

*The Chartered Institute
of Loss Adjusters*



CILA Conference 2016

11.15am – 12.00pm

The Insurance Act: BI peccadilloes

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Damian Glynn, Chair of the CILA Business Interruption SIG

Stanley Suite

CILA Business Interruption SIG



Agenda

- Purpose of the Act
- Duty of Fair Presentation
- Remedy For Breach - Principles
- Impact on BI claims handling



Duty of Fair Presentation

- Who are you?
- What do you/don't you know?
- Who are the Senior Management?
- Who are the Others?
- What is a reasonable search?



Duty of Fair Presentation

- What actually is it – power point?
- How far in the future must it look (MIP?)
- Scope of FP – FoC covers?
- Expectation of protocols developing?
- Who will do exactly what to establish a breach?



Remedy For Breach

Breach of the duty of fair presentation: deliberate or reckless? No	Yes	Policy voidable, Insurers keep premium
Would Insurers have still taken the risk with the adverse feature but on different terms? Yes	No	Policy voidable, Insurers return the premium
Would Insurers have applied terms other than premium? No	Yes	Apply different terms and adjust claims as if such terms applied
Apply proportionate reduction in ratio that the premium that would have been charged compares to that actually charged		(In other words average based on premium shortfall not asset values)

Proportionate Reduction

“reduce proportionately” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 5), where—

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

Higher premium



Remedy For Breach

- BI Under Declaration
- Cross Contamination
- Stacking with Average clauses
- Tricky issues



RFB: BI Under declarations

- Is a significant under declaration of itself a breach of the DFP?
- Do we care **why** EGP is under declared?
- Is the Declaration:
 - Material?
 - Fact?
 - Expression of Expectation/belief?
- What do policies actually ask for?

The Scale of Naughtiness

Declaration Issue	Policy Declaration Requirement				
	HISTORIC FACT	12 months pre renewal/inception	Last set of Statutory Accounts	Accounts most nearly coterminous with policy period	FUTURE ESTIMATE
Unexpected industry upturn results in Declaration being low					
Policyholder has inadvertently failed to appreciate that the policy definition differs from the meaning in their accounts.					
Policyholder understands that there is a different definition of Gross Profit in the accounts compared to the policy, but deducts costs beyond the Specified Working expenses listed in the policy, anticipating that many costs will reduce (but leaving the policy definition unaltered)					
Policyholder fills out returns required by their broker without appreciating the importance or relevance of them					
Broker, as the policyholder's agent passes on a calculation deducting costs significantly beyond the Specified Expenses in the policy (policyholder oblivious)					
Policyholder has assessed the BI exposure (as they see it) and insured that amount, without reference to the policy wording (the 'secret' EML)					
Policyholder insures an amount based on the premium they can afford, without reference to the policy wording					
Policyholder decides to declare only 75% of the amount they know should be declared, on the basis that there is an uplift of 133.33% on the happening of a claim					

DELIBERATE

RFB: Cross Contamination

- Breach re risk disclosure
- Breach re Sums Insured?
- No premium silos in IA land
- Dec Linked (non average) BI and liability covers affected



RFB: What about Average?

- Accumulates with PR or not?
- Mutually exclusive or bed fellows?



Tricky issues

- Co-insurance
- Local/master policies
- Inner limits



PR: Summary

	Current position	Position under the Act – representations of fact	Position under the Act – representations of expectation or belief
Description	Average	Proportionate reduction or avoidance (if deliberate/reckless)	Avoidance (if not in good faith) or payment in full
Basis of Reduction	Asset values	Premium paid/payable	N/A
Party calculating the Amount	Loss Adjusters	Insurers	N/A
Scope	Caption based	Premium across the policy	N/A
Reason for shortfall	Irrelevant	Is it deliberate or reckless?	Is it deliberate or reckless?

Impact on BI claims handling

- Establish **cause** of under declarations
- Potential Delay:
 - Consideration of the DFP
 - Who will decide what the premium would have been?
- Scope of adjuster Investigation



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