)

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and where will problems arise?

Probably around "knowledge" issues:-

- o There are complex provisions about the attribution of an agent's (i.e. broker's) knowledge to the insured (s.4(4) –(5) IA 2015)
- o And the Act is silent about the "agent to know"

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remedies 1

The remedies for breach of the insured's duty of disclosure and misrepresentation are:-

- o Avoidance (with no return of premium) where the breach was "deliberate or reckless" (Para 2, Sched. 1 IA 2015)
- o Otherwise, proportionate remedies apply...

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## remedies 2

Proportionate remedies apply if the insurer would:-

- o not have entered the contract on any terms – the insurer may avoid (but must return the premium)
  - o have entered the contract but on different terms – those terms apply
  - o have entered the contract on the same terms except premium – the indemnity is proportionately reduced
- (Paras. 3-6, Sched. 1 IA 2015)

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## so what is new?

- o Just about everything – the single remedy of avoidance is abolished
- o But note the requirement to prove *inducement* remains
- o And the new proportionate regime focusses intently on what the insurer *would have* done *if* the insured had complied with its duty...

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## warranties

What is a warranty?

*“Typically, it is a promissory term whereby the insured promises either that a given state of affairs existed prior to the inception of the insurance or that it will continue to exist during the currency of the risk...”*

MacGillivray, Insurance Law, 11<sup>th</sup> ed., 10-002

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## warranties – the new law 1

In the event of breach, the insurer remains liable:-

- o for losses occurring before the breach; and
- o if the breach can be remedied, after it has been remedied

(s.10, IA 2015)

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## warranties and terms – the new law 2

Non-compliance with a term tending to reduce the risk of loss of a particular kind, at a particular location or at a particular time will not discharge the insurer *unless* non-compliance with the term increased the risk of the loss which actually occurred.

(s.11, IA 2015 – and note this applies to any term)

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## warranties – the new law 3

“Basis” clauses are abolished (s.9, IA 2015)

(A “basis” clause is a warranty by the insured of the accuracy of its replies to the questions in the proposal form or other information provided before inception of the contract)

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## so what changes?

- o Just about everything except the definition of a warranty
- o Under the old law, the insurer was discharged from liability from the date of breach of warranty
- o Now, the effect of breach is suspensory only
- o And there needs to be a causal relationship between the breach and the loss

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## fraudulent claims

The law is now codified so that:-

- o If the insured makes a fraudulent claim, the insurer is not liable for it
- o The insurer may recover any sums paid and, *on notice*, treat the contract as terminated
- o If the insurer terminates, it may refuse all liability for "relevant events" after the fraudulent act (s.12, IA 2015)

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## so what changes?

Very little – the Act codifies existing law. In particular:-

- o There is no change to existing case law on what constitutes a fraudulent claim
- o The remedies codify existing case law
- o The only oddity is that Act is silent on the vexed subject of “fraudulent devices”

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## contracting out 1

The Act preserves freedom of contract except:-

- o In the case of consumer insurance (s.15, IA 2015); and
- o In the case of “basis” clauses (s.16(1))

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## contracting out 2

Otherwise, it is possible to contract out of the Act provided the insurer complies with the “transparency requirement”.

That means:-

- o The insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention before entering the contract; and
- o The disadvantageous term must be clear and unambiguous as to its effect (s.16 IA 2015)

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## what does it all signify?

In terms of the problem areas, there are the “known knowns”, in particular:-

- o “knowledge” issues – particularly as regards brokers
- o the operation of proportionate remedies
- o the changes to remedies for breach of warranty – particularly the causation requirement

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but...

There will undoubtedly be “unknown unknowns” – as to which we can only guess

And then there is the economic impact on the market...

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and what about the broker?

Much of this ought to be good news for brokers but:-

- o They will need to watch closely and advise their clients if the insurer contracts out
- o Underwriters’ approach to non-disclosure may become more aggressive
- o Warranties may become more of an issue than previously

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Finally...

The commencement date is **12 August 2016**.

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thank you

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