

Beale & Company

London | Bristol | Dublin | Dubai

Griffiths &
Armour

Insurance Act 2015 – What does it mean for you as an Insured?

Ian Masser and Nathan Modell – Beale & Company Solicitors LLP

Craig Roberts – Griffiths & Armour

19 July 2016

Background

- + Insurance law developed in 18th and 19th centuries.
- + Marine Insurance Act 1906
- + Out-dated
- + Consumer Insurance (Disclosure and Representations) Act 2012 – in force 6 April 2013

Insurance Act 2015

- + Received Royal Assent in February 2015. Comes into force 12 August 2016.
- + Applies to insurance and reinsurance contracts governed by the laws of England and Wales, Scotland and Northern Ireland (wherever they are underwritten).
 - Applies to insurance contracts entered into on or after 12 August 2016.
 - Applies to variations made on or after 12 August 2016 to insurance contracts that were entered into at any time.
- + Main changes:
 - Duty of Disclosure
 - Warranties
 - Fraudulent Claims
 - Contracting Out
 - Third Parties (Rights against Insurers) Act 2010

Duty of Disclosure – the Current Law

- + Duty to disclose every material circumstance which is known to the insured.
- + Concept of fair presentation/waiver.
- + Insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.
- + Knowledge of relevant directing will and mind.
- + Duty owed by insured and independently by broker.
- + Draconian remedy of avoidance.
- + Perceived problems with current law identified by the Law Commissions:
 - Duty of disclosure is poorly understood;
 - Duty too onerous;
 - Encourages “data dumping”;
 - Single remedy of avoidance too harsh.

Duty of Disclosure – Insurance Act 2015

- + “Fair Presentation of the Risk” (section 3(1))
- + Defined as “every material circumstance” which Insured “knows or ought to know” (section 3(4)(a))

Or failing that ...

- + Disclosure must provide sufficient information to put prudent insurer on notice to make further enquiries (section 3(4)(b))
- + Form not just content (Section 3 (3) (b))
- + Don't forget about good faith (Section 3 (3) (c))

Duty of Disclosure – Insurance Act 2015

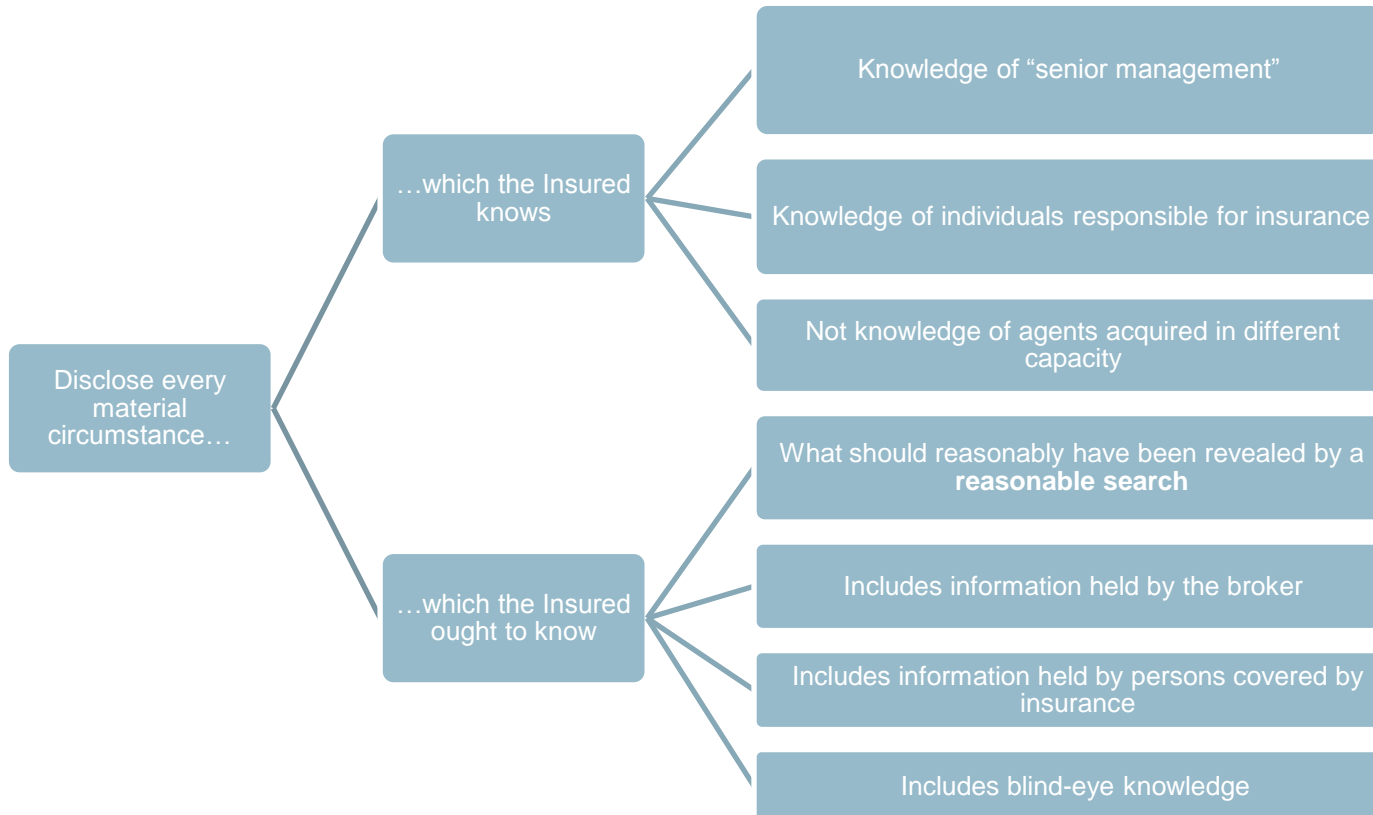
- + Knowledge is clarified in the Act to avoid confusion.

- + Knowledge of Insured (section 4)
 - + Individual or non individual?
 - + Senior management – Section 4 (8) (c)
 - + Those responsible for the Insured’s insurance – Section 4 (8) (b)
 - + Information revealed by reasonable search
 - + Blind eye knowledge – Section 6 (1)

- + Knowledge of Insurer (section 5)
 - + Individuals, who on behalf of insurer, decide to take the risk
 - + Information readily available to such individuals acting on behalf of insurer



Fair Presentation – Insured’s knowledge





Fair Presentation – Insurer’s Knowledge

<p>“Know”</p>	<ul style="list-style-type: none"> • Actual knowledge of the individual(s) deciding whether to take the risk, i.e. the underwriter • Includes blind-eye knowledge
<p>“Ought to know”</p>	<ul style="list-style-type: none"> • Information which an employee or agent of the insurer knows and ought reasonably to have passed on to the underwriter • Relevant information held by the insurer and which is readily available to the underwriter
<p>“Presumed to know”</p>	<ul style="list-style-type: none"> • Things which are common knowledge • Things which an insurer offering insurance in 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

Remedies for Breach of Duty of Disclosure

- + Section 8 of Insurance Act 2015
- + Has there been a qualifying breach?
- + Deliberate or reckless (section 8(1)) – remedy of avoidance remains
- + Neither deliberate or reckless (Section 8(2)) – proportionate remedy to be considered



Remedies for Breach of Duty of Disclosure

Has the breach been deliberate/ reckless?	N	Would the Insurer have accepted the risk but charged a higher premium?	N	Would the Insurer have entered into the contract on different terms?
Y		Y		N
Contract may be avoided – No requirement to repay premium		Any claim can be reduced proportionately		Would the Insurer have entered into the contract at all?
			Y	N
			Insurer may treat the contract as if it contained those terms from the outset	Contract may be avoided – premium returnable to insured

Warranties: Current Law

+ What is a warranty?

- A term of an insurance contract which must be complied with exactly whether or not material to the risk
- A warranty is a term by which an insured:
 - Undertakes to do/not do a particular thing;
 - Undertakes that some condition shall be fulfilled; or
 - Affirms or negatives the existence of a state of facts.

+ Identifying a warranty:

- No particular form of words required;
- Can be created by an express statement or the construction of a term;
- Basis of contract clauses

Basis of Contract Clauses: Current Law

+ What is a basis of contract clause?

- Declaration in policy/proposal form that certain representations made by an insured are warranted to be true and accurate;
- No particular form of words:
 - The statements made “form the basis of the contract”;
 - Reference to proposal form or other statements being incorporated into the policy.

+ What is its effect?

- Converts pre-contract representations made by the insured into warranties.

Warranties/Basis of Contract Clauses: Current Law

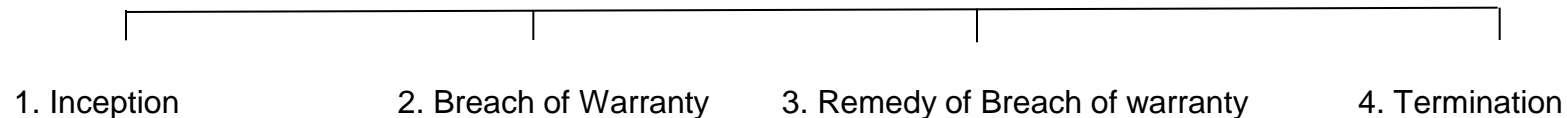
+ Remedies

- Remedy for breach: insurer discharged from liability from date of breach;
- Even if no causal connection to a loss;
- Breach cannot be remedied.



Warranties – Insurance Act 2015

- + Abolition of “basis of contract” clauses
- + Parties cannot contract out of this
- + Section 10(1) abolishes any rule of law that a breach of warranty results in the discharge of insurer’s liability
- + Warranties become “suspensive” – breach of warranty results in suspension rather than discharge (section 10(2))



- + Casual requirement between breach and loss (section 11)

Remedies for Fraudulent Claims – Insurance Act 2015

- + Sets out what an insurer may do in the event of fraud on a claim (Section 12).
- + Consequences
 - Not liable to pay the claim (section 12(1)(a))
 - Recover from insured any sums paid (section 12(1)(b))
 - By notice treat policy as terminated from time of fraudulent act (section 12(1)(c))
- + Group Insurance Policies (section 13)
 - Innocent group members are not unfairly prejudiced (section 13(2))

Contracting Out – Insurance Act 2015

Contracting Out

- + Intended default regime for non-consumer contracts
- + Parties can opt out of the default regime except ‘basis of contract’ clauses
- + Compliance with transparency requirements:
 - Draw attention to disadvantageous term BEFORE contract entered into
 - Clear and unambiguous

Third Parties (Rights Against Insurers) Act 2010

- + Key changes
- + Act hopefully to come into force later this year.

Comments on Insurance Act 2015

- + Welcomed by many
- + Insurers, brokers and insureds needs to be prepared for the changes
- + Training for underwriters / claims handlers
- + Potential policy implications

Insurance considerations

+ Introduction

+ Timing

- start early
- give early warning to colleagues who need to be involved
- ensure the information is collated in a suitable form
- watch out for insurers being more “pro active” and questioning
- don’t submit information at the 11th hour...otherwise be prepared for...
 - - gaps in cover, insurers won’t renew if you haven’t answered their questions satisfactorily.
 - - paying more. Arguing over price whilst satisfying underwriters’ concerns are not good bed fellows

Insurance considerations

- + Fair presentation?
- + Requires:-
 - disclosure of actual knowledge
 - disclosure of information revealed by a reasonable search

Which must be:-

- disclosed in a reasonably clear manner

Insurance considerations

+ Final thoughts...

- Request a copy of the information your broker submits on your behalf
- Consider with even more care any change in broker/insurer
- Don't simply recreate what you did last year without consider the consequences
- Remember the duty to disclose material facts exists beyond renewal



+ Ian Masser, Partner, Beale & Company Solicitors LLP

i.masser@beale-law.com

+44 (0) 20 7469 0439



+ Nathan Modell, Partner, Beale & Company Solicitors LLP

n.modell@beale-law.com

+44 (0) 20 7469 0442



+ Craig Roberts, Griffiths & Armour

croberts@griffithsandarmour.com

+44 (0) 151 600 2218



Beale & Company Webinars:



- + On 7 September 2016 we will be hosting a webinar on the topic of limitation of liability.
- + Details of the webinar will be circulated at a later date.
- + If you have any questions about our webinars please contact webinars@beale-law.com
- + Recordings of some of our previous webinars which may also be of interest can be found on our website on the events page.
- + www.beale-law.com/events.php