SQUIRE PATTON BOGGS

Pensions Quick Guide

Insurance Act 2015 – What Trustees Need to Know

We Are About to Renew/Take Out Insurance, What Do We Need to Consider?

The Insurance Act 2015 (Act) introduced the following measures:

- A duty of fair presentation – described below in more detail.
- Proportionate remedies if there is a breach of the duty of fair presentation (rather than avoidance being the only remedy). See "What Are the Consequences of Failing to Comply?" for further information.
- An insurer can now only avoid a claim on a breach of warranty if that breach is directly relevant to the loss arising. For example, a breach of a warranty to install a security system would not impact on a claim for loss arising as a result of burst water pipes. Similarly, if a breach of warranty (for example, failing to install a security system) is remedied then the insurer would be liable for a claim arising after the breach has been remedied (in this example it would be liable in respect of a claim for theft occurring after the security system has been installed).
- Ability to contract out of the Act (except in certain limited circumstances). If an insurer is trying to contract out, professional advice should be sought, as it may be that trustees' rights and remedies under the Act could be affected or reduced.

It is now possible to claim damages for late payment of any claim (as well as interest), provided a claim for late payment is brought within one year of the insurer paying all sums due in respect of the claim.

Which Type of Insurance Is Caught?

The Act applies to all new insurance and reinsurance policies which are subject to English law regardless of the country in which the policy is underwritten; it also applies to any variations or renewals of existing insurance policies.

The Act mainly applies to non-consumer insurance business. So, it directly impacts upon trustees of pension plans when they go out to the market to buy different types of commercial insurance policies. Therefore, the provisions of the Act are of direct relevance when trustees go out to the market to source a liability policy (e.g. pension trustees' cover or against cyber risks), a bulk purchase annuity or a buy-in policy.

The Duty of Fair Presentation of a Risk

Trustees need to be familiar with their obligations under the duty of fair presentation of the risk to be insured by the insured to the insurer, before an insurance policy incepts.

This is important because if they do not comply with the duty then they risk jeopardising an insurance claim being paid in full by an insurer.

To comply with the duty the insured must disclose to the insurer:

- Every material circumstance which the insured knows or ought to know about the risk when they are proposing for an insurance policy (either for the first time or on renewal)
- Sufficient information to put an insurer on notice that it needs to make further enquiries for the purposes of revealing material circumstances about the risk to be insured

The First Limb of the Duty – Disclosure of All Material Circumstances

A material circumstance is information that would influence the insurer's decision in deciding whether to insure the risk and if so on what terms. Court guidance confirms it does not have to have a decisive effect on the insurer's decision-making. So, in the context of a pension trustee's liability this would include details of previous claims or complaints against or about the trustees.

An insured's knowledge includes actual knowledge of the individual trustee, i.e. material circumstances about the risk to be insured that they actually know about. In the case of a corporate trustee, this means the actual knowledge of the directors, but it could go wider and include the knowledge of others who may be responsible for managing insurance (such as the pensions manager or the trustees' advisers).

An insured's knowledge also includes their constructive knowledge, i.e. material circumstances about the risk to be insured that they ought to know about. So, in the case of trustees, they will be deemed to know what should have been revealed to them by a reasonable search for information that is material to the risk. The English courts have held that materiality is an objective test, by reference to the attitude of a hypothetical prudent insurer. As an insured might not know what influences the mind of an insurer, they may well need guidance from an insurance broker to comply with their duty of good faith.

The Second Limb of the Duty – Disclosure of Sufficient Information to Put the Insurer on Notice

If an insured does not fall within the first limb of the fair presentation duty, then they can still satisfy the overall duty (and not put themself at risk of a claim being rejected by an insurer) provided they fall within the second limb.

To do so, an insured must disclose enough information to put an insurer on notice that it needs to make further enquiries to reveal material circumstances about the risk to be insured. If an insurer chooses not to make those enquiries, they cannot later claim that the insured failed to disclose them.

The trustees must disclose information to the insurer in a reasonably clear manner and in a form that the insurer is able to access easily, i.e. don't expect the insurer to sift through bundles of irrelevant information to identify which issues might affect the risk to be insured.

Some Practical Points

Do...	Don't...
Do make enquiries of all trustees, the pensions manager, administrators, actuary and anyone else involved with managing the plan and insurance arrangements. This should include enquiries of former trustees if current trustees have not got sufficient information. Keep an audit trail of the searches carried out, and the enquiries made, to prove that you have conducted a reasonable search.	**Don't** assume that you can deal with the proposal form in the same way that you have always dealt with it. Read the form. The terms may be different. Make sure you are clear on any areas of the Act that the insurer is contracting out of.
Do try to agree with insurers in advance whose knowledge is relevant for the purposes of fair presentation and the scope of the reasonable search for material information.	**Don't** be tempted just to think about falling within the second limb. It is a safety net so make sure you also strive hard to fall within the first limb of the fair presentation duty. The second limb is more easily open to challenge by an insurer and by relying on compliance with the second limb only you might also inadvertently miss a crucial fact, which should be disclosed.
Do spend time well in advance with your broker preparing for renewal or replacement of your insurance. Properly organise the information that you send to the insurer, so that it is easy to follow and do allow sufficient time for the pre-contract disclosure exercise. Anticipate more questions than usual from insurers.	**Don't** forget to make a reasonable search for all material information relevant to the risk. Think carefully about how you are going to perform the search – who, where and what – and how you are going to evidence the search.
Do carefully consider what issues might increase the level of risk to the insurer and/or impact upon the insurer's desire to provide cover or affect its assessment of an appropriate premium. These might include: Past insurance claims, Pensions Ombudsman complaints or court action, any outstanding (or pending) complaints under the plan's IDRP, fines or investigations by the Pensions Regulator, missing pension plan documents, failure to take legal advice when appropriate, failure to properly equalise or close a plan to accrual, failure to regularly carry out data cleansing exercises, benefit calculation checks or pensioner existence checks.	**Don't** "data dump" on insurers. Don't send everything about the plan to the insurer in the hope that it will spend time sifting through and sorting relevant information from non-relevant information. Likewise, don't be tempted to bury away material information in the small print.

What Are the Consequences of Failing to Comply?

If there is a breach of the duty of fair presentation then new, proportionate remedies are available to the insurer. Whilst not as draconian as used to be the case, the risks are still very significant. For example:

- If the insurer can show that it would have entered into the contract on different terms, those different terms will apply
- If the insurer can show it would have charged a higher premium if it had known about the breach, the amount of any claim can be reduced by a proportionate amount
- If the insurer can show it would not have entered into the contract at all, had it known about the breach, the contract can be avoided by the insurer (as though it had never been entered into in the first place), but the insurer must return the premium

Note, however, that if any breach of the duty of fair presentation is deliberate or reckless, the insurer can avoid the policy without returning the premium. Going forward, the onus will be on the insurer to show what it would have done had it know about the breach of the duty of fair presentation by the insured.

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