This Seminar

Introduction to the new insurance legislation about to come into force, including the *Insurance Act 2015*, the *Third Parties (Rights Against Insurers) Act 2010* and ss 28 – 29 of the *Enterprise Act 2016*, adding s 13A and s 16A to the *Insurance Act 2015*.

Simon Salzedo QC will talk on *Insurance Act 2015* Parts 2 and 3. Stephen Midwinter will cover Parts 4 and 5. Charlotte Thomas will deal with the *Third Parties (Rights Against Insurers) Act 2010* and the relevant part of the *Enterprise Act 2016*.

General Introduction to the Insurance Act 2015

In force from 12 August 2016.[[1]](#footnote-2) Based on Law Commission consultations and draft Bill.

Main parts of the Act:

* 1. Part 2: The Duty of Fair Presentation – ss 2 – 8.
  2. Part 3: Warranties and Other Terms – ss 9 – 11.
  3. Part 4: Fraudulent Claims – ss 12 – 13.
  4. Part 5: Good Faith and Contracting Out – ss 14 – 18.
  5. Part 6: Amends the *Third Parties (Rights Against Insurers) Act 2010* – ss 19 – 20.
  6. Part 7: General – ss 21 - 23. Repeals *Marine Insurance Act* 1906 ss 18 – 20. Parts 2 – 5 apply (in essence) to contracts and variations entered into after 12 August 2016.
  7. Schedule 1: Insurers’ Remedies for Qualifying Breaches.

Insurance Act 2015 Part 2: The Duty of Fair Presentation

Applies to “non-consumer insurance contracts”,[[2]](#footnote-3) and to variations of such contracts.[[3]](#footnote-4)

Section 3 provides that the insured must make to the insurer a “fair presentation of the risk”.[[4]](#footnote-5) That is a presentation which makes the required disclosure in a manner which would be reasonably clear and accessible[[5]](#footnote-6) to a prudent insurer and in which every material[[6]](#footnote-7) representation as to a matter of fact is substantially correct[[7]](#footnote-8) and every material representation of a matter of expectation or belief is made in good faith.

The required disclosure is “every material circumstance which the insured knows or ought to know”[[8]](#footnote-9) OR sufficient disclosure “to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.”

Absent enquiry, disclosure is not required of: circumstances which diminish the risk; or which the insurer knows or ought to know or is presumed to know; or as to which the insurer waives information.[[9]](#footnote-10)

The meaning of “know or ought to know” for an insured is set out in detail in s 4:

* 1. An insured knows only what is known to individuals who are:
     1. The individual insured;
     2. Part of the insured’s senior management; or
     3. Responsible for the insured’s insurance.[[10]](#footnote-11)
  2. An insured is not taken to know confidential information known to his agent which was acquired through a business relationship with a person not covered by the insurance (or any insurance of which the relevant contract is a reinsurance).
  3. An insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured.

For an insurer, s 5 provides:

* 1. An insurer knows or ought to know only that which:
     1. Is known to an individual who participates on behalf the insurer in the decision whether to take the risk (including agents as well as employees); or
     2. Is known to an employee or agent of the insurer who ought reasonably to have passed it on to a person participating in the decision whether to take the risk; or
     3. Is held by the insurer and is readily available to an individual participating in the decision whether to take the risk.
  2. An insurer is presumed to know:
     1. Things which are common knowledge; and
     2. 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.

S 6 provides that in both ss 4 and 5:

* 1. Knowledge includes matters which the individual suspected and of which the individual would have had knowledge but for deliberately refraining from confirming or enquiring about them.[[11]](#footnote-12)
  2. Nothing in this Part affects the operation of any rule of law that knowledge should not be attributed to (i) the insured of a fraud perpetrated on the insured by individuals responsible for the insured’s insurance or (ii) the insurer of a fraud perpetrated on the insurer by a person who participates on behalf of the insurer in the decision to take the risk.[[12]](#footnote-13)

S 8 provides that an insurer has a remedy for a breach of the duty of fair presentation only if the insurer shows that but for the breach the insurer would not have entered into the contract of insurance or would only have done so on different terms.[[13]](#footnote-14) If that is demonstrated, then the remedies are set out in Schedule 1.

Schedule 1 provides for the following remedies for a breach of the duty of fair presentation (called a “qualifying breach”):[[14]](#footnote-15)

* 1. If the breach was deliberate or reckless, the insurer may avoid the contract and refuse all claims and need not return premium;[[15]](#footnote-16) otherwise:
  2. If (but for the breach) the insurer would not have entered the contract on any terms, the insurer may avoid the contract, but must return the premium;[[16]](#footnote-17)
  3. If the insurer would have entered the contract on different terms, the insurer can elect that the contract is treated as if it had been made on those different terms;[[17]](#footnote-18)
  4. If the insurer would have charged a higher premium, then the insurer may reduce a claim pro rata to the proportion of the proper premium that was actually charged.[[18]](#footnote-19)

Insurance Act 2015 Part 3: Warranties and other Terms

Section 9 provides that representations made by the insured are not capable of being converted into a warranty by means of any provision in a non-consumer insurance contract.[[19]](#footnote-20)

One of the most dramatic provisions of the Act is s 10 (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”.[[20]](#footnote-21) However, the former rule is replaced by a suspensive form of the rule: “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.”[[21]](#footnote-22)

The remainder of s 10 places a number of qualifications on the suspensive effect of breach of warranty, which may be summarised thus:

* 1. A warranty ceases to be effective to relieve the insurer if:[[22]](#footnote-23)
     1. Because of a change of circumstances, the warranty ceases to be applicable in the circumstances of the contract,[[23]](#footnote-24) or
     2. Compliance is rendered unlawful by a subsequent law,[[24]](#footnote-25) or
     3. The insurer waives the breach of warranty.[[25]](#footnote-26)
  2. A breach which consists of failing to do something by a certain time is remedied if “the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties”.
  3. Any other kind of breach is remedied if the insured ceases to be in breach of warranty.

Section 11 applies to warranties and to other terms, other than those “defining the risk as a whole”, compliance with which would tend to reduce the risk of loss of a particular kind, or at a particular location or time. If such a term is not complied with, the insurer may not rely on that to exclude limit or discharge its liability if the insured 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.”

According to the Government’s explanatory notes, S 11 “is intended to enable an objective assessment of the ‘purpose’ of the provision, by considering what sorts of loss might be less likely to occur as a consequence of the term being complied with”, but is not intended to require a “direct causal link between the breach and the ultimate loss”. There is likely to be room for argument as whether this provision is satisfied in particular cases.

Insurance Act 2015 Part 4: Fraudulent Claims

### **Section 12**

### Remedies for fraudulent claims

(1)If the insured makes a fraudulent claim under a contract of insurance—

(a) the insurer is not liable to pay the claim,

(b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and

(c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.

(2) If the insurer does treat the contract as having been terminated—

(a) it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and

(b) it need not return any of the premiums paid under the contract.

(3) Treating a contract as having been terminated under this section does not affect the rights and obligations of the parties to the contract with respect to a relevant event occurring before the time of the fraudulent act.

(4) In subsections (2)(a) and (3), “relevant event” refers to whatever gives rise to the insurer’s liability under the contract (and includes, for example, the occurrence of a loss, the making of a claim, or the notification of a potential claim, depending on how the contract is written).

Law Commission included s.12 to deal with perceived problem that the remedy for a fraudulent claim was not clear. Had become clear up to Court of Appeal level by the time of the Act: see *The Aegeon* [2002] 1 Lloyd’s Rep IR 573 and *Axa General Insurance v Gottlieb* [2005] 1 All ER 445. Remedy is right to reject claim and treat contract as terminated, but not to recover past claims. That position preserved in the Act.

Act deliberately does not answer question “what is a fraudulent claim?” – Law Commission wanted to leave that to the common law. However, Law Commission does not draw any distinction between fraudulent claims and fraudulent devices and it seems the latter will count – *Versloot Dredging BV v HDI Gerling Industrie* [2014] EWCA Civ 1349. Law Commission suggested might be questionable on facts, but no doubt that if fraud then falls within s.12.

Note s.13 – fraudulent claim by one insured in group insurance does not affect the position of other insureds.

Insurance Act 2015 Part 5: Avoidance and contracting out

Section 14: no right to avoid for breach of the duty of utmost good faith (s.17 of MIA 1906 amended).

Sections 15 – 17 – contracting out:

Section 15 – no contracting out in consumer insurance

Section 16 – no contracting out of s.9, but may contract out otherwise provided clause satisfies test of “transparency” in s.17 (i.e. is sufficiently drawn to the attention of the insured or the insured actually knows of it).

Insurance Act 2015 Part 6: Amendment of the Third Parties (Rights Against Insurers) Act 2010

The history of the *Third Party (Rights Against Insurers) Act 2010* has been painfully slow. A new Third Party (Rights Against Insurers) Bill was proposed by the Law Commission and the Scottish Law Commission in their joint report of May 2001. The government accepted their recommendations in 2002. A draft Bill was finally introduced in Parliament in November 2009 and the Act received Royal Assent on 25 March 2010. It then gathered dust on the statute books for over six years. It finally comes into force on 1 August 2016.

At common law, when an insured becomes insolvent, insurance monies form part of the creditors’ pot and are distributed accordingly. The Third Parties (Rights Against Insurers) Act 1930 intervened to (i) allow a third party to step into the shoes of the insured and claim against the insurer, and (ii) preserve the proceeds of the claim for the third party so that they are not lost to the general pot.

The immediate problems facing the injured third party were therefore addressed. However, the third party still faced the burden of having to establish liability on the part of the insured in separate proceedings, which where the insured was a dissolved company required an application to restore it to the Register of Companies.

Moreover, while the 1930 Act did by s 2 impose a duty on the insured or his representatives to *“give at the request of any person claiming that* [the insured] *is under a liability to him such information as may reasonably be required by him”* for the purpose of ascertaining and enforcing his rights under the 1930 Act, the courts had initially interpreted that duty as applying only once the insured’s liability was established. The position was improved by the decision of the Court of Appeal in *Re OT Computers* [2004] EWCA Civ 653, where it was acknowledged that the third party could ‘reasonably require’ such information on the insured’s insolvency, even before establishing the insured’s liability.

However, severe practical difficulties attended the recovery of such information. The third party could be required to decide whether to launch proceedings against the insured without knowing whether the insured was in fact insured; whether any policy would respond to the claim, or would limit recovery; whether any policy attached conditions to cover and whether they had been complied with; or whether and why the insurer had previously declined cover.

The 2010 Act comes to the injured party’s rescue. The principal changes made are:

* 1. Third parties can bring claims directly against the insurer, without first having to step into the shoes of the insured (and so without having to issue two sets of proceedings, or needing to restore dissolved insureds to the Register) (s 1(3));
  2. The third party has an improved and clarified right to obtain information about the insurance position (s 1 and schedule 1);
  3. Insurers are no longer allowed to rely upon certain conditions as against third parties, such as a condition requiring an insured to provide information and assistance where the insured is dissolved or dead (s 9(3)), or a condition requiring the insured to pay out first then recover under the policy (s 9(5), save in respect of marine insurance where the claim is not for death or personal injury (s 9(7)); and
  4. Moreover, the third party will itself be allowed to satisfy other conditions, such as the notification of the claim (s 9(2)).

Unfortunately, the 2010 Act as originally enacted failed to take into account of changes in insolvency law. The circumstances in which a corporate or unincorporated body may become a ‘relevant person’ whose rights are transferred under an insurance contract to the person to whom the liability is incurred were too narrow—in particular, they failed to include persons who have entered into voluntary arrangements or schemes of arrangement with creditors. It was necessary to amend the 2010 Act to widen its scope before it became law. The 2010 Act skulked on the statute books for years waiting for this issue to be addressed. Finally, in s 19 of the Insurance Act 2015, the power to change the circumstances in which a person is a ‘relevant person’ was inserted into the 2010 Act (also in s 19 of that Act). Such circumstances must be limited to actual or anticipated dissolution or insolvency, or circumstances similar to the insolvency scenarios already set out in ss 4-7 of the 2010 Act. Schedule 2 of the 2015 Act inserts further amendments specifying the circumstances in which an insured comes within the scope of the Act. The s 19 power was exercised in the Third Parties (Rights Against Insurers) Regulations 2016, making the necessary extensions.

In many cases, then, the (welcome) effect of the 2010 Act as eventually enacted will be simply to make it procedurally easier for the injured party to bring a claim and to widen the substantive scope of the Act. However, it will also have substantive effects by stripping away certain defences which the insurer may have possessed, in particular regarding the satisfaction of conditions. Moreover, removal of the insured from the procedure may have other consequences, such as hampering the insurer’s ability to step into the shoes of the insured and claim contribution in long-tail cases where the insurer no longer has the right to restore the insured to the Register.

Giving evidence to the House of Lords on the Bill, Lord Mance expressed the optimistic view that it could be *“hoped, with some degree of assurance,* that [the 2010 Act] *is going to have a reasonably case-free future”* (although *“any lawyer who predicted the future course of litigation would be most unwise!”*)[[26]](#footnote-27)—though he himself has already had some occasion to consider the operation of the Act.[[27]](#footnote-28)

Enterprise Act 2016 Part 5: late payment of insurance claims

English courts have exempted insurance contracts from the usual rule that the victim of a breach of contract may claim damages for the loss suffered because the other party fails to meet its contractual obligations, based on the legal fiction that payments under insurance contracts are in fact payments of damages for breach of the insurer’s contractual obligation to hold the insured harmless.[[28]](#footnote-29) The English and Scottish Law Commissions pointed out in chapter 26 of their 2014 Report that this rule was unprincipled, unfair, unexpected, and anomalous.[[29]](#footnote-30)

That recommendation was not adopted in the 2015 Act. However, in a change of heart, it was adopted in the *Enterprise Act 2016*, which received Royal Assent on 4 May 2016 and will come into force on 4 May 2017, applying to all insurance and reinsurance contracts entered into after that date. It will amend the 2015 Act (creating a new s 13A) to insert an implied term into all insurance contracts providing that insurers and reinsurers must pay sums due *“within a reasonable time”*. The implied term may be contracted out of or varied in the case of non-consumer contracts, save in respect of deliberate or reckless breaches of the term by the insurer (new s 16A of the 2015 Act). Breach of the term entitles the insured to damages, quite separately from the insured’s right to claim the sum and interest on the sum (s 13A(5)).

What is reasonable will, of course, depend on “all the relevant circumstances”. Such circumstances include (s 13A(3)):

* 1. the type of insurance;
  2. the size and complexity of the claim;
  3. compliance with any relevant statutory or regulatory rules or guidance; and
  4. factors outside the insurer’s control.

If the insurer has reasonable grounds for disputing the claim and delays payment while the dispute is continuing, the term will not be breached merely for that reason, though the insurer’s manner of conducting the claim will be taken into account (s 13A(4)). No guidance is given as to what amount to *“reasonable grounds”*. Courts may look to case-law concerning the strike-out test under CPR r 3.4(2), where a statement of case or part of a statement of case can be struck out where it *“discloses no reasonable grounds for bringing or defending the claim”*, but it may also be that courts will conclude that a higher standard is appropriate where the sanction of strike-out is not at issue.

Some relief is given to insurers by the imposition of a short limitation period of one year from the date of the final payment by the insurer (s 30 of the Enterprise Act 2016, amending the Limitation Act 1980 to insert a new s 5A) (contrary to the recommendation of the Law Commissions, which thought that the usual rule of 6 years from date of breach should apply: para 27.7 of the 2014 Report).

The operation of this clause where there are multiple (re)insurers (e.g. layered programmes, or reinsurance) and the primary insurer delays payment will be particularly complex and is likely to turn on the wording of the contracts concerned, to which additional attention must now be paid.

1. S 23. [↑](#footnote-ref-2)
2. S 2(1). This means a contract of insurance which is not a “consumer insurance contract” as defined in the *Consumer Insurance (Disclosure and Representations) Act 2012*: s 1. (So it presumably does not apply to a contract for insurance such as certain treaties and open covers.) [↑](#footnote-ref-3)
3. “Variation” is the term used in the Act, which obviously covers endorsements as well as any other form of variation. [↑](#footnote-ref-4)
4. The term “fair presentation” has become common as an expression of the overall effect of the common law rules against non-disclosure and misrepresentation. Its first use in a reported judgment seems to be in the judgment of Kerr LJ in *CTI v Oceanus Mutual* [1984] 1 Lloyd’s Rep 476. [↑](#footnote-ref-5)
5. “Clear and accessible” is a phrase that has been used in other contexts, but does not feature in caselaw regarding fair presentation of insurance risk. The government’s explanatory note says that it is “intended to target, at one end of the scale, ‘data dumps’, where the insurer is presented with an overwhelming amount of undigested information. At the other end, it is not expected that this requirement would be satisfied by an overly brief or cryptic presentation.” [↑](#footnote-ref-6)
6. “Material” means “would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms”: s 7(3). This re-enacts *Marine Insurance Act 1906* s 18(2). See also the “examples of things which may be material circumstances” in s 7(4). [↑](#footnote-ref-7)
7. “substantially correct” means that “a prudent insurer would not consider the difference between what is represented and what is actually correct to be material”: s 7(5). This re-enacts *Marine Insurance Act 1906* s 20(4). [↑](#footnote-ref-8)
8. This is very similar to the disclosure requirement in *Marine Insurance Act 1906* s 18(1). [↑](#footnote-ref-9)
9. Substantially re-enacting *Marine Insurance Act 1906* s 18(3). [↑](#footnote-ref-10)
10. E.g., a broker (or employee of the same). This reflects the common law as enacted at *Marine Insurance Act 1906* s 19(1). [↑](#footnote-ref-11)
11. I.e., “blind-eye” or “Nelsonian” knowledge. [↑](#footnote-ref-12)
12. I.e. the principle in *Re Hampshire Land Co (No 2)* [1896] 2 Ch 743. [↑](#footnote-ref-13)
13. Intended to codify the common law principle of actual inducement as determined in *Pan Atlantic v Pine Top* [1995] 1 AC 501. [↑](#footnote-ref-14)
14. It is here that this Part of the Act parts company fundamentally with the pre-existing law. [↑](#footnote-ref-15)
15. In the case of a deliberate or reckless breach in presenting a variation the insurer may treat the contract as terminated with effect from the date of the variation. [↑](#footnote-ref-16)
16. In the case of a breach in presenting a variation, the insurer may treat the contract as if the variation had never been made, returning any additional premium charged for the variation. [↑](#footnote-ref-17)
17. Similarly for a variation. [↑](#footnote-ref-18)
18. In the case of a variation, Sched 1 ¶11 makes provision for claims to be reduced pro rata to what the premium should have been in various scenarios. [↑](#footnote-ref-19)
19. The same prohibition of basis clauses for consumer insurance contracts was passed into law earlier at s 6 of the *Consumer Insurance (Disclosure and Representations) Act 2012*. [↑](#footnote-ref-20)
20. The second sentence of *Marine Insurance Act 1906* s 33 is deleted by s 10(7)(a). [↑](#footnote-ref-21)
21. S 10(2), with the purely suspensive effect confirmed at s 10(4). This reverses *Marine Insurance Act 1906* s 34(2), which is repealed at s 10(7). It is important to note that (after debate at the consultation stage), there is no requirement of a causative link between the breach of warranty and the loss. [↑](#footnote-ref-22)
22. S 10(3). [↑](#footnote-ref-23)
23. Re-enacting *Marine Insurance Act 1906* s 34(1), which is deleted by s 10(7)(b). [↑](#footnote-ref-24)
24. Also re-enacting *Marine Insurance Act 1906* s 34(1), which is deleted by s 10(7)(b). [↑](#footnote-ref-25)
25. Re-enacting *Marine Insurance Act 1906* s 34(3), which is deleted by s 10(7)(b). For the nature of such a waiver, see *The Good Luck* [1992] 1 AC 233 and *Liberty Assurance v Argo Systems* [2012] 1 Lloyd’s Rep 129. [↑](#footnote-ref-26)
26. Third Parties (Rights Against Insurers) Bill [HL], Special Public Bill Committee, HL Paper 58: Evidence, 54. [↑](#footnote-ref-27)
27. *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, [83]-[93], considering the insurer’s right to contribution against the insured the context of long-tail mesothelioma claims and concluding that any such right fell outside the scope of the insurance policy and so could not be exercised against the insured (see now s 10(1) of the 2010 Act, giving the insurer a right of set-off in respect of liability *“under the contract”* only, and schedule 2, paragraph 4 of the 2015 Act, which ensures that such long-tail liabilities are caught by the 2010 Act). [↑](#footnote-ref-28)
28. *The President of India v Lips Maritime Corporation (The Lips)* [1988] AC 395; *Sprung v Royal Insurance (UK) Limited* [1999] 1 Lloyd’s Rep 111. [↑](#footnote-ref-29)
29. Law Commission and Scottish Law Commission, ‘Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment’, Law Com No 353/Scot Law Com No 238, July 2014. [↑](#footnote-ref-30)