

Coming in force of the Insurance Act 2015

The Insurance Act 2015 (the "Act") came into force on Friday 12 August and brings about the most significant changes to insurance contract law in England and Wales in more than a century.

This note highlights some of the key changes brought about by the Act. For a more detailed assessment of the Act itself, please refer to our March 2015 briefing note "[The countdown begins: The Insurance Act 2015](#)". Later this year, we will host a seminar which will consider the impact of the Act and the manner in which the issues highlighted below are being addressed in practice. If you would be interested in attending, please contact Philip Hill or Ashley Prebble.

Application

The Act applies to both business and consumer insurance, although the most significant change – a new duty to make a fair presentation – only applies to business insurance contracts, with the consumer equivalent already dealt with under the Consumer Insurance (Disclosures and Representations) Act 2012.

A 'consumer' in the context of the Act refers to individuals (i.e. insureds) who purchase insurance which is unrelated to their trade, business or profession.

Many of the concepts in the Act are 'principles based' which means the practical implications will, to a significant extent, only be determined when cases are brought before the Courts.

Key actions

- **Compliance:** Insureds (and brokers) should not underestimate the time and care required to ensure compliance with the new duty to make 'a fair presentation of the risk' and to disclose 'every material circumstance which the insured knows or ought to know'.
- **Existing knowledge:** An insured is exempt from the duty to disclose information to an insurer, if the insurer already knows the information. Insurers need to consider practical steps to ensure that this knowledge is properly captured and understood.
- **Reviewing policies:** The Act re-writes how warranties in insurance policies operate and these changes need to be understood.
- **Contracting out:** It should be noted that contracting out is permitted where the insurer complies with the Act's transparency requirements.

Disclosure and the duty to make a fair presentation

Compliance with the duty of fair presentation

The Act imposes a new duty on the insured to make 'a fair presentation of the risk' and to disclose 'every material circumstance which the insured knows or ought to know'.

Where these obligations are not complied with, if the insurer is able to demonstrate in the absence of the breach:

- it would not have insured the risk; or
- would have insured the risk but on different terms,

the insurer will have a remedy.

If the breach was deliberate or reckless, the insurer may avoid the contract and need not return any of the premium paid. If the breach was not deliberate or reckless, various other remedies (as shown in the diagram to the right) will be available to the insurer.

However, what the insured will be taken to know for these purposes is not straightforward because of the distinction drawn between insureds who are 'individuals' and those who are not (i.e. a company).

Where the insured is an individual, knowledge is not limited to 'what is known to the individual' but extends to include the knowledge of those responsible for 'the insured's insurance', such as the insured's insurance broker.

Where the insured is not an individual, the relevant knowledge is that of anyone who is:

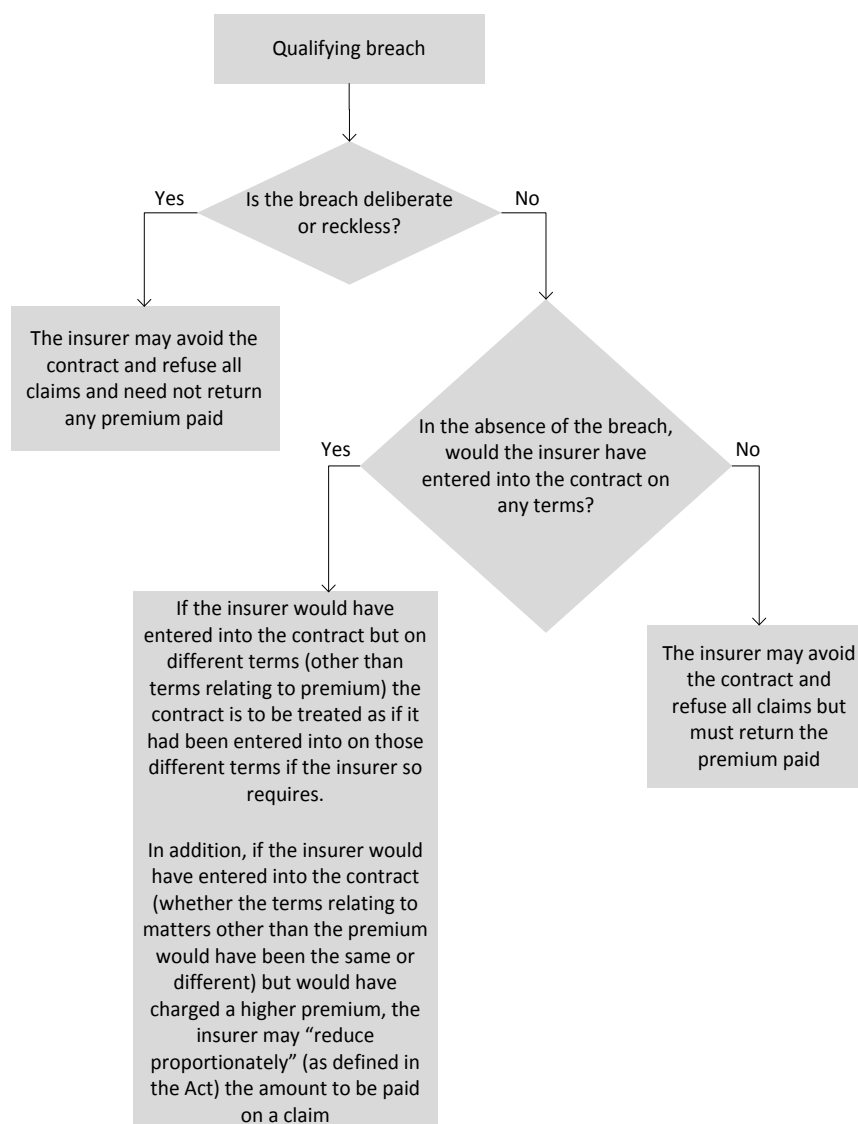
- part of the insured's 'senior management'; or
- 'responsible for the insured's insurance'.

Insureds should carefully consider how the knowledge of such a potentially wide group of individuals should be ascertained and captured.

Timing

Full compliance with the new duty may take time, even for small

Remedies for breach of the duty of fair presentation



businesses where information is likely to be relatively consolidated. An insured should therefore bear in mind that:

- significant time may be needed to collect the risk information;
- collection timescales will need to allow for the review of the risk information, its 'sign off' and the recording of the enquiries made to illicit the information;
- time spent on the collection of risk information needs to balance the need to conduct and record a reasonable search, with the need to ensure the information collected is not out of date by inception;
- responsibility for the 'fair presentation' standard cannot be outsourced to the broker but the insured and the broker will need to work closely together.

Insurer's knowledge

An insured is exempt from the duty to disclose information to an insurer, if the insurer already knows, or ought to know, the information. In this case, insurer knowledge extends to those individuals involved in the underwriting process.

Warranties

The Act changes the current law on warranties for non-consumer insurance contracts by:

- replacing the existing remedy for breach of warranty, so that instead of the breach terminating all cover under the policy, even if the breach is remedied, the insurer's liability is instead suspended until the breach is remedied;
- abolishing 'basis of contract' clauses; and

- addressing the issues of breaches of a warranty or other terms which are not material to the actual loss suffered.

Damage for late payment of claims

The Enterprise Act 2016 introduces a new provision to the Act¹ under which a term will be implied into insurance contracts to the effect that the insurer must pay any sums due in respect of a valid claim within a reasonable period of time. The insurer will be liable to the insured for damages in the event of a breach.

This will reverse the position in *Sprung v Royal Insurance* [1997], which held that an insured's remedy for late payment of claims was limited to the additional payment of interest.

Contracting out

It is important to note that the Act permits contracting out for non-consumer contracts.

The parties are entitled to agree alternative terms to those set out in the Act (apart from the terms prohibiting 'basis of contract' clauses), provided that the insurer satisfies certain transparency requirements.

These require:

- the insurer to take 'sufficient steps' to draw 'disadvantageous terms' to the insured's attention; and
- that the 'disadvantageous term' must be 'clear and unambiguous'.

With regard to the term implied as a result of the Enterprise Act 2016, in non-consumer insurance the parties are not allowed to agree terms more favourable to the insurer in respect of deliberate or reckless breaches of the obligation to pay within a reasonable time.

Related briefings:

[Spring has Sprung: A New Remedy for Late Payment of Insurance Claims](#)

¹ This will enter into force on 4 May 2017.

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