Nicola Maher, A Partner in Edwin Coe's Insurance Litigation Team

INSURANCE LITIGATION

Edwin Coe discusses Insurance and Insurance Brokers in the UK

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Risk minimisation is the ultimate goal of insurance. Its purpose is to buy peace of mind and to soften the financial blow should the worst case scenario occur. Insurance claims can however, lead to complex coverage disputes and professional negligence claims and Lawyer Monthly speaks with Insurance Litigation Partner, Nicola Maher of Edwin Coe LLP, who discusses the recent and future changes and developing trends in insurance law.

ABOUT NICOLA MAHER

Nicola Maher is a Partner in Edwin Coe's Insurance Litigation team which acts exclusively for policyholders in a wide-range of commercial and insurance disputes. She has particular experience in liability and coverage disputes arising from fires, floods, thefts and other perils. Her practice also includes areas such as professional negligence, directors' and officers' liability, cyber losses and under-insurance issues with an emphasis on business interruption claims.

Credentials include:

- **Ranked in the latest edition of Chambers and Partners**
- **Recommended in the latest edition of Legal 500**
- **Member of the London Business Interruption Association**
- **Member of the London Chamber of Commerce**
- **Member of the Professional Negligence Lawyers Association**
- **Member of the British Insurance Law Association**

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As a professional whose practice focuses on insurance litigation what have been the recent changes in the regulatory environment regarding insurance in the UK?

The Insurance Act 2015 (the Act), which came into force on the 12th August 2016, represents one of the most significant reforms of insurance contract law in the UK in the last century. The Act came about as a result of a Law Commission review into insurance law which was felt, at the time, to be weighted heavily in favour of the insurer.

The Act changes the law for business in much the same way that the Consumer Insurance (Disclosure and Representations) Act 2012 changed the law for consumers.

At a glance, the key changes are:

- The pre-contract duty of disclosure has been replaced by a new duty of fair presentation which is aimed at encouraging active engagement by insurers where disclosure is concerned.

- Where policyholders are deemed to have breached the duty of fair presentation the Act now provides more commercially flexible and proportionate remedies rather than the previous single remedy of avoidance.

- The law on breach of warranty has changed to make warranties suspensive conditions such that if a breach is remedied prior to loss, cover will remain in place. The basis of contract clause which turned representations made by the insured into a warranty has been abolished and breach of a warranty unconnected with the loss is no longer a ground for terminating cover.

- Contracting out of the Act is permissible provided the insurer has taken sufficient steps to draw the disadvantageous terms of doing so to the insured's attention and that such terms are clear and unambiguous as to their effect.

Are there any future regulatory changes which are expected to affect insurance litigation?

Currently, insurance companies are able to withhold payment, sometimes for years, and insured parties with valid claims have no form of redress. I have seen many businesses fail following a delayed insurance payment because, after a large loss, they have been unable to rebuild premises or replace plant and machinery required for their business to continue.

This is in direct contradiction to normal contract law where if one party breaches a contract, the other can generally claim damages for any actual loss caused by the breach, provided the loss was foreseeable at the time the contract was made.

However, the Enterprise Act 2016, which comes into force on the 4th May 2017, will amend the Insurance Act 2015 to enable insureds to claim damages actually suffered as a result of insurers' "unjustified late payment" of claims, which is good news for policyholders.

Of course, those damages will still be assessed with reference to ordinary principles of law, including causation, foreseeability, remoteness and mitigation and what amounts to payment within a "reasonable time" will depend on a number of factors to be determined on a case by case basis.

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Furthermore, as with the Insurance Act, contracting out of this implied term will be allowed in non-consumer contracts subject to careful drafting but it is likely that the Enterprise Act will at least result in more active, earlier and open engagement between the parties about any difficulties with the claim.

Are there any other particular developments or trends you expect to see in relation to insurance litigation in the future?

The other hot topic in insurance circles is cyber, and the growing threat to policyholders of cyber-attacks and losses. Cover under specific stand-alone cyber policies, or cover which is added on to existing policies, is likely to come under increasing scrutiny. The rapidly developing threat of cyber-attacks means that insurance requirements are constantly changing. At the moment the SME market is significantly at risk of cyber-attack and yet a significant proportion of that market is either under insured or not insured at all. Education will be a key consideration as far as insureds are concerned, and insurance brokers have a role to play in this respect.

As a minimum, The Association of British Insurers (ABI) recommends that businesses need to consider appropriate steps to take to minimise the risks and also whether they have or ought to have insurance cover for the following:

- Cyber business interruption losses;
- Privacy breach costs;
- Cyber extortion;
- Damage reinstatement/asset replacement expenses;
- Media liability;
- Cyber forensic support.

As this area of insurance grows, and the need for it becomes more widespread, it follows that insurance brokers who fail to bring the availability of cyber cover to the insured's attention, or who fail to obtain adequate cyber cover, are going to be at risk of litigation.

How will the new regime change things, in particular for policyholders and/or insurance brokers?

Disputes between policyholders and insurers have depended, to a large extent, on the particular class of insurance. It is common to see specific wording and claims issues particular to certain sectors such as the D&O market, the property market, the construction market, and the combined liability market. Many disputes arise from the information purportedly presented or not presented to insurers at the time the risk was first placed or on renewal i.e. alleged non-disclosures or misrepresentations. Breach of policy terms, conditions, warranties and conditions precedent is also a common cause of disputes, as is underinsurance. In turn, these disputes often lead to claims against insurance brokers for a failure to ensure placement of adequate insurance or to explain the terms of the policy and the consequences of breaching those terms.

The new obligation under the Insurance Act 2015 to conduct a reasonable search is likely to give rise to arguments about the scope of that search and what a fair presentation involves. The search is certainly more onerous than that required by previous law in that it extends to information held by the insured, broker and other parties such as IT consultants, subcontractors and outsourced operations.

Brokers will need to give consideration as to how they go about dealing with and explaining the reasonable search duty to insureds. It will also be important for brokers to explain to insureds and to agree with insurers the scope of persons whose knowledge is relevant. They will need to consider the use of formal questionnaires in addition to site visits and discussions and will have to ensure they keep records of those discussions if they are to avoid or rebut any arguments over the duty of fair presentation.

The broker also has a duty to ensure that the insured understands how to go about making disclosure in accordance with the Act and will need to advise on the merits or otherwise and appropriate terms of "contracting out" of the Act.

Whilst the "fair presentation" regime may appear to be onerous for policyholders, it should have some significant benefits including greater certainty for those policyholders who are well-organised and engaged with their insurance arrangements, in addition to more commercially flexible and proportionate remedies in the event of a breach of the duty of fair presentation.

The onus is now on the insurer to demonstrate what it would have done had it received a fair presentation of the risk and remedies include:

- Avoidance;
- The application of alternative terms; and
- A proportionate reduction on payment of the claim which is reflective of a higher premium.

Is there still a place for ADR in insurance disputes?

Absolutely. It is well-known that litigation is prohibitively expensive, takes place in the public domain, is often protracted, and can be damaging to commercial interests. In many cases it makes sense for the parties to adopt alternative mechanisms to settlement, such as without prejudice discussions or mediation, which is conducted in private and can lead to earlier resolution.

In my experience, insurance claims benefit from some form of ADR, and more and more policies are including clauses which oblige the parties to seek resolution by ADR such as arbitration or mediation. However, insurance disputes are complex and require a genuine commitment by the parties to the process and a good mediator in order to achieve resolution.

ADR allows the parties to more candidly identify their true obstacles to settlement and to address contract issues and possibly a more creative form of resolution whilst also being a cost-effective way of resolving disputes quickly. **LM**

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