



# Insurance Act 2015

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# Insurance Act 2015

## UK insurance law reform

- Insurance Act 2015 received Royal Assent on 12 February 2015
- Comes into force on 12 August 2016
- First time that the Marine Insurance Act 1906 has been amended
- Applies to both insurance and reinsurance
- Some provisions only apply to non-consumer/business insurance
- "Consumer insurance": where an individual enters into the contract wholly or mainly for purposes unrelated to his business, trade or profession

## The scope of the Act

1. New duty of "fair presentation of the risk" and a new regime for remedies for breach
2. Removes the existing rule that avoidance ab initio of a policy is the remedy for breach of the duty of utmost good faith
3. Changes the law relating to terms in policies that have the status of "warranties"
4. Clarifies the law regarding the consequences of making a fraudulent claim
5. Permits (at least in theory) contracting-out from the new Act



## The insured's current duty of disclosure

### Existing Law

- Duty of utmost good faith
- Insured must disclose all material circumstances
- Insurer has a remedy for (even innocent) non-disclosure or misrepresentation if:
  - a) it relates to a circumstance that would have an effect on the decision of the prudent underwriter in assessing the risk; and
  - b) it induced the actual underwriter
- The only remedy for breach is avoidance of the insurance contract ab initio

### A new duty of disclosure: duty of "fair presentation of the risk"

- The Act introduces a new concept in relation to business insurance (including reinsurance) contracts
- The insured must now provide a "fair presentation of the risk":
  - a) disclosure of every material circumstance which the insured knows or ought to know; or
  - b) disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries; and
  - c) representations of fact/belief must be substantially correct/made in good faith
- Disclosure must be "reasonably clear and accessible"
- Onus is then on (re)insurer to ask further questions if the presentation of the risk suggests potential problems



### The insured's knowledge

- The insured must disclose what it actually knows:
  - the knowledge of "senior management" (e.g. board members); and
  - the persons responsible for the insured's insurance (e.g. risk managers and brokers) will be directly attributed to the insured
- The insured must disclose what it ought to know:
  - the insured must make a reasonable search of information within its own organisation or held by any other person, such as a broker (and, potentially, in a reinsurance situation information held by the original insured)



## The insurer's knowledge

1. The insurer has actual knowledge of circumstances that are known to one or more of its employees or agents who took part in the underwriting
2. The insurer has constructive knowledge (i.e. ought to know) of:
  - information that an employee or agent knows and ought reasonably to have passed on to the underwriters; and
  - information that is readily available to the underwriters
3. The insurer is also presumed to know information that is common knowledge and things which an insurer offering that class of insurance would reasonably be expected to know

## Proportionate Remedies

- A fundamental change to the existing law
- Insurance contracts remain contracts of the utmost good faith but good faith is downgraded to "an interpretative principle"
- Abolishes the rule that the only remedy for breach of the duty of utmost good faith is avoidance of the insurance contract
- The insurer has the burden of proving that,

but for the breach, it would:

- not have entered into the insurance contract; or
  - have done so on different terms
- The remedy then depends on whether the insured's breach was or was not deliberate or reckless (i.e. where the insured knew it was breaching its obligation to make a fair presentation or did not care either way)

## New remedies for breach of the duty of fair presentation

- Deliberate / reckless conduct: the insurer is entitled to avoid the contract, refuse all claims and retain the premium
- Conduct which is not deliberate / reckless: the insured must put the insurer into the position it would have been in had full and accurate information been provided, so that if the insurer would have:
  - declined the risk, the policy can be avoided, the claim refused and premiums returned;
  - accepted the risk, but included another contract term, the insurance contract will be treated as if the term was included; or
  - charged a greater premium, the claim can be reduced proportionately



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The provisions of the Insurance Act 2015 will modernise the law; balance more fairly the interests of insurers and buyers; and provide a framework for an effective, competitive and trusted business insurance market.

*Stephen Lewis, Law Commissioner*

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### Existing law on warranties

- A warranty must be strictly complied with
- A breach of warranty (no matter how inconsequential the breach) automatically discharges the insurer from all future liability
- Once a warranty is breached, the insured cannot cure or remedy its breach

### New rules on warranties

- 'Basis of contract' clauses prohibited
- The existing rules that any breach of warranty discharges insurers from liability and that once a warranty has been breached it can never be remedied are abolished
- Warranties are now treated as 'suspensive conditions' i.e. a breach suspends, not discharges insurer's liability
- Where a breach of warranty is remedied before the loss, the insurer must pay the claim

### Breach of terms that reduce the risk/could not have increased the risk of the actual loss

- Insurers may not rely on non-compliance with terms (except for terms "defining the risk as a whole") if the insured can show that:
  - it is a term that tends to reduce the risk; and
  - non-compliance with the term could not have increased the risk of the actual loss
- For example, breach of a warranty to install a burglar alarm would suspend / avoid liability for loss caused by an intruder, but not a flood loss i.e. insurer's ability to rely on breach of warranty to avoid liability is limited where claim is for loss entirely unrelated to warranty



### Clarity around the consequences of making a fraudulent claim

- Applies to both consumer and business insurance (including reinsurance)
- Where fraud is committed, insurer may:
  - forfeit whole of claim;
  - recover any sums already paid under claim;
  - give notice to terminate insurance from time of fraudulent act;
  - refuse all claims after date of fraud and not return premiums; but
  - fraud does not affect previous valid claims

### Contracting Out

- Parties are entitled to contract out of the new Act but, the "transparency requirements" mean that it:
  - must be written in clear unambiguous language; and
  - the disadvantageous term must be brought to the attention of the insured prior to the contract / variation being made
- Cannot contract out of provisions concerning consumer insurance

### Enterprise Act 2016

#### Damages for late payment of claims

- Will introduce an implied term into insurance contracts that claims must be paid within a reasonable time:
  - includes time to investigate / assess claim; and
  - reasonableness depends upon size, complexity, location, type of insurance
- The insurer's conduct in handling the claim may be a relevant factor
- Insureds will be able to claim damages for late payment (on normal contract principles)
- One year time limit for bringing such claim



## Further Information and Training

To find out more: please contact a member of the Insurance Policy Wording Unit: Helen Chapman or Clare Douglas.



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Recommended

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