Keoghs
a Davies business

Insurance Act 2015:

Fair Presentation of the Risk

In the second of a series of updates from the Healthcare team, David Bowes provides a recap on the Insurance Act 2015, and reviews relevant case law.

The Insurance Act 2015 ('The Act'), which came into force on 12th August 2016, introduced significant changes to Insurance Law. As has been well documented, after 100 years of insurance contracts being governed by the Marine Insurance Act 1906, the Insurance Act brought in significant changes.

The Duty of Fair Presentation of the Risk is one such change. It applies to non-consumer contracts and replaced the duty of utmost good faith, which was governed by the Marine Insurance Act. The crux of the duty of good faith was that the Insured must disclose to the Insurer every material fact, with the failure to do so giving the Insurer the remedy of avoiding the Policy, which was the only remedy available under the old law.

In this article I will provide a recap of some of the key changes of the Insurance Act in relation to the duty of fair presentation of the risk, in particular in relation to remedies and exploring the two cases that have arisen in the six years since the Act came into force.

Changes brought about by the Insurance Act 2015 to Fair Presentation of the Risk

Section 3 of the Act legislates to remove the previous requirements with regards to an Insured's obligations of disclosure of material facts in advance of entering into an insurance contract, and introduces the concept of a **duty of fair presentation of the risk**. A fair presentation of the risk is one which discloses, **in a manner which would be reasonably clear and accessible to a prudent insurer, every material fact which the Insured knows or ought to know** or, failing which, gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing these material facts (section 3(3) and (4)). A fact is material if it would influence the judgement of a prudent Insurer in determining whether to take the risk, and if so, on what terms (section 7(3)).

The duty of fair presentation of the risk has not changed the meaning of 'materiality.' Under the old law an Insured was required to disclose material facts which would be important to a prudent Insurer. The Act however does set out examples of things which may be material facts under sections 7(4)(a) – (c). This includes anything which relevant persons would generally understand as being something that should be dealt with in a fair presentation of risks (Section 7(4)(c)). This could, for instance, include the involvement of directors or other key employees in criminal proceedings.

The knowledge of the Insured and Insurer is defined in section 4 (Insured) and section 5 (Insurer). A key part of the knowledge definition for the Insured is section 4(3) which suggests that an Insured company knows only what is known to person(s) who are – a) part of the Insured's management team, or b) responsible for the Insured's insurance. This is important because the person who is responsible for the Insured's insurance may not be aware of a material fact known by one of the directors and is therefore at risk of breaching the duty of fair presentation if they do not make sufficient inquiries of the senior management team.

The knowledge of the Insurer is defined as an insurer who knows something only if it is known to one or more of the individuals who participate on behalf of the Insurer in the decision of whether to take the risk (Section 5(1)) e.g. the Underwriters. Of note is that Insurers ought to know something if an employee or agent knows e.g. to the underwriters, or the information is readily known to them. Therefore, there could be an employee within the Insurer who knows something the Insurer ought to know, but might perhaps work in a different area to the underwriters, in which case the underwriter is not deemed to have that knowledge.

Another key change is the requirement for the Insured to make the disclosure in a manner which is reasonably clear and accessible. Under the old law it was possible for the Insured to 'data dump' key information and material facts. The new duty prevents this and the Insured now has an obligation to make a fair and reasonable disclosure.

Remedies

There are major differences in the remedies available to the Insurers for a breach of the duty of fair presentation. Under the duty of good faith, if an Insured failed to disclose a material fact then the only remedy was avoidance of the policy i.e. to treat the policy as if it had never been incepted, albeit the Insurers had to return the premium in most instances,[1] which was clearly a disproportionate remedy.

The remedies are now more wide ranging, and intended to be proportionate. Where the Insured's breach is deliberate or reckless (see section 8(4)) then the remedy is the same as under the old law i.e. avoidance. In this scenario the Insurer does not have to return the premium.

If the breach is not deliberate or reckless, then the remedies available are less onerous to the Insured and a key consideration is the subjective perspective of what the Insurer would have done if they had known about the material facts. If the Insurer would not have entered into the contract at all, then the Insurer may still avoid the policy but must in that situation return the premium. If the Insurer would have offered a higher premium, then the figure payable on any claim would be proportionally reduced in line with the reduction in the premium.

If the Insurer would have entered into the contract, but on different terms e.g. applying an exclusion clause to deal with the material fact or increasing the policy excess, then those terms will apply.

Of course in determining what a prudent insurer would have done, when a breach arises, will always be contentious. The Underwriter will need to support the contention of what they say they would have done by reference to the reliable evidence such as underwriting strategy guidelines and practice notes. Please see section 8(1 – 6) and the remedies as set out in the Schedule to the Act for full details.

Recent Cases

In Young v RSA plc (2020 WL 02227401) (2020), the Insured ('pursuer') brought an action against the Insurer ('the defender') for a declaration that the Insurer was bound to indemnify the Insured under a policy of insurance and sought payment in the sum of £7.2 million. Whilst this is a Scottish case, and so not binding on judges in the High Court or County Courts in England and Wales, it will be an influential decision. The pursuer entered into a policy with the defender in respect of certain commercial premises. Among the perils insured against was fire. The premises were damaged by fire and needed to be demolished and the pursuer made a claim to be indemnified. The defender declined to indemnify and sought to avoid the policy from inception on the grounds that the pursuer had failed to disclose that he had been a director of 4 companies that had been dissolved. The defender pleaded that this amounted to a breach of fair presentation of the risk and it was entitled to avoid the policy.

In terms of disclosure, the pursuer's brokers sent the defender a market presentation and requested terms based on this. The market presentation indicated that there were no material facts applicable to the pursuer, any director or partner or subsidiary company. The defender responded with an email that quoted the premium offered together with the statement that,

'Insured has never been declared bankrupt or insolvent had a liquidator appointed.'

The pursuer admitted that the undisclosed information was material and the defender would not have entered into the contract had it been disclosed. The case proceeded on the issue of whether the defender waived its entitlement to receive the undisclosed information.

The Court held that there had been no such waiver and the defender was entitled to avoid the policy. The key section of the Insurance Act 2015 is section 3(5)(e) which states that the duty of fair presentation does not require the Insured to disclose a circumstance if it is something to which the Insurer waives information.

A key factor in this case was that the defender did not expressly waive the requirement for the pursuer to provide the disclosure. The pursuer contended that the defender did so by implication by means of a 'question limiting waiver' i.e. asking questions demonstrating disinterest in that information. The Court held that there was no waiver either expressly or by implication, the test being whether a reasonable man would consider that the defender had restricted his right to receive all material information and consent to the omission of the information. The Court held that a reasonable man would not construe the defender's email as being evidence that it was not concerned to know about the pursuer's wider experience of insolvency.

It is important to note that in this instance, there was no proposal form and so the Insurer did not define in advance the information it wished to receive. There may have been a waiver if the Insurer had set out similar information in a proposal form. It is clear that an Insurer can impliedly waive an Insured's duty to disclose by virtue of the questions it asks and so it is important for Underwriters to make questions clear and not to restrict them accidentally.

Also of note is that the case does not set out the reason for the non-disclosure nor is it explained whether the non-disclosure was reckless, deliberate, or innocent. In any event, the pursuer conceded the issues of materiality and inducement i.e. that the defender would not have incepted the policy if it had known about the non-disclosure. Overall, this case did not change anything in terms of the established case law on waiver.

---

1. If the Insurer could prove that the Insured made a fraudulent non-disclosure, this permitted insurers to keep the premium under the old law.

The more recent English case is Berkshire Assets (West London) Limited v AXA Insurance UK PLC. (2021 WL 04803813) (2021). This was a High court decision. The claimant, Berkshire Assets, sought to recover an indemnity from the defendant, AXA Insurance, pursuant to a Contractors All Risks ("CAR") and Business Interruption ("BI") policy. The indemnity was sought in relation to a development in which there was an escape of water at the property causing substantial damage to around 40 apartments.

The non-disclosure made was in relation to one of the claimant's directors. Prior to renewal, the Attorney General as Public Prosecutor in Malaysia filed 4 criminal charges against Mr Sherwood and 16 other individuals. The charges were filed in connection with an alleged scheme to defraud the Government of Malaysia in relation to bonds underwritten by Goldman Sachs. The following year, the proceedings against Mr Sherwood were discontinued.

AXA pleaded that the claimant did not make a fair presentation of the risk, the charges against Mr Sherwood were material and should have been disclosed and had the true position been known, AXA would have declined to provide cover. The claimant argued that the fact Mr Sherwood had been charged was not a material circumstance for the purpose of the duty of fair presentation. Further, if it was material, then AXA would still have entered into the Policy with the claimant.

The Court held that the charges against Mr Sherwood were material under the Act and should have been disclosed, noting that criminal charges are often material. The Court had to consider the matter from the point of view of a reasonable Insurer at the time of placement if the claimant had given full disclosure. The Court heard evidence from Ms Harris, an underwriter at AXA, who said that if she had been aware of the charges, she would have investigated the charges online and discovered that Mr Sherwood was facing a prison sentence of up to 10 years and large fines, which would have been a huge concern to her. Ms Harris was also aware of an AXA practice note on criminal matters, which indicated that such risks would not be acceptable and should be declined. Ms Harris gave evidence that she would have regarded the charges as material and would have declined the request for cover. Another more senior underwriter, Mr Sargant, also confirmed that cover would have been declined. The Court accepted AXA's evidence that had the charges been disclosed to them then it would have declined the risk.

Again there is nothing ground-breaking in the Berkshire Assets judgment. The pre-existing concepts of material facts and prudent Insurer and the existing case law were applied to find that the criminal charges were material and that had the Insurer known about them, they would have declined the risk. Of note, the pre-existing law that materiality is to be tested at placement was applied and the fact that the charges against Mr Sherwood were later dropped was irrelevant.

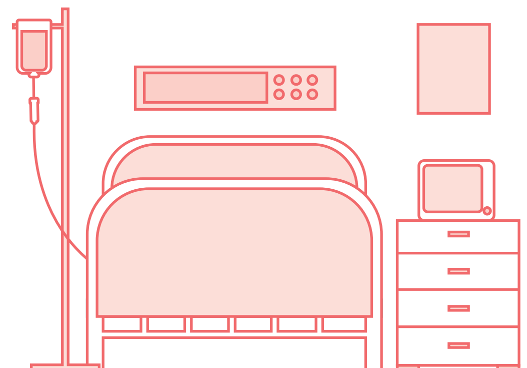
It is, however, useful to see how the subjective test of what a prudent Insurer would have done was applied. In this case, a key part of the evidence was AXA's reliance on a practice note that indicated they would not accept risks where criminal matters were in play. Reference was also made to AXA's underwriting strategy, in that it would have been outside AXA's strategy if it had made the decision to cover, notwithstanding the existence of criminal charges. Further, expert underwriting evidence was relied on by both parties and the Court preferred AXA's expert witness who had more experience in both CAR and BI policies than his counterpart.

Again this case did not go into detail about whether the non-disclosure of the facts was deliberate or reckless or innocent. However the claimant director, Mr Garside who gave renewal instructions on behalf of the claimant, gave evidence that it did not occur to him that he would need to check whether any of his co-directors had been charged with a criminal offence. This suggests that the non-disclosure was innocent. Therefore although in this case AXA were entitled to avoid the policy, they may have had to return the premium.

Both the above cases demonstrate that whilst the law has changed in respect of the duty of fair presentation of the risk, the existing case law continues to govern the key concepts such as materiality, the prudent insurer and the law on waiver. We will watch this space to see how this area develops and it will be interesting to see how cases involving the non-disclosure of less sensitive information than in these two cases (i.e. criminal charges and insolvency) will be interpreted, particularly as the remedies available are more wide ranging now than before the implementation of the Act.

For more information please contact:

David Bowes
Assistant Solicitor
T: 0203 436 2372
E: dbowes@keoghs.co.uk



Disclaimer and Copyright Notice

The contents of this document are considered accurate at the time of publication. Nothing in this document constitutes specific legal advice. You should always consult a suitably qualified solicitor about individual legal matters. Keoghs LLP accepts no liability for errors or omissions in this document. All rights reserved. This document and the information contained within it are provided for personal use only. No part may be reproduced, stored in a retrieval system or transmitted in any form or by any means electronic, mechanical photocopying, microfilming, recording, scanning or otherwise for commercial purposes without the written permission of the copyright holder.

Keoghs LLP is a limited liability partnership registered in England and Wales (registered number OC 321124) which is authorised and regulated by the Solicitors Regulation Authority. A list of the names and our members is available for inspection at our registered office, 2 The Parklands, Bolton, BL6 4SE. We use the word "partner" to refer to a member of the LLP. Keoghs Scotland LLP, is a limited liability partnership registered in Scotland (registered number SO305857) which is authorised and regulated by the Law Society of Scotland and trading from its registered office The Forsyth Building, 5 Renfield Street, Glasgow, G2 5EZ. A full list of members is open for inspection at the registered office. Keoghs Scotland LLP utilises the trading name Keoghs under licence from Keoghs LLP. All services in Northern Ireland are delivered under Keoghs Northern Ireland LLP; a limited liability partnership registered in Northern Ireland (registered number NC001575) which is authorised and regulated by the Law Society of Northern Ireland and trading from its registered office address, Keoghs Northern Ireland LLP, 7TH Floor, City Exchange, 11-13 Gloucester Street, Belfast, BT1 4LS. Keoghs Northern Ireland LLP utilises the trading name Keoghs under licence from Keoghs LLP.

© Keoghs LLP. All rights reserved.

0822/A/V1