



HERBERT
SMITH
FREEHILLS

10 MONTHS OF THE INSURANCE ACT

TOP 10 ISSUES FOR PLACEMENTS AND POLICY WORDINGS

AIRMIC CONFERENCE 2017

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SCENARIO



- Company A with HQ in Birmingham
- A has a Combined Property and Liability policy which insures HQ and 20 properties around UK
- Policy renewed on 10 May 2017
- Risk manager adopted same approach to renewal as he has done for the last few years without dialogue with insurer
- Disclosure tells insurer of A's corporate strategy to acquire 2 new properties this year

SCENARIO



- Company B operates staff restaurant within HQ and at all A's locations
- Fire in the staff restaurant on May bank holiday weekend (27 May)
- Property damage of £20 million
- Risk manager on holiday for half term with the family

INSURER RAISES NUMEROUS ARGUMENTS:

#1 Breach of the duty of fair presentation – Actual Knowledge

#2 Breach of the duty of fair presentation – Reasonable Search

#3 Breach of the duty of fair presentation – Reasonably Clear and Accessible Manner

#4 Remedies raised by insurer

#5 Failure to comply with Critical Information clause

#6 Breach of warranty

#7 Late notification

#8 Failure to obtain insurer's consent

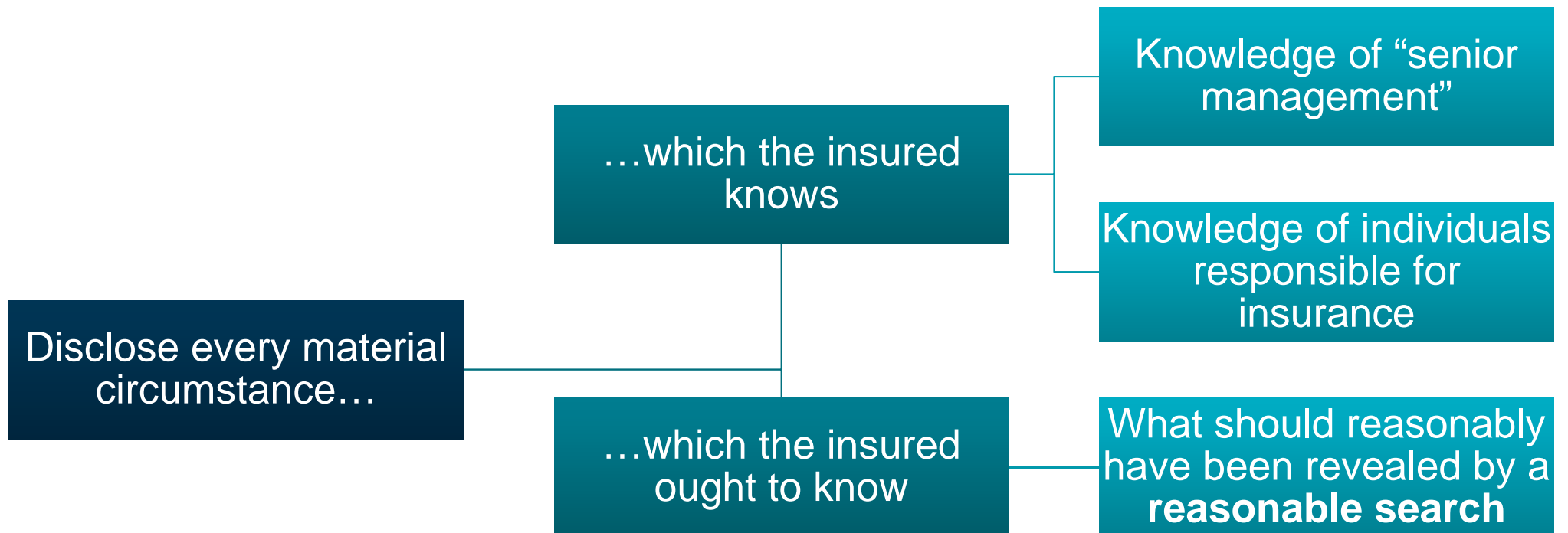
#9 Dispute over claims handling

#10 No right to damages for late payment

AIM OF THIS WORKSHOP

How could the insured have better protected itself during placement of its policy, in particular in light of the IA2015?

DUTY OF FAIR PRESENTATION



DUTY OF FAIR PRESENTATION

- There have been sporadic issues with overheating of the extractor fans in the kitchens at all locations in certain environments
- We will consider the impact of this being known by:
 - Company A's Head of Facilities for all UK locations
 - Company B's Head Chef at HQ
- Insurer argues that A breached its duty of fair presentation by failing to disclose this

ISSUE 1: DUTY OF FAIR PRESENTATION

Actual knowledge: Senior Management

- Company A is under an obligation to disclose the actual knowledge of those individuals who are part of “senior management”
- IA2015 provides: *“senior management” means those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised*
- A did not consult its Head of Facilities
- Insurer argues Head of Facilities falls within “senior management”
- A responds that its Head of Facilities is not a director of Company A, is one-tier below the Board and reports to COO

ISSUE 1: DUTY OF FAIR PRESENTATION

Actual knowledge: Senior Management – how can you protect yourself?

- Agree defined list of individuals by reference to role with insurers
- Beware market clauses, eg. LMA9120

Under section 4(3)(a) of the Insurance Act 2015, the Insured must disclose all material circumstances known to (amongst others) its “senior management”. For these purposes, the “senior management” shall include the persons occupying the positions listed below (or their equivalents):

- Sounds promising but offers no real benefit because not exhaustive
- Consider alternative – minor amendments can have large impact

*For these purposes, the “senior management” **shall include comprise** the persons **only** occupying the positions listed below (or their equivalents):*

ISSUE 2: DUTY OF FAIR PRESENTATION

Scope of reasonable search

- Company A is under a obligation to conduct a reasonable search of information available to it
- This includes “*information held within the insured’s organisation or by any other person (such as the insured’s agent or a person for whom cover is provided by the contract of insurance)*”
- Risk Manager sent B a very simply worded and formulaic questionnaire with no questions directed to individual locations
- Insurer argues that B’s information forms part of the reasonable search, simple questionnaire was not a “reasonable” search and therefore breach of the duty of fair presentation
- If correct, insurer may have proportionate remedies available

ISSUE 2: DUTY OF FAIR PRESENTATION

Scope of reasonable search – how can you protect yourself?

- Scope of questions asked (closed v open)
- Make sure those responding to questions know the test that applies
- Will insurers be prepared to ‘sign off’ on your disclosure process?
- Engage with insurers in any event and record that you have:
 - Described your process to insurers
 - Provided insurers with opportunity to comment/ask questions
- Consider the challenges of composite policies where these include non-group assureds and whether it is sensible to try and limit the scope of the reasonable search to the information known by principal insured

ISSUE 3: DUTY OF FAIR PRESENTATION

Reasonably clear and accessible disclosure

- Risk manager discloses information in same manner as in previous years
- Provides insurer with CD of unnamed excel spreadsheets setting out location values, headcounts, contract information, etc
- Insurer argues that A breached its duty of fair presentation by failing to present its disclosure in a reasonably clear and accessible manner

ISSUE 3: DUTY OF FAIR PRESENTATION

Reasonably clear and accessible disclosure – how can you protect yourself?

- Do it properly
- Consider:
 - Index (perhaps hyperlinked?)
 - Executive summary / Key facts
 - Labels
 - Sign-posts
 - Logical order
- Seek sign off from insurers that they accept the presentation is reasonably clear and accessible

ISSUE 4: REMEDIES SOUGHT BY INSURER

- Insurer does not try to avoid the policy but argues that if a fair presentation of the risk had been made, premium would have been increased by a third – from £1m to £1.33m
- Claim is therefore proportionately reduced

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

- Calculation:

$$\frac{1,000,000}{1,330,000} \times 100 = 75\%$$

- 75% of £20 million claim payable – £15 million
- £5 million uninsured

ISSUE 4: REMEDIES SOUGHT BY INSURER

Non-disclosure clause:

“The Insurer will not seek to avoid or repudiate this Policy for non-disclosure or misrepresentation other than fraudulent non-disclosure or fraudulent misrepresentation”

(Not updated since the Act came in to force)

- A seeks to rely on non-disclosure clause to argue any breach of the duty of fair presentation was entirely innocent and so no remedy for insurer
- Is this clause sufficient to prevent the insurer from making a proportionate reduction to the claim?

ISSUE 4: REMEDIES SOUGHT BY INSURER

How could clause be improved?

“In the event of a breach of the duty of fair presentation by the Insured, the Insurer irrevocably waives all and any rights and remedies it has/may under the Insurance Act 2015 save where such breach was fraudulent.”

- Ensure clause is triggered by breach of the duty of fair presentation
- Cover off all proportionate remedies to avoid any argument clause does not apply

ISSUE 4: REMEDIES SOUGHT BY INSURER

Assuming the innocent non-disclosure clause is not wide enough what other wording could have been used?

- Consider provision that insured pays the additional premium rather than face proportionate reduction in claim – payable even if no claim
- Key issue to consider is your loss frequency and severity
- Can be an added benefit in combined policies such as this where breach of DoFP in relation to one section (eg property) may proportionately reduce claim on separate, unrelated section (eg liability)
- Several clauses address this issue – LMA, IUA, Airmic clause, broker clauses – be aware that some are better than others for insureds/insurers

ISSUE 4: REMEDIES SOUGHT BY INSURER

Other considerations

- Insurer might have successfully argued that it would have required safeguards to be put in place when using the extractor fan
- Possible wording solutions?

ISSUE 5: CRITICAL INFORMATION CLAUSE

It is a condition precedent to the Insurer's liability under this policy that the following matters are true and accurate at the time of inception:

- 1. No director of any Insured has sat on the board of a company that has been declared insolvent in the last 3 years; and*
- 2. All information provided to the Insurer.*

LMA5253

- Insurer argues insured in breach as one director was previously on the board of a company that is now insolvent
- Result of LMA5253 is that if, upon inception of the risk, any of the matters contained in the Critical Information clause are found not to be true, the insurer would have no liability under the policy

ISSUE 5: CRITICAL INFORMATION CLAUSE

How can you protect yourself?

- In particular circumstances (but not as a matter of course), the complete accuracy of certain information will be a legitimate underwriting concern
- But if misused, such clauses can constitute an attempt to re-introduce basis clauses via the back door and undermine the Insurance Act
- Avoid such clauses where possible unless strictly necessary
- If used, limit information to which the clause refers and ensure very rigorous checks on accuracy with all information providers understanding the importance of the enquiry

ISSUE 6: BREACH OF WARRANTY

Recap on section 11 of the Act

- Only applies to clauses which tend to reduce the risk of loss of a particular kind / at a particular time / location (“risk mitigation” terms)
- If the insured breaches such a term, insurer cannot rely on a breach to limit its liability if the insured can show that its breach could not have increased the risk of the loss which actually occurred

ISSUE 6: BREACH OF WARRANTY

“The Insured warrants that it shall maintain an operational burglar alarm at all insured properties whenever such properties are left unoccupied. It is agreed that this clause defines the risk as a whole within the meaning of Section 11 of the Insurance Act 2015.”

- Insured in breach of this warranty at another property at the time of the fire
- Insurer relies on breach of warranty to argue it is off risk – ‘suspensive condition’
- Insurer also argues that section 11 does not apply because of express wording in the policy

ISSUE 6: BREACH OF WARRANTY

How could clause be improved?

“The Insured warrants that it shall maintain an operational burglar alarm at all insured properties whenever such properties are left unoccupied. It is agreed that this clause ~~defines the risk as a whole within the meaning of Section 11 of the Insurance Act 2015.~~ would tend to reduce the risk of loss of a particular kind as set out in Section 11 of the Insurance Act 2015”

- To the extent possible, avoid warranties
- Delete wording designed to deem a clause to apply to the risk as a whole, depriving the insured of the benefit of s.11 of the Act
- Beware complexities around potential application of s.11
- Seek express wording in clause that s.11 does apply to this clause

ISSUE 7: LATE NOTIFICATION

General Condition 1:

“It is a condition precedent to the Insurer’s liability that the Insured shall notify the Insurer immediately on becoming aware of any occurrence likely to give rise to a claim under this Policy”

- GC 1 is a condition precedent
- Risk manager is on holiday with family for half term
- Notifies insurer on his return – 10 days after fire
- Insurer argues breach of condition precedent because notification not ‘immediate’
- Breach allows insurer to deny liability for the claim even if no prejudice suffered

ISSUE 7: LATE NOTIFICATION

How could clause be improved?

Notification clause:

~~“It is a condition precedent to the Insurer’s liability that the Insured shall notify the Insurer immediately as soon as reasonably practicable on the Risk Manager becoming aware of any occurrence likely to give rise to a claim under this Policy”~~

- Avoid conditions precedent
- Avoid absolute timings
- Link notification to awareness/knowledge of the risk manager/GC
- Section 11 of the Act unlikely to assist

ISSUE 7: LATE NOTIFICATION

Beware hidden conditions precedent

“This policy covers claims first made against the Insured during the Period of Insurance and notified to the Company during the same Period of Insurance...”

“The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the policy period which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after expiration of the policy period shall be deemed for the purposes of this insurance to have been made during the subsistence hereof” (emphasis added)

SCENARIO CONTINUES...

- A faces a claim from neighbour C whose property has suffered smoke damage
- C is important commercial contact for A
- A keen to resolve the matter asap
- A incurs legal costs asking its company lawyers to give some initial advice to assess the merits of C's claim
- COO of A has an informal meeting with the COO of C
- COO of A accepts the fire was its responsibility and seeks to ascertain what level of damages C is seeking



ISSUE 8: INSURER'S CONSENT

Claims Conditions for Section 2 (Liability)

- 1) *It is agreed that the Insured shall not negotiate admit liability or make any promise payment or settlement without the Insurer's written consent.*
- 2) *The Insurer shall not be liable to indemnify the Insured for any costs and expenses which have been incurred without the Insurer's prior written consent*
- 3) *It is a condition precedent to any liability on the part of the Insurer under this Section 2 (Liability) of the Policy that the Claims Conditions are duly and faithfully observed and fulfilled by the Insured.*

Insurer argues:

- Sweeper clause at 3) makes 1) and 2) conditions precedent
- Breach of Condition 1) = no liability for any payment which may be paid to C
- Insurer argues breach of Condition 2) = no cover for A's legal costs

ISSUE 8: INSURER'S CONSENT

How could clause be improved?

- Beware of and delete sweeper clauses
- Provide that insurer's consent not to be unreasonably withheld or delayed
- Provide that insurer will give retrospective consent where not reasonably practicable to obtain prior consent

ISSUE 8: INSURER'S CONSENT

Claims Conditions

- 1) *It is agreed that the Insured shall not negotiate admit liability or make any promise payment or settlement without the Insurer's written consent such consent not to be unreasonably withheld or delayed.*
- 2) ~~*The Insurer shall not be liable to indemnify the Insured for any*~~ *No costs and expenses which have been shall be incurred without the Insurer's prior written consent such consent not to be unreasonably withheld or delayed. The Insurer shall give retrospective consent to the incurring of costs in respect of which it was not reasonably practicable for the Insured to obtain prior consent.*
- 3) ~~*It is a condition precedent to any liability on the part of the Insurer under this Liability section of the Policy that the Claims Conditions are duly and faithfully observed and fulfilled by the Insured.*~~

ISSUE 9: DISPUTE OVER CLAIMS HANDLING

The Insurer shall be entitled to take over the conduct in the name of the Insured of the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any such claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any such claim

- Insurer appoints panel firm and has full discretion over conduct
- A is keen to resolve matter with C asap
- Insurer wants to fully defend action brought by C on basis that C has exaggerated the damage caused

ISSUE 9: DISPUTE OVER CLAIMS HANDLING

How can you protect yourself?

- Review wording carefully
- Consider introducing QC clause – but ensure it dovetails with your dispute resolution provisions
- Be mindful of your dispute resolution provisions – do not ignore on the basis they are boilerplate
- Seek to ensure you get the best legal protection
- If you do not want to be represented by an insurer's panel firm, engage with insurers

ISSUE 9: DISPUTE OVER CLAIMS HANDLING

The Insurer shall be entitled to take over the conduct in the name of the Insured of the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any such claim for indemnity or damages or otherwise. ~~and~~ The Insurer shall have full discretion in the conduct of any proceedings and in the settlement of any such claim, save that

- the Insurer must give due consideration to the interests of the Insured and shall not agree the settlement of any claim without the Insured's consent, and*
- the Insurer shall keep the Insured reasonably informed as to progress of the claim.*

Nevertheless the Insured shall not be required to contest any legal proceedings unless a Queen's Counsel (to be mutually agreed upon by the Insured and the Insurer) shall advise such proceedings should be contested.

SCENARIO CONTINUES...

- Coverage issues are resolved
- Company A confirms to insurer it will reinstate damaged property
- Insurer then challenges level of expenditure as wholly unreasonable and withholds payment
- Delay in receiving payment (which insurer ultimately pays) means Company A cannot go ahead and finally acquire 2 new properties
- Company A suffers loss as a result
- What can A do?

ISSUE 10: DAMAGES FOR LATE PAYMENT OF CLAIMS

- New implied term that claims must be paid within a reasonable time
- Applies to policies entered into on or after 4 May 2017
- Usual contractual hurdles apply, insured must show:
 - ✓ there is valid claim under the policy
 - ✓ the insurer has failed to pay within a reasonable time
 - ✓ the insured suffered loss caused by the insurer's failure to pay
 - ✓ loss was foreseeable – important to recognise this at placement
- One year time limit to bring a claim from payment of all sums due in respect of the claim
- Not a substitute for business interruption cover

ISSUE 10: DAMAGES FOR LATE PAYMENT OF CLAIMS

Beware clauses which contract out

The Insurer's liability to pay damages to the Insured for late payment of a claim under this insurance contract is limited as follows:

- *[The Insurer's liability is limited to £X.] OR*
- *[The Insurer's liability is limited to a multiple of [X] times the premium charged under this insurance contract.] OR*
- *[The Insurer's liability is limited to interest on the amount which should have been paid, at a rate of 2% above LIBOR. The interest shall be payable from the date when payment should reasonably have been made until the date of actual payment.]*



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TAKE-AWAYS FOR POLICY WORDINGS



PRACTICAL ISSUES FOR POLICY WORDING

Look to define “senior management”

Consider narrowing whose knowledge is attributed to the insured

Avoid conditions precedent and check for “sweeper” clauses

Ensure any Innocent Non-Disclosure clauses are fit for purpose

Avoid absolute obligations

Record warranties, breaches and remediation

Consider impact of section 11

Check if the insurer is seeking to contract out of IA2015



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10 PRACTICAL STEPS TO BEING A CIA* SURVIVOR

*COMPLIANCE WITH THE INSURANCE ACT

Kate Warren, Head of Insurable Risk, Lloyds Banking Group





A BRIEF INTRODUCTION





10 PRACTICAL STEPS

1) Do you need help?

- Can you manage this on your own?
- Do you sufficiently understand and can translate it for your business?
- External support?
- Internal – legal?

2) Renewal Process & Plan

- Review current process to evaluate compliance
- What needs to be done, who needs to be involved, and why
- What do you want from them and how is it to be presented
- What training / support / documentation do you need to provide?
- What is the sign off and approval process?

3) Policy Wording Review

- Review key heads of cover against data provided
- Are there any gaps and how to plug these
- Consider non-disclosure language in policy wording
- Review all proposed wording changes...Insurer contracting out!



10 PRACTICAL STEPS

4) Stakeholder Map

REASONABLE SEARCH

- List of individuals who 'know or ought to know'
- Detail role / title / seniority
- Agree this with insurers (at least primary) as reasonable / adequate / realistic
- Incorporate this into the wording if that is required / relevant

5) Data Collection

REASONABLE SEARCH

- Explain the Act – info providers are aware of the Act, disclosure requirements, non-compliance etc
- Provide explanatory note accompanying data requests
- Senior sign off to compliance with Act
- Audit trail!!

6) Governance

- Where does your team authority come from & is this written down, agreed by appropriate execs / committees? We linked to Insurer security.
- Are Board / Risk committee aware of the Act & how you intend to ensure compliance?
- Board Paper



10 PRACTICAL STEPS

7) Permission to proceed / sign off

- Head of Insurance / senior exec to review full pack of info
- We are preparing full briefing pack for Head of Operational Risk
- Reference in renewal sign off papers

8) Renewal Submission

FAIR PRESENTATION

- Bigger & more comprehensive pack than last year
- Lay out, no 'hiding' info
- Easily navigated
- Internal Renewal Process guide index
- Check what Brokers submit to the market including covering e-mail
- Last years info updated as well as new information?
- Check it before you send it out!

9) Broker Contract

- Review contract / TOBA you have with your Brokers
- Consider specific Insurance Act clause & define roles and responsibilities
- Get Brokers on board early in your planning



THE RENEWAL PACK

Renewal Pack Contents

- Renewal Process Guide index
- Stakeholder Map & disclosure statement
- Responsibility & authority summary
- Policy coverage vs data gap analysis
- Summary of what info / from whom
- Summary of how we comply with the Act
- Glossary of terms / definitions required??

Claims Data

- Use standard information bases
- Headings & itemise data – ie 1 large loss or many small ones
- For large losses, what doing to resolve
- How do these link to Risk Management information

A dog is for life.....and information is not just for renewal



10 PRACTICAL STEPS AT PLACEMENT

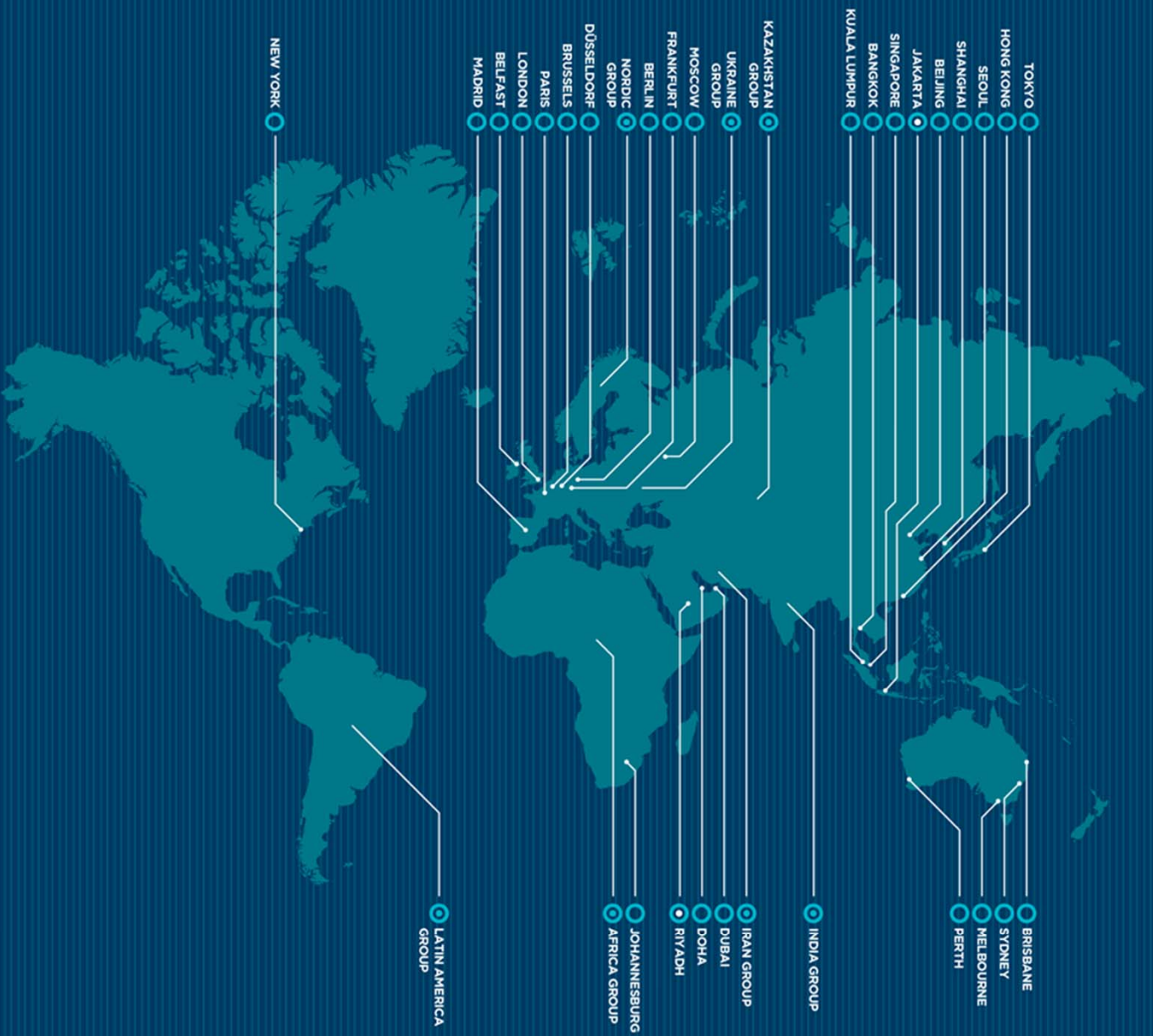
10) Relax



**KEEP
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AND
GET A
LIFE**

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