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Insurance Law and The Insurance Act 2015

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AGENDA



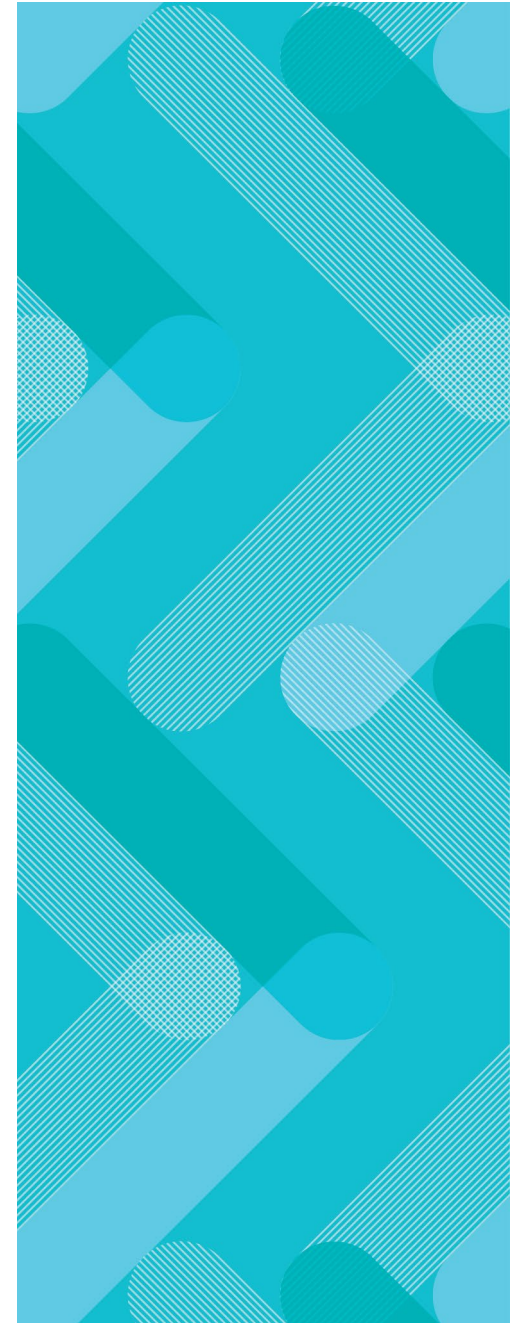
Placement / Pre-contract disclosure

Categorisation of terms

Damages for late payment of claims



PLACEMENT / PRE-CONTRACT DISCLOSURE



PRE-CONTRACT DISCLOSURE

“Old” law

- Duty to disclose every material circumstance which is known (or deemed known) to the insured
- The insured is deemed to know every circumstance that, in the ordinary course of business, ought to be known by him
- **Material fact** = every circumstance which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk
- Breach of duty = insurers can **avoid the policy in its entirety**
- Duty arises (i) before contract is concluded, (ii) at renewals; and (iii) extensions and other variations

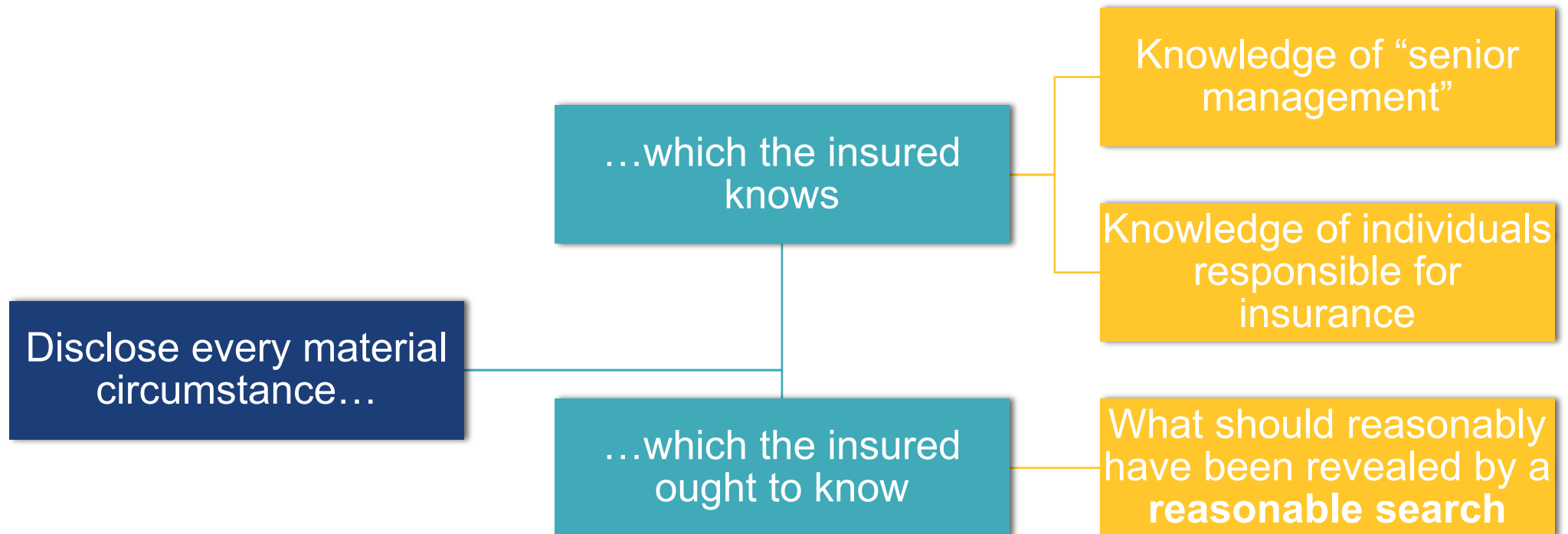
PRE-CONTRACT DISCLOSURE

Insurance Act 2015

- Applies to policies entered into or varied on or after 12 August 2016
- **Duty of fair presentation of risk**: insured must:
disclose every material circumstance which the insured knows or ought to know, or
failing that, give the insurers sufficient information to put a prudent insurer on notice to make further enquiries
present in reasonably clear manner and accessible to prudent insurer
- **Materiality** = test unchanged i.e., every circumstance which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk

PRE-CONTRACT DISCLOSURE

Duty of fair presentation



- Disclosure should be made in a reasonably clear and accessible manner
- The insurer is presumed to know common knowledge and what underwriters writing that class of business should know.

PRE-CONTRACT DISCLOSURE

Proportionate remedies

- For deliberate/reckless breaches: **avoidance** (no return of premium)
- For other types of breach:
 - if the insurer would not have entered into the contract: **avoidance** (but must return premium)
 - If the insurer would have entered into the contract but on different terms: **contract may be treated as if it included those terms from the outset**
 - If the insurer would have entered into the contract but would have charged a higher premium: **the amount paid on claim may be “reduced proportionately”**

CASE STUDY



- Company A has HQ in Birmingham and owns 20 properties around the UK
- Company B operates staff restaurant within HQ and at all A's locations
- Company A has a Combined Property and Liability policy for HQ and all its UK properties
- Policy renewed on 10 May 2019
- Disclosure tells insurer of A's corporate strategy to acquire 2 new properties this year
- Disclosure does not mention that there have been sporadic issues with overheating of the extractor fans in the kitchens at all locations in certain environments
- Fire in the staff restaurant on May bank holiday weekend (27 May)
- Property damage of £20 million

INSURER'S ARGUMENTS AROUND DUTY OF FAIR PRESENTATION

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

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

#3 Remedies

ISSUE 1: DUTY OF FAIR PRESENTATION – ACTUAL KNOWLEDGE

Insurer's argument:

- A breached its duty of fair presentation by failing to disclose the sporadic issues with overheating of the extractor fans in the kitchens at all locations in certain environments

Poll question:

- Did Company A have actual knowledge of this if it was known by:
 1. Company A's Head of Facilities for all UK locations?
 2. Company B's Head Chef at HQ?

ISSUE 1: DUTY OF FAIR PRESENTATION – ACTUAL KNOWLEDGE

Who counts as “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*
- Company A’s Head of Facilities could fall within “senior management” depending on his/her role e.g., is that a director role? Does the Head of Facilities report into the COO?
- The Head Chef is not employed by Company A.

ISSUE 1: DUTY OF FAIR PRESENTATION – ACTUAL KNOWLEDGE

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 – REASONABLE SEARCH

Insurer's argument:

- Insurer argues that information known to Company B forms part of the reasonable search
- Company A's Risk Manager sent Company B a simple and formulaic questionnaire with no questions directed to individual locations
- Insurers argue that the questionnaire was not a “reasonable” search and therefore Company A breached the duty of fair presentation

Poll question:

- Can information known to Company B form part of Company A's reasonable search?

ISSUE 2: DUTY OF FAIR PRESENTATION – REASONABLE SEARCH

What is the scope of a 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)*”
- If insurers are correct that the formulaic questionnaire was not reasonable, they may have proportionate remedies available

ISSUE 2: DUTY OF FAIR PRESENTATION – 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
- Keep an audit trail of the reasonable search you have done

ISSUE 3: REMEDIES

Insurer's argument:

- 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

$$\% \text{ of claim payable} = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

- Calculation:

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

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

ISSUE 3: REMEDIES

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)

Poll question:

- 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 3: REMEDIES

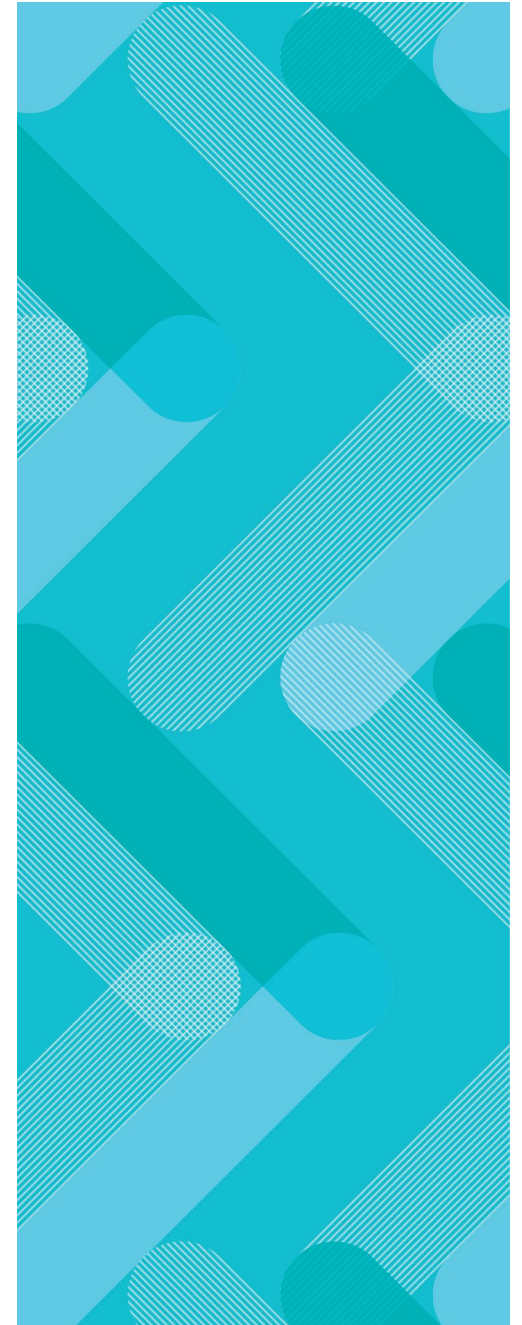
How could clause be improved?

“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 have 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



CATEGORISATION OF POLICY TERMS



KEY TERMS OF AN INSURANCE POLICY

Warranties

Conditions

- Conditions precedent
- Bare policy conditions

CATEGORISATION OF POLICY TERMS

Warranties

- Pre-contractual promise by the insured
- Warranties can be created by:
 - express statement
 - construction of the term:
 - Goes to the root of the contract,
 - Is descriptive of the risk or bears materially on the risk, and
 - Damages would be inadequate/unsatisfactory remedy.
- Pre IA2015 – “basis of the contract” clauses

CATEGORISATION OF POLICY TERMS

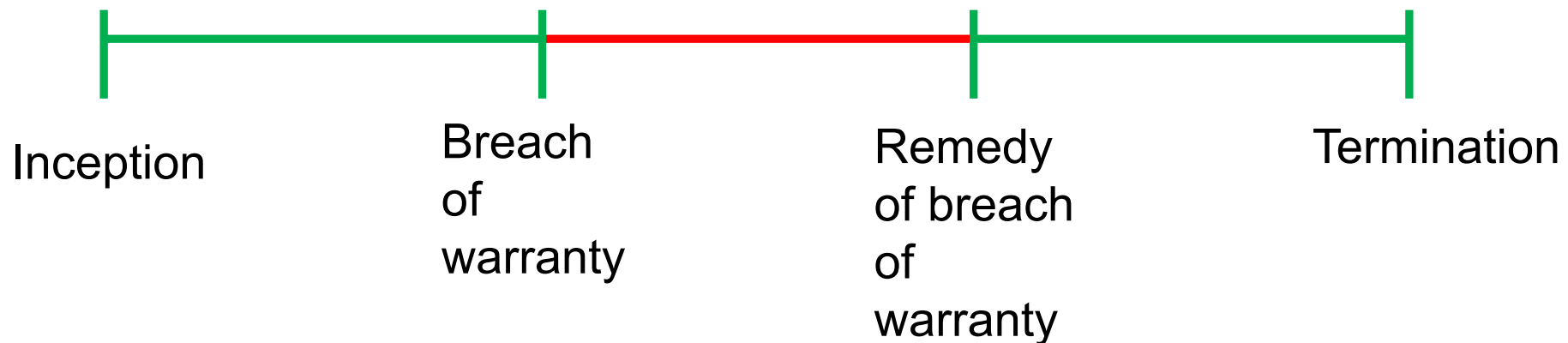
Warranties – Effect of Breach

Old law

- Automatic end to the risk as soon as the warranty is breached

Insurance Act 2015

- Warranties operate only as suspensive conditions



- Abolition of basis clauses

CATEGORISATION OF POLICY TERMS

Conditions

Conditions specifies:

- An obligation on the insured to act in a particular way; or
- A contingency upon which the validity of the policy or a claim may depend
 - Conditions precedent
 - Bare policy conditions

CATEGORISATION OF POLICY TERMS

Conditions precedent

- Condition precedent to validity of policy/attachment of risk – if not fulfilled, insurer does not come on risk and insured is entitled to a return of premium.
- Conditions precedent to the insurer's liability – failure to comply generally prevents insured from making a particular claim.

Can be created by:

- Consequences of a breach of condition spelt out
- Labelled as "condition precedent"
- Sweeping up clause
- Wording or significance of condition leads to conclusion that it was intended to be a condition precedent

CATEGORISATION OF POLICY TERMS

Bare policy conditions

- Deal with conduct of insured during currency of policy
- Breach generally gives insurer an action for damages for proven loss
- No right to determine the policy

TERMS DESIGNED TO REDUCE RISK OF LOSS

Old law

- Insurers' remedy depends upon classification of the term
 - **Warranty**: breach automatically brings insurance cover to an end
 - **Condition precedent**: breach means:
 - insurer does not come on risk (if cp is precedent to the validity of the policy or to the attachment of the risk), or
 - insured is prevented from making a claim (if cp is precedent to the insurer's liability)
 - **Bare condition**: breach will give rise to a claim in damages if insurers can show they have suffered prejudice – likely to be difficult
- Remedies available irrespective of cause of the loss
- Breach of term can be irrelevant/immaterial to the claim/loss and insurer still has a remedy

TERMS DESIGNED TO REDUCE RISK OF LOSS

Key Change under Insurance Act 2015

- Applies to any contractual term if compliance would tend to reduce the risk of loss of a particular kind or at a particular location or time (“**risk mitigation**” terms)
- Does **not** apply to terms which go to the **risk as a whole**
- Where such a term is breached, insurers will only have a remedy if the loss suffered is of the **particular kind** or at the **time/place** contemplated by the term
- Burden on the insured to show that the breach **could not have increased the risk** of the loss which actually occurred in the circumstances in which it occurred

Potential difficulties in practice:

- Determining which terms fall within the scope of this provision
- Will the policyholder be able to show that the breach could not have increased the risk of the loss?

POLL QUESTION

Which of these clauses is a condition precedent?

A

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

B

It is a condition precedent to any liability on the part of the Insurer under this Policy that the Claims Conditions are duly and faithfully observed and fulfilled by the Insured.

C

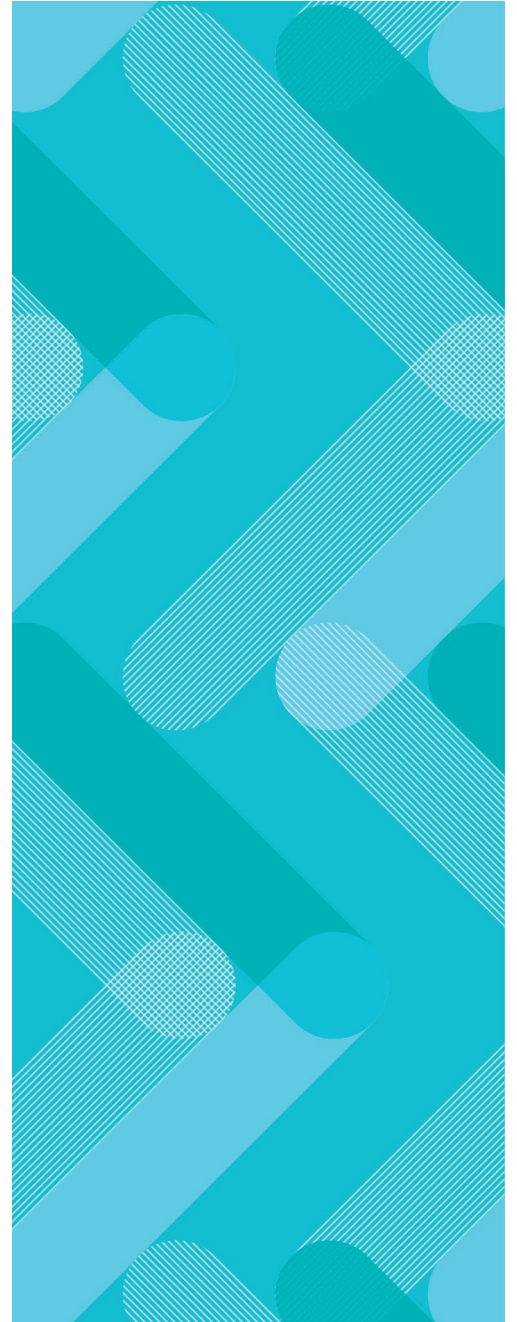
The Insured shall give to the Insurer notice in writing as soon as practicable of any circumstance of which they shall become aware during the policy period which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which 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"

Answers

1. A?
2. B?
3. C?



Damages for late payment of claims



DAMAGES FOR LATE PAYMENT OF CLAIMS

- Old position = policyholder could only recover original loss + simple interest whatever length or cause of delay
- Enterprise Act 2016 now implies a term into policies 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

PRACTICAL TAKEAWAYS

Look to define “senior management”

Create audit trail of “reasonable search”

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

Questions?

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