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COMMENTARY

The UK Insurance Act 2015–Some Early Pointers on Possible Areas of Contention

The UK's Insurance Act 2015 has now been in force since August 2016.

The Act, which applies only to commercial insurances, modifies the centuries old duties of disclosure placed upon buyers of insurance policies governed by English law. It also aims to redress some of the imbalances previously thought to exist as between insurer and policyholder (imbalances in the former's favour) in the event of a claim on the policy being contested.

In this *Commentary*, members of our Insurance Recovery Practice (which acts only for policyholders, not insurers) consider one particular area which may prove contentious. They highlight the continuing importance of paying careful attention to the terms of any policy which is being sought. The potential insured must be satisfied that those terms represent what it requires before it agrees to buy.

After a significant delay between it being signed into law and its coming into effect—a delay intended to allow the insurance industry to adapt—the UK's Insurance Act 2015 is now in force.

The Act refines a proposer's duty of disclosure, in a way that will require policyholders and their brokers to review how renewals or purchases of new insurances are carried out. It also restricts the use by insurers of forms and formulations of words which, until now, might have seemed to some observers too easily to have released insurers from what would otherwise have been their obligations to indemnify.

The anticipated outcome of the new Act's introduction is—according to the buyers' association, AIRMIC—that it will be much more difficult for insurers to refuse to pay. The much vaunted "45% of claims end up disputed"[1] metric should fall.

However, as with all new laws, it seems there may be a settling-in period during which, counter-intuitively perhaps, disputes may rise.

Here we look at one possible area that could prove troublesome: Section 11 of the new Act.

This section is headed "Terms not relevant to the actual loss" and states:

1 MacTavish (FT 21.07.14).

1. This section applies to a term (express or implied) of a contract of insurance *other than a term defining the risk as a whole*, if compliance with it would tend to reduce the risk of one or more of the following:
   1.1 Loss of a particular kind;
   1.2 Loss at a particular location;
   1.3 Loss at a particular time.

2. If a loss occurs and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies sub-section 3.

Sub-section 3 then provides the hurdle which the insured must clear:

3. The insured satisfies this subsection if *it* 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.

(Emphases added)

So, in plain English, if it is a condition of a property insurance policy, say, that the insured must maintain a functioning fire alarm at the property, and it does *not* do so, then a claim for loss occasioned by, say, flood (not fire) should not be defeated by the breach.

This is the case only providing the insured can show, in our example, that the absence of a fire alarm *could not* (i.e. not just *did not*) contribute to the loss in the circumstances in which the loss occurred.

However, what if insurers seek to argue that what happened in fact fell within the exception to the new provision as set out above? That is to say, what if they argue that the term breached was of such consequence that it actually defined the risk?

So, in our example, could the insurer argue that it was only ever intending to cover property with working fire alarms, irrespective of the risks that might actually befall such properties? Might they be tempted to try?

A useful pointer may perhaps be seen in the recent Australian Federal Court decision in *Pantaenius Australia Pty Limited v Watkins Syndicate 0457 at Lloyd's*.[2]

This was a decision under the Australian Insurance Contracts Act 1984 ("ICA") which Act was studied by UK's Law Commissions when making their recommendations in respect of what ultimately became the Insurance Act 2015. There are therefore (perhaps unsurprisingly) some significant similarities.

The *Pantaenius* decision concerns the interpretation of section 54 of the ICA which is similar to Section 11 of the UK Insurance Act 2015 in that it requires an insurer who wishes to decline a claim, by reason of some alleged breach on the part of an insured, to prove that breach caused the loss. Unlike in the UK, however, there is no exception in the Australian Act for terms defining risk.

In the *Pantaenius* case (in fact, a claim for contribution between insurers) the defendant insurer sought to deny liability to contribute on the grounds that when the loss occurred, the insured vessel was outside a geographical limit provision in its policy. The policy was, it would seem, intended to provide coverage only within Australian territorial waters but, rather than saying this expressly, it stated instead that coverage was suspended between the vessel clearing Australian customs on an outbound voyage and clearing them again when she returned.

The loss actually occurred when the vessel grounded within Australian territorial waters on a return journey but had not, as a formality, yet cleared customs. The defendant insurer argued that because customs had not been cleared, the claim was excluded—it did not matter, it said, that the vessel was in fact within Australian territorial waters.

The Australian Court held that the absence of a causal link between, in effect, the yacht's paperwork not being in order and its grounding meant that this was not a breach that could be relied upon to decline coverage.

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2 [2016] FCA 1

The significance of the case for observers of the new English insurance law landscape is that one could have seen the question in the *Pantaenius* case being posed either as one concerning an exclusion *or* as one concerning the definition of scope of coverage. This is not a distinction with any relevance under Australian law, as we have seen, but is one which is critical under the new UK regime.

Observant readers will have noticed that the defendant insurer in the Australian case was an English insurer (a syndicate at Lloyd's). Had the claim been subject to English law, might it have been open to them—rather than seeking to rely upon the provision as an exclusion (with the attendant risk that the policyholder might successfully argue lack of causal link)—to argue it as one defining the scope of the risk as a whole?

If such argument had been run, and if it had succeeded, then the outcome under English law would of course have been entirely different from the actual outcome under the Australian ICA, as lack of causation would be an irrelevance: If the loss is outside the scope of the insurance, it is, by definition, uninsured.

It is for this reason that we believe arguments over Section 11 may well prove to be one of the early areas in which the English courts are asked to test the meaning of the 2015 Act.

What might policyholders do?

Whilst headings within contract documents (including contracts of insurance) are not usually determinative of interpretation, nevertheless it may be useful, when considering a draft policy form offered for review pre-inception, to look to see how such provisions are being described by insurers. Do they claim them as defining the risk? If so, then, given the additional scope this may afford for insurers to seek to decline a claim, is that something to which a policyholder should ever agree?

Close attention to contractual terms being offered always pays dividends, and for this purpose a policy of insurance is as much a contract as any other—more so, in fact, given the possible consequences of breach. In short, make sure you are in agreement with the terms being offered before you buy.

Over the coming months, our insurance recovery lawyers will continue their assessment of the likely impact of the new Act from the policyholder's perspective. Further *Commentaries* will be issued on an ad hoc basis.

Lawyer Contacts

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