

Update

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The Insurance Act 2015

Caroline Hedley, Associate

The Insurance Act 2015 received Royal Assent on 12 February 2015 and will come into force in August 2016. It applies to business insurance and, together with the consumer insurance reforms that came into effect in 2013, represents the greatest change to English insurance contract law in over 100 years.

We set out below some of the key changes to impact on the property and liability market.

Utmost good faith/non-disclosure

Under the Act, the insured will remain subject to a duty to volunteer information however, the scope of that duty will be limited to what is necessary to make a “fair” presentation to insurers.

When making disclosure, the insured must carry out a reasonable search for information. What is reasonable will be a question of fact in each case and will take into account factors such as the size, nature and complexity of the business. It is in the insured’s interests to carry out a thorough search because it will, regardless of its actual knowledge, be deemed to know what “should reasonably have been revealed by a reasonable search” (section 4(6) of the Act).

When making disclosure, the insured must disclose information in “a manner which would be reasonably clear and accessible to a prudent underwriter” (section 3(3)(b) of the Act).

An insured is not, however, obliged to disclose information an insurer knows, ought to know or is presumed to know (section 3(5)b to d of the Act).

Remedies

Where an insured has made a deliberate or reckless misrepresentation or non-disclosure, insurers may avoid the policy and keep the premium. In all other cases (i.e. innocent misrepresentation and/or non-disclosure), a system of proportionate remedies will apply as follows (schedule 1 of the Act):

- Where the insurer would have declined the risk altogether, the policy can be avoided, with a return of premium.
- Where the insurer would have accepted the risk but included a contractual term, the contract should be treated as if it included that term (irrespective of whether the insured would have accepted that term).



- Where the insurer would have charged a greater premium, the claim should be scaled down proportionately (for example, if the insurer would have charged double the premium, it need only pay half the claim).

Warranties and other policy terms

The Act seeks to move away from situations where what could be perceived by the insured as a “technical” breach deprives it of cover for a loss unconnected to the breach. To achieve this, the Act has introduced the following significant changes to the way that policy terms are classified and the effect of non-compliance.

- Basis of the contract clauses will be prohibited and it will not be possible for business insurers to contract out of this particular change (section 9 of the Act).
- All warranties* will become “suspensive conditions” (section 10 of the Act). This means that an insurer will not be liable for loss occurring during a period of non-compliance, but will be liable for loss occurring after the breach has been remedied (assuming this is possible).
- Where there is non-compliance with a term (not just a warranty) designed to reduce the risk of a particular type of loss, or of loss at a particular time or in a particular place (section 11 of the Act) insurers will not be able to rely on that non-compliance as a defence if the insured can demonstrate that it could not potentially have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

**NB: all other types of condition will continue to operate as before.*

Fraudulent claims

Currently, an insurer is not liable to pay a fraudulent claim and can recover any sums already paid in respect of it. It is not clear whether an insurer can refuse to pay genuine claims for losses suffered after the fraudulent act but before discovery/termination of the policy.

Under the Act (section 12), an insurer will also have the option of terminating the contract from the date of the fraudulent act (not the discovery of it), without any return of premium.

Contracting out

An insurer is free to contract out of most provisions of the Act, subject to strict requirements of clarity and transparency. Wordings will require careful drafting to achieve this.

Going forwards

It is now, more than ever, crucial that underwriters and claims professionals understand that rationale behind policy terms and the nature of the risk(s) they are intended to address so that breach may be assessed and dealt with appropriately. In those cases where basis of contract clauses are relied upon, underwriters may wish to review their wordings with a view to reclassifying policy terms.

We will discuss the Act's practical implications for property and liability insurers at our upcoming seminar on **Tuesday 23 June**.



Case update: *Hufford v Samsung Electronics (UK) Ltd*

Jamie Hui, Associate

What was the case about?

Mr Michael Hufford brought proceedings against Samsung based on allegations that he was supplied with a defective fridge freezer.

The appliance in question was purchased in 2007. On New Year's Eve 2009, Mr Hufford hosted a celebratory lunch with his parents at his home and then left to attend a party with his girlfriend. He returned the next day to discover that a fire had destroyed his house.

The seat of the fire was found to be in the kitchen but there was a dispute over the actual cause of the fire.

- Leicestershire Fire and Rescue Service reported that the fire most likely originated from inside the fridge freezer.
- Mr Hufford contended that the fire was caused by a fault within the fridge freezer and argued the appliance was defective within the meaning of s.3 of the Consumer Protection Act 1987 ('CPA') as it had caught fire during normal use.
- In its defence, Samsung relied on Mr Hufford's heavy smoking habit to argue that the fire originated externally from the appliance due to the ignition of combustible materials left in front of the fridge freezer.

What were the issues?

The central issue before the court was whether or not the appliance was 'defective' within the meaning of the CPA. Section 3 states:

"...there is a defect in a product...if the safety of the product is not such as persons generally are entitled to expect..."

The concept of 'expectation' is rather nebulous and the key to proving a claim under s.3 often comes down to the cause of the damage. The court therefore had to decide what the probable cause of the fire was based on the evidence of the parties and their experts.

What did the Court decide?

In determining causation, the court focused its attention on:

1. The history of the appliance;
2. The forensic expert evidence on the pattern of fire damage; and
3. The witness evidence of the claimant.

It found in favour of Samsung that combustible material in front of the fridge freezer had ignited first and there was consequently no defect in the appliance.

The court held that the claimant had failed, in this instance, to discharge his burden of proof. It was not enough for Mr Hufford to assert that the seat of the fire was at or around the product in order for the court to draw an inference of a defect. The claimant needed to also prove that the fire was started by the product itself (i.e. show the fire began within the product). If Mr Hufford had been able to overcome this initial burden of proof, his task would have then become easier as there was no legal requirement for him to point to a specific defect in the product.

What are the implications for future cases?

The application of s.3 of the CPA has historically produced quite unpredictable results. The phrase: *"not such as persons generally are entitled to expect..."* has fuelled a long-standing debate on how far a claimant must go to prove that the product was defective. Helpfully, the court in *Hufford v Samsung* has provided clarity on the evidential thresholds for proving that a "defect" exists and has set out a clear framework within which judges will examine and assess the evidence.

We will examine the requirements in detail at the seminar on **Wednesday 1 July**.



Meet the authors

These topics will be examined in further detail at breakfast seminars at Clyde & Co's offices on the following dates.

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The Insurance Act 2015

23 June 2015

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Case update: Hufford v Samsung Electronics

1 July 2015

Presenter: Jamie Hui



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Attendance is free of charge.

Those wishing to attend should contact: **Chloe.Thomas@clydeco.com**

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