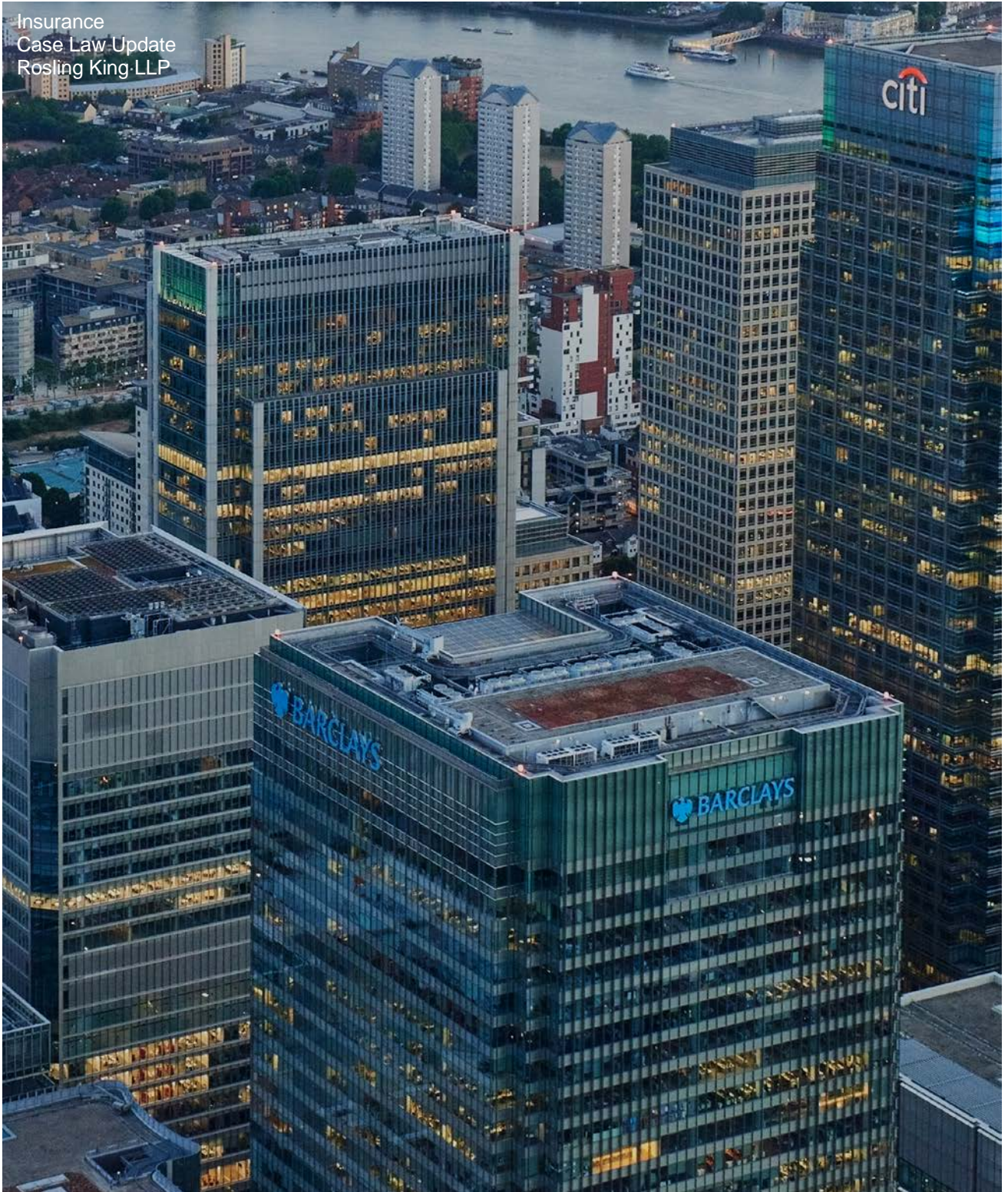


Insurance  
Case Law Update  
Rosling King LLP



On 12 August 2016, the long awaited Insurance Act 2015 (the “Act”) came into force, introducing fundamental reform to insurance coverage law. The Act marks the biggest change to insurance law in over 100 years and looks to address a perceived imbalance between Insurers and Insureds. The Act applies to all insurance contracts, and variations of existing insurance contracts, entered into on or after 12 August 2016.

Further to our previous update in February 2015, we set out a reminder below of the key changes and provisions introduced under the Act.

### Key changes under the Insurance Act 2015

#### Duty of fair presentation

The Act imposes a new duty on the Insured to make a fair presentation of risk to Insurers before entering into a non-consumer insurance contract. It is hoped that this will lead to increased co-operation between Insurers and Insureds to consider the risks in further detail pre-inception. Under the Act, the Insured is obliged to disclose every material circumstance which it knows or ought to know. Failing that, Insureds are required to disclose sufficient information to put a prudent Insurer on notice that it needs to make further enquiries about potentially material circumstances. In conjunction with the duty, Insureds are required to undertake a “*reasonable search*” of the information available to them. This new duty of fair presentation replaces the previous duty of disclosure

#### Remedies for breach of duty of fair presentation

Under the Act, Insurers are able to bring an action for relief from non-disclosure. Insurers are required to show that, but for the breach, Insurers would not have entered into the insurance contract, or they would have done so, but on different terms. The remedies available to Insurers are set out at Schedule 1 of the Act. A breach for which Insurers have a remedy is known as a “*qualifying breach*” under the Act.

There is a variety of remedies available, dependent on the severity of the breach, from avoidance of the contract (the old remedy) to proportionate options of premium increase or part/whole non-payment of a particular claim.

#### Warranties and other terms

Part 3 of the Act abolishes “*basis of contract*” clauses from non-consumer insurance contracts (which previously converted representations into warranties and released Insurers from liability where a warranty was breached). A breach of warranty will now suspend Insurers’ liability, pending resolution of the breach, rather than give the insurer a right to termination of the insurance contract. Once the breach has been remedied, the policy of insurance will continue as if there had never been a breach.

In addition, under section 11 of the Act, there must be a relevant connection between the breach of any term (other than a term which defines the risk as a whole) and the actual loss that occurred, in the circumstances in which it occurred. By way of example, if a burglar alarm warranty was not complied with and if it has no connection with a subsequent claim for



a kitchen fire, Insurers cannot rely on the breach of the burglar alarm warranty to avoid liability for that fire claim. The onus is on the Insured to demonstrate the lack of connection

### Fraud

Previously, in the event of a fraudulent claim, Insurers were able to terminate the insurance contract. Insurers are still able to do so under the Act, but are required to give notice to the Insured that they are treating the contract as having been terminated with effect from the fraudulent act. Previous valid claims arising prior to the fraudulent act are unaffected.

### Duty of good faith and contracting out

The Act also abolishes any rule of law which allows a party to avoid the insurance contract on the ground that the other failed to act in "*utmost good faith*".

Under Part 2 of the Act, in respect of non-consumer insurance contracts, parties are free to contract out of certain provisions, namely, the duty of fair presentation and fraudulent claims. This allows parties to negotiate on a commercial basis and agree less favourable terms than those provided under the Act. This is on the proviso that they comply with the transparency requirements at section 17 of the Act in respect of any "*disadvantageous terms*" agreed. The transparency provisions are included to ensure that any Insured will be aware that they are entering into a policy on terms less favourable than those provided for under the Act.

However, parties are restricted from contracting out of the new prohibition on "*basis of contract*" clauses under Part 3 of the Act and the contracting out provisions do not apply to settlement agreements.

It is not possible to contract out in respect of a consumer insurance contract as any attempt to do so will have no effect.

### Conclusion

The Act is a welcome update to these key areas of insurance practice and law, bringing the UK more into line with other countries and by doing so, reinstating its position as the leading insurance market in the world.

The Act is of key importance to all forms of insurances and should assist both Insureds and Insurers in having created a fairer and more balanced landscape in which to operate.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.