



## Campbell Johnston Clark

### THE INSURANCE ACT 2015

The Insurance Act 2015 (the “Act”) received Royal Assent on 12 February 2015 and will enter into force from August 2016. The Act represents the most significant change in more than 100 years to established English insurance law and repeals certain key sections of the Marine Insurance Act 1906 (“MIA”). The stated intention of those responsible for drafting the Act is to bring commercial insurance into the 21st century by ameliorating to a large extent what have previously been seen as a set of draconian remedies available to insurers for breach of certain provisions of the MIA. The most significant changes relate to the sections pertaining to the pre-contractual duty of disclosure, warranties, basis of contract clauses and fraudulent claims.

#### Duty to make a fair presentation of the risk

Section 21 (2) of the Act repeals sections 18 to 20 of the MIA. The duty to make a fair presentation is set out as a two limb test which requires the insured to “a) disclose every material circumstance which the insured knows or ought to know; b) failing that, disclosure 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 those material circumstances.” While the first limb is largely the same as the insured’s duty of disclosure under the MIA which required the insured to disclose every material circumstance, the second limb is new and purports to balance the duty of pre-contractual disclosure between the insurer and the insured by encouraging insurers to be proactive and make enquiries.

Pursuant to the MIA, the remedy for breach of the duty was avoidance of the policy from its inception. The new Act, however, provides flexible remedies. If the qualifying breach is either deliberate or reckless, the insurer may avoid the policy and return the premium to the insured. If, however, the qualifying breach is not deliberate or reckless, the insurer’s remedies will be proportionate depending on what the insurer would have done had the insurer had knowledge of the undisclosed material circumstances. If the insurer would not have accepted the risk, the policy may be avoided. However if on the other hand, the insurer would have accepted the risk but only having inserted additional terms to the policy and/or

charged a larger premium, then the claim paid out by the insurer will be reduced by the amount of the excess premium and/or the additional terms will be deemed to have been inserted in the policy.

#### Basis of contract terms, warranties and fraudulent claims

Under the previous act, all statements made by the insured in a proposal form could be incorporated as warranties in a policy. The new Act abolishes basis of contract clauses altogether in business insurance. The remedy for breach of warranty under the MIA is release of the insurer from liability in respect of all claims from the date of the breach, even if the breach is later remedied and/or if the breach of a particular warranty is not relevant to the actual loss. Pursuant to the new Act all warranties become suspensive conditions in that an insurer will only become liable for losses following remedy of a breach of warranty by the insured. Lastly, under the MIA, the remedy for fraud is non-payment of the claim. The Act now provides a remedy of forfeiture of the entire claim and termination of the policy with effect from the date of the fraudulent act and no return of premium to the insured.

The amendments to the long standing MIA brought about by the Act are bound to give rise to increased litigation due to uncertainty over the construction of the sections of the Act. The changes will apply to and affect the entire insurance industry. Further law reforms are also expected in the near future as the Law Commission plans to put forward another bill within 2015.



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