Fifty Shades of Insurance

The International Institute of Marine Surveying presents a compendium of the thirteen chapters of the ***50 Shades of Insurance*** series in association with Matrix Insurance Ltd.

This publication is made up of a collection of thirteen articles written by the Matrix Insurance Ltd team and originally published in The Report Magazine over a number of editions.

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Fifty Shades of Insurance

by MATRIX Insurance Services Ltd.

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Fifty Shades of Insurance: Chapter One

Matrix Insurance Services Ltd is an independent insurance intermediary based in south east England. In this article, one of a series and not to be confused with *Fifty Shades of Grey*, Matrix explains why getting a 'quick insurance quote' is just not that straightforward and argues the necessity for form filling.

THE START OF SOMETHING WONDERFUL...

As an independent insurance intermediary one of our jobs is to arrange insurance for marine surveyors for their professional indemnity insurance and associated liabilities. In order for us to do this we require them to fill in a proposal form that will then be sent to insurers to obtain a quotation. Existing clients receive a renewal declaration from us six weeks prior to their renewal date for them to complete to inform us and insurers of any material changes that will occur in the forthcoming insurance year for, example change in income or activities. Insurers issue a renewal quotation based on the information provided in a renewal declaration form. This is usually, although not always, a relatively simple process.

We all dislike filling in forms and marine surveyors are no exception! We receive many email enquiries from those interested in professional indemnity insurance for their marine surveying activities asking us to give them a "quick quote" without having to go through the process of filling in a proposal form. The short answer, of course, is that we can't! Not because we can't be bothered to contact insurers, but because it is simply impossible to know what an individual surveyor's requirements might be. Marine surveying is varied and diverse encompassing many activities from pre-purchase surveys to post purchase inspections, cargo inspections, sea trials and the list goes on. Equally there might be a requirement for cover for Marine Coastguard Agency Code of Practice or Boat Safety Scheme work but without knowing the requirements of an individual or a firm, insurers cannot possibly guess whether these covers should be included. Nor can the limits of indemnity that a marine surveyor might require be conjured up out of thin air without an idea of what aspects of the profession they actually undertake and the risks involved.

In order for insurers to provide a quotation they need to know amongst other things how much income has been earned during the previous insurance year and what the income forecast is for the forthcoming year. All these facts are important to insurers so that they can properly rate a risk. So forms, alas, have to be completed!

The proposal form then is a necessity in order for insurers to be able to provide an accurate quotation and to ensure the correct cover is obtained for an individual or company.

For us it is important at an even earlier stage to know certain information. An important issue is where a marine surveyor is located and where they operate which is not apparent from a one line email enquiry signed only "John Smith" for example. We deal with surveyors from around the world and know from experience that there are some countries where we are unable to arrange cover without the involvement of a local agent and others such as North Korea where cover cannot be provided due to sanctions. So something as simple as an address is of paramount importance in the earliest stages for us to start the process of arranging insurance cover and a telephone contact number is always very useful.

So as soon as a proposal form is completed and returned to us we forward this to insurers, they issue a quotation and we pass this information to the surveyor for them to consider. The renewal process works in the same way but with most of the information with insurers the form filling takes less time! However you look at it form filling is an integral part of the insurance process, but once you've filled in the proposal form it gets much easier!

Fifty Shades of Insurance: Chapter Two

DO YOU KNOW YOUR "APPLES FROM YOUR PEARS"!

Who are your insurers?

Few know the history of insurance but it is fundamental to the understanding of the structure of the current insurance market to know how underwriters view risk, why they underwrite certain risks and not others and no doubt most important to the readers of this article why your premium is what it is!

We will expand on these issues in future articles but let's now take a journey back through time.

Back in ancient times there had been various methods of transferring and distributing risk but we will start with a concept that is more recognisable to our modern insurance mechanism.

So for the purpose of this article we start with the commercial concept of insurance that appeared in response to the Great Fire of London in 1666 when "London burnt to sticks". As a result of the immense personal loss to ordinary citizens a company was set up that would not only rebuild homes that burnt down in any subsequent disaster but would also offer compensation to people in order for them to replace their possessions. All you had to do to take advantage of this new scheme was to pay an annual amount of money to the company which has become known as a "premium". This idea was so successful that it spread like wildfire to other areas of daily life to insure against general loss. The first fire insurance company was set up in 1681.

The real growth in insurance, however, began in the early 1700s at Edward Lloyd's coffee house in the City of London. There were more than 80 coffee houses within the city walls each specialising in a different area of commerce. Lloyd's particular area of interest was shipping and the lucrative trading routes upon which the wealth of the emerging British Empire depended.

He began to amass crucial information about the transport of goods by sea to disseminate among his customers making his coffee house an important centre for those with shipping interests.

But it wasn't only cargoes that were at stake, the defence of Great Britain depended upon her navy. Edward Lloyd knew that the ships and their cargoes were at the mercy of the weather, privateers and war. If a ship was in peril the cargo would be the first thing to be thrown overboard without a thought for any losses that would be incurred by the owner of that cargo. If, on the other hand, a ship fell prey to conditions outside the control of the crew there would be harsh financial implications for her owners.

Back in the City of London, and thanks to Lloyd's wealth of information, such eventualities and the way to mitigate against them were being discussed in his coffee shop. Wealthy members of Lloyd's clientele were asked to pay a subscription which, together with the premiums paid by traders and ship owners, would be invested to provide high returns in order that compensation could be paid to those who lost ships or cargoes, but the investments had to reap profits for the members or there would be no attraction for the members to invest in the ventures. All they had to do was write their name under the risk information on the Lloyds slip for the venture they had agreed to back. The first underwriters were born. These underwriters became "selective" in the risks they wrote to try to ensure there was always a pool of money to pay out when claims arose and also to ensure the concept remained attractive to investors, the names. In 1774 long after Lloyd's death the members formed a committee moved to the Royal Exchange on Cornhill and the Society of Lloyds was formed.

So from these humble beginnings mutual societies, insurance companies and Lloyd's syndicates developed.

But it is not that simple! There are also brokers, independent insurance intermediaries, agents that deal solely with one insurer, underwriting agencies and intermediaries with schemes as well as binding authorities. So in some cases risks are bound for insurers by other entities with the authority of insurers. Their role will be explained in future chapters.

The information on your insurance that you receive should comply with the Financial Conduct Authority rules (the regulatory body of insurance) and should state who the insurers are that are underwriting your risk; sometimes it may just state underwritten by various Syndicates at Lloyd's.

Unless you deal direct with an insurer there is normally, between you and the insurer, an intermediary such as an insurance broker or independent insurance intermediary that arranges the insurance cover for you. They may approach a selection of insurers; mutual, companies and Lloyds syndicates as well as underwriting agencies and other insurance intermediaries that may have specialist schemes arranged with insurers. Not all insurance intermediaries will approach the same insurers and there may be more than one intermediary involved in the placing of your business.

If you require further clarification or wish us to address an insurance matter please contact us.

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Fifty Shades of Insurance: Chapter Three

DISCOVER OUR NEEDS & UNDERSTAND THE DEMANDS OF OTHERS

We made a presentation at the recent IIMS conference in Southampton from which we received requests for more! So here we are...

Because we are living in an increasingly litigious society Professional Indemnity Insurance or PII as it is commonly known is accordingly increasingly important and in some cases a requirement of a client. Never assume that it "won't happen to me" as it very well might! So if you have PII cover you have some form of financial protection for your assets as well as more peace of mind in this otherwise stressful world. BUT make sure you have the correct cover! There is no point in paying a premium to find out that your insurance policy will not be providing indemnity for a particular occurrence.

Check your policy provides:

- cover for personal injury and death arising from professional negligence
- an adequate indemnity limit for personal injury and death arising from professional negligence; some policies give an annual total indemnity limit (often termed in the aggregate) and others an indemnity limit specified for each claim, sometimes with an overall policy or section aggregate indemnity limit;
- cover for claims arising from accidental personal injury and death of a third party as well as accidental damage to third party property, with an adequate limit of indemnity
- the cover you are expecting to receive such as the countries where you will be undertaking work and where your client may commence proceedings; some policies may restrict cover to claims that commence in UK courts and/ or to UK judgements; the latter may be a problem if your client is resident in another country. So read your schedule, policy document and any endorsements carefully particularly the exclusions, limitations and warranty clauses.

So you are happy with your insurance cover, what about your trading terms and conditions (T&Cs). Applying your T&Cs from the beginning of a job could alleviate substantial stress in the future. What does this really mean? Well it means getting your T&Cs to your client either before they accept your quotation to do the work or with your quotation. Perhaps refer in your quotation to your T&Cs on your web site or automatically attach them to an email with your quotation - better still get your T&Cs signed by your client as acceptance of your quotation. Yes we know it can be difficult!

T&C's agreed and hopefully signed and you are away! But beware, this doesn't mean you can embark on a survey thinking that you can do anything in the belief that your T&Cs will defend you against any claim. Clauses in contracts are not always applied by a court of law and less so if they are restrictive or limit liability and you are dealing with a consumer. Also, different countries have different laws and if you trade with persons in another country perhaps say the EU you may find that the claim is litigated in the country that the claimant is resident.

Okay so not all clauses may be applied even if they are in a contract but they may be a deterrent to some people who may consider "just having a go". So, some basic clauses that should be considered are clauses that limit the amount you may be liable to pay to a claimant should you be found liable to them, and time restrictions on the period in which a claimant can commence a claim against you. Another useful clause is a " Force Majeure" clause. This essentially protects you from circumstances arising from events beyond your control and which prevent you from undertaking your obligations under your contract with your client, such as completing the work you agreed to undertake. These are just a few clauses to think about including in your T&Cs and it is always worth reading other contracts you sign or agree to during your everyday life as many contain interesting clauses.

On a final point of this chapter, it is always a good idea to make notes of any conversations you have had with your clients or potential clients immediately or as soon as possible after the conversation has taken place and to date and sign your notes and then send them, where possible, to the client. This could be your saviour!

Fifty Shades of Insurance: Chapter Four

NOW YOU'VE DISCOVERED YOUR NEEDS – WHAT NEXT!

Well we said we would continue and so we are...

Control your risks
It is difficult to stop people commencing litigation which is an unfortunate fact of everyday life. So often casually started without a thought for the consequences, time, money and stress. So what can we do about it?
Here are a few tips…

You have your professional indemnity insurance cover in place, you have applied your terms and conditions of business and you are on to doing the job you are to be paid for. The risks to you now arise from the work and advice you are to provide to your client.

So as with all stories we start at the beginning. It starts with you knowing what you are expected to be doing for your client. What is your job? Good question as it depends predominantly on your client's remit: a valuation, condition survey or cargo survey perhaps. Did you get your instructions in writing? Or at least confirm in writing what you have been asked to do and why? Or better both! Should you be giving your client or prospective client some guidance at this stage as to what you should be doing for them? Do you need to ask some more questions such as their intended use of the vessel?

Your obligations to your client and their expectations are intrinsically linked with understanding and correctly complying with your remit; one" flows" from the other and this is the starting point of the structure and content of the report you compile and you should always keep this in mind when providing your advice.

A mistake which can arise is that when instructed to provide only a valuation survey, comments are included in the report relating more appropriately to a condition survey. This may change the report from solely a valuation report to one including a condition report from which liabilities may arise if there is reliance on the comment(s) provided which results in financial loss for a client.

Do you need to temper the expectations of a client, for example, by referring to subjectivities in a report such as the fact that the location of a vessel may affect its sale price?

We would like to know, what is a "walk-through-survey"? We have seen these instructions to surveyors, but surely all surveys and most survey jobs require walking through or around a vessel? Answers on a postcard please… But it seems from our experience that however casual it may sound a "walk-through-survey" is anything but casual. Many a claim has arisen from such a survey because the report does not make it clear what has been undertaken, *i.e.* lesser time than was required to undertake a proper and full condition survey. The "walk through" survey seems to arise most of the time from the desire of a client to control expenditure and you have to ask yourself whether this is work you wish to undertake, or rather are you happy with the risks!

Understand your remit. Make it clear in your report what you were instructed to do and any consequences of those instructions. Make clear your findings providing a priority on actions that need to be undertaken so that an unseaworthy vessel is not used until seaworthy and vessels are not used for what you did not expect them to be used for, such as sailing half way around the world.

Finally in this chapter a real don't - don't sign off unseen work or do favours for any person however much you may trust them – the apparently nicest clients can also be the cutest when it comes to litigation.

To be continued...

Fifty Shades of Insurance: Chapter Five

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The Marine Insurance Act 1906 Fades to Grey in the Shade of the Insurance Act 2015

What the Changes Mean for You...

There is often a view amongst those who take out insurance that insurance companies perform a useful function but are not there to pay out! In other words an insurer will make every excuse to void a policy or avoid paying out under the terms of a policy based on the failure of an insured to comply with pre-contractual duty of disclosure, warranties and attempts to prove that an apparently reasonable claim may be fraudulent.

Until 12th February 2015 all insurance was underpinned by the Marine Insurance Act (MIA) 1906. However, as the title suggests, this has become impracticable in the 21st Century. Therefore the Law Commission of England and Wales and the Scottish Law Commission, collectively called the Law Commissions, have been undertaking since 2006 a fundamental reform of the MIA. In so doing they have updated such principles as "utmost good faith", whereby the insured is obliged to disclose every material circumstance. However, not everyone is aware of what constitutes a material circumstance and in the event of a claim insurers may find circumstances of which they were previously unaware and thus decide to invalidate the policy in one fell swoop.

It is widely supposed that in 1906 it was the fledgling insurance companies who were at the mercy of well-established city firms, rather than the other way round as it is seen today. Thus "utmost good faith" begun in the 18th Century, developed in the 19th Century and brought into law in the 20th Century, has become irrelevant in the 21st Century where it is seen as being weighted in favour of insurers. So circumstances change for everyone…

So, what were the Law Commissions' findings, and what does the new Insurance Act 2015 mean for you?

Before 12th February 2015 the Law Commissions had already made two pieces of legislation. The first, the Third Parties (Rights against Insurers) Act 2010 makes it easier for a third party to pursue a claim directly against liability insurers if the insured is or becomes insolvent. Meanwhile, the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) deals with misrepresentation, disclosure and breach of warranty in consumer general insurance contracts.

Focussing now on commercial (non-consumer) insurance law, it was evident to the Law Commissions that reform was essential as the existing law:

- Undermined market trust and confidence because the UK economy was prey to the unbalanced nature of the law which aggravated disputes between insurers and business
- Threatened the credibility of UK business law because the antiquated nature of the law meant it was out of touch with reality

In order to overcome the archaic MIA the Insurance Act 2015 sets out to remedy the old laws in three important ways by addressing:

- The pre-contractual duty of disclosure and the effect of (mis)representations at that stage
- The effect of warranties contained in a policy which often lead to claims not being paid
- Insurer's remedies for fraudulent claims which were considered harsh and resulted in wrongful accusations of fraud and voiding of policies after years of premium payments

The Law Commissions' solution to pre-contractual duty of disclosure is to replace the previously embedded principle of "utmost good faith" with a new obligation upon insureds that of "a fair representation of the risk" which should be "reasonably clear and accessible to a prudent insurer". The legislation states that a "fair presentation of the risk [requires] disclosure of every material circumstance which the insured knows or ought to know, or… gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries".

Pre-contractual duty of disclosure also includes the issue of "Knowledge" for both insured and insurer. An insurer can reasonably expect an insured to know about their day to day business activities and to include information in their proposal form that "should reasonably have been revealed by a reasonable search".
The Act goes on to lessen the burdens on insureds as it imputes knowledge into underwriters as it is deemed that:

- An underwriter ought to know:
  - information known to an employee in the insurance entity or their agents which they ought reasonably have passed on to the underwriters,
  - Information in the possession of the insurer and readily available to the underwriter, and
- An underwriter is presumed to know:
  - information which is common knowledge
  - Information which an insurer offering insurance to a particular field of activity would reasonably be expected to know in the ordinary course of business

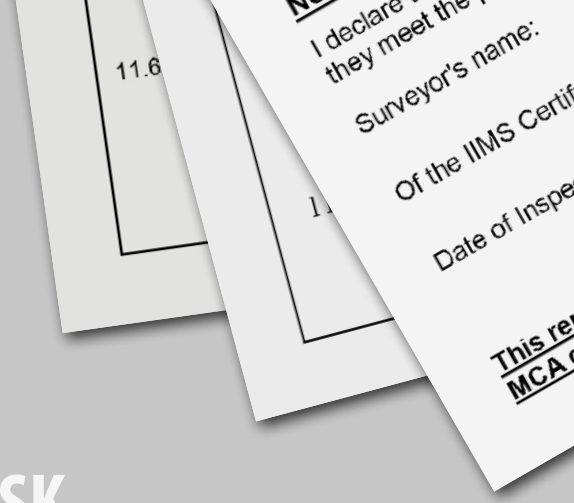
Used by insurers to control risk, warranties are a means of ensuring that policyholders are held to the terms of their policies, especially if the "basis of contract" principle is applied to the initial proposal form. The "basis of contract" has the effect of turning the whole form into a warranty allowing insurers to void a claim on the flimsiest of pretexts. It is staggering to think that this principle has been a matter of hot and costly legal dispute since 1908 – just two years after the MIA became law – and has only now been addressed by Clause 9 of the Insurance Act 2015 which abolishes "Basis of contract" clauses from business insurance contracts. Under the current regime insurers have been able to discharge their insurance responsibilities over a breach of warranty even when that breach had been remedied. This was too harsh so the new Act affect is to make a breach of warranty merely suspend insurer's liability and a breach of warranty will be deemed to be remedied if it can be proved that the breach carries no consequences, financial or otherwise to insurers.

Wrongful accusations of fraud that have led to long-term policies being cancelled instigated the writers of the new Act to address this problem. There is still the remedy for insurers of forfeit of claims if they are proven fraudulent as is the current position, and insurers will be able to terminate a policy at the time of the fraudulent act. However, any outstanding legitimate claims prior to the fraudulent claim must under the Act still be settled by insurers even if a policy becomes void as the result of a fraudulent claim.

Although the Insurance Act 2015 became law on 12th February 2015 it will not come into force until 12th August 2016 so until then all policies will remain subject to the Marine Insurance Act 1906. However, now with the new Act there is light at the end of the tunnel.

The above is just a brief summary of the content and effect of the new 2015 Act that we hope readers have found of interest.

Fifty Shades of Insurance: Chapter Six



THE THREE S'S - CONTROL YOUR RISK, CONTROL YOUR DESIRES

SUPRESS SMO

Continuing to control your risk:

Chapter 4 was headed "control your risks" and signed off with a "to be continued…" Chapter 5 duly took a significant detour to outline the effects of the new Insurance Act 2015. We return now, then, to the continuation of risk control…

We have already outlined some of the "what not to do's": the "walk through survey"; sign off unseen work; favours; undertake work without Terms & Conditions the list goes on… This article, then, will attempt to take a more positive stance with a few "do's" rather than "don'ts".

Some of what follows may be obvious to you, but a few practical suggestions may nonetheless be helpful to consolidate what you already know. If, on the other hand, you are just starting out on your marine surveying career this may help you avoid early mistakes and start you off on a good footing.

Your report:

Having carried out the survey to your client's written instructions and expectations you now need to write your report. Do this with care. Write exactly what you have done and seen, and just as importantly what you have not done and seen and why. If a survey should have taken two days, but it in fact was completed in one, explain why; if it was at the client's request say so and state any concerns that may arise as result of a too short a survey time.

Use clear language that is meaningful and avoid where possible, comments such as "good for her age". What one person believes represents "good for age" another may not. You may decide to use a coding system to explain the condition of parts of a vessel i.e. to identify what is new or used but serviceable or what is used but requires checking again within a time period.

Once written read the report thoroughly, this is best done after a break from writing a report so if possible walk away from it and go back to it later with a fresh eye to (re)consider what you have written and how it will be interpreted by your client or any other reader. If there is a dispute ultimately the content of your report may be interpreted by a judge!

So have you given a true representation of your findings? Will the client understand your comments and understand any action(s) they should be taking now or within a certain time period. Keep all your notes and photographs whether you use them in a report or not and check and reconsider them again before you sign off your report. This is always a worthwhile exercise as it is easy to miss something first time around, and when you are constantly reading and checking, something in the "brain" can read what it thinks the report should say and not what it does.

Your Terms and Conditions and Activities:

Always provide your Terms and Conditions to your client before starting work and best practice, although not always possible, is to obtain written confirmation that your client agrees to those Terms and Conditions applying. Check your terms and conditions regularly to ensure they are up to date, especially if you are offering new services. Send a copy of any updated terms and conditions to your broker or insurer as they will normally need to know about any changes you have made and in particular advise them of any changes of business activities; you are normally only insured for the business activities that you are undertaking that you declared to your insurers.

If you are required to provide your services under a third party's contractual terms and conditions, read the contract carefully and consider whether you need legal advice. Are there any onerous terms in the contractor or indemnity or limitation clauses?

Again notify your broker or insurer (if you arrange your insurance direct with insurers) and find out if they require a copy of the contract; always check the confidentiality issue. Insurers will need to be made aware of a contract that may affect your liabilities and/or the insurance policy cover, so a good rule of thumb is to liaise with them while negotiations are proceeding. Insurers are always concerned, amongst other things, that a contract may increase an insured's liabilities or perhaps waive insurer's rights of subrogation.

Rights of Subrogation What is this?

In simple terms this mean that if an insurer indemnifies an insured under the terms of an insurance policy the indemnifying insurer has the right to seek recourse against the person who caused the loss to the insured (and hence the insurer) in order to recover the amount paid out under the policy terms and conditions. They "step into the shoes of an insured". They are in essence the insured as they have no more rights or remedies than an insured they have indemnified. So if a contract between an insured and a third party prevents recourse against a party that has a caused a loss, the insurers would have lost their right of subrogation and may not provide indemnity.

The rights of subrogation is something that should ALWAYS be considered when you are signing contracts with third parties or dealing with a client who has a complaint as you may have a problem with obtaining indemnity under your insurance policy if insurers can prove that without their consent you waived their rights of subrogation; you may have also prejudiced their ability to defend you. So think carefully before you act.

In summary, we would suggest that a part of controlling your risk requires controlling your desires!

- **Supress the urge to rush home from a survey, dash off your report and press "send".**
- **Smother the desire to respond without thought.**
- **Stifle your temptation not to advise your broker or insurers of changes.**

We call these the "3 S's"!

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Fifty Shades of Insurance: Chapter 7

UNLEASHING THE ADVANTAGES OF MEDIATION

In this and the next chapter we will "pry" into the secret world of mediation, hopefully "unleashing" its advantages and "destroying" any myths and the mystery of the process.

Talking and listening are skills we use every day as a matter of course throughout our whole lives. It is however interesting that in certain situations we "freeze" and avoid talking with someone or listening to them, commonly when there is a conflict or dispute. What causes this we wonder? Perhaps the dislike of confrontation or the fear of not being able to handle a situation or being unsure whether what may be said could invalidate an insurance cover. There can be many reasons.

Conflicts and disputes don't just dematerialise suddenly, they won't go away on their own. Ultimately if there is no communication at an early stage in a dispute it can quickly escalate and soon costs can spiral out of control.

SO WHAT CAN FACILITATE DISCUSSION BETWEEN DISPUTING PARTIES?

A solution is to use a form of alternative dispute resolution and one of these is mediation which has now been recognised by the courts. Under the court practice directions litigation should be a last resort. Parties should consider the possibility of reaching a settlement at all times by negotiation or some other form of alternative method of resolving a dispute. If proceedings are issued parties may be required by the court to provide evidence that some form of alternative dispute resolution has been considered.

SO WHAT IS MEDIATION?

- It is a private non-binding, voluntary and without prejudice process in which a third party known as a mediator intervenes in a dispute as a facilitator for discussion with the intention of bringing the matter to a close in a written settlement agreement. That settlement agreement does not have to be financial; a party may agree to discontinue their claim.
- If the mediator is successful in assisting the conflicting parties to achieve resolution then a binding agreement is drawn up by the parties themselves and signed by the parties.
- At any time either party may choose to terminate the mediation process and continue with or start the litigation process.
- Hopefully at the very least the mediator will be able to assist the parties in narrowing the dispute to the key issues which can often have become blurred over time.

Mediation is a private non-binding, voluntary and without prejudice process

WHY BOTHER TO CONSIDER USING OR UNDERSTANDING MEDIATION?

These are just some of the reasons:

- To remove a conflict or settle a dispute at an early stage.
- For compliance with the requirements of court practice directions.
- To negotiate a settlement that could not be ordered by a court.
- To benefit from the advantages the process provides.

WHAT ARE THE ADVANTAGES OF MEDIATION?

There are many advantages in using mediation and these are just some of them:

- It is a relatively fast process as a dispute can generally be mediated within one day.
- There are benefits to businesses and individuals as resolution allows their lives to return to normal and stops affecting businesses.
- Unlike litigation mediation brings decision-makers together. You need decision-makers in the room otherwise the effectiveness of mediation is destroyed.
- There is an obvious cost advantage in that settlement by this method avoids the usual Court Protocols and procedures involved in litigation and even if settlement is not reached it has often reduced costs by settling certain issues at an early stage.

WHY CAN MEDIATION BE EFFECTIVE?

The mediation process assists in breaking down some of the barriers that frequently prevent resolution of a dispute.

- Parties in dispute often maintain their position as they feel they are right and they are reluctant to discuss issues with opponents.
- This stance frequently means that they leave their legal representatives to state their case with no flexibility for discussion or movement on any point, both sides can then become intransigent.
- Intransigence can lead to increased legal costs and as costs rise parties to a dispute become less willing to discuss and find a resolution to settle a dispute for anything less than they want.
- Mediation provides an opportunity for parties to voice their views and sometimes allowing just this can be more important than a financial settlement.

With the many benefits of mediation why not try it next time you have a conflict or dispute; the alternative is to participate in time-consuming, protracted litigation that can be stressful, a financial drain on resources and where the outcome is uncertain.

To be continued...

If you would like more information on the mediation process or would like to speak with a mediator please contact us.

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Fifty Shades of Insurance: Chapter 8

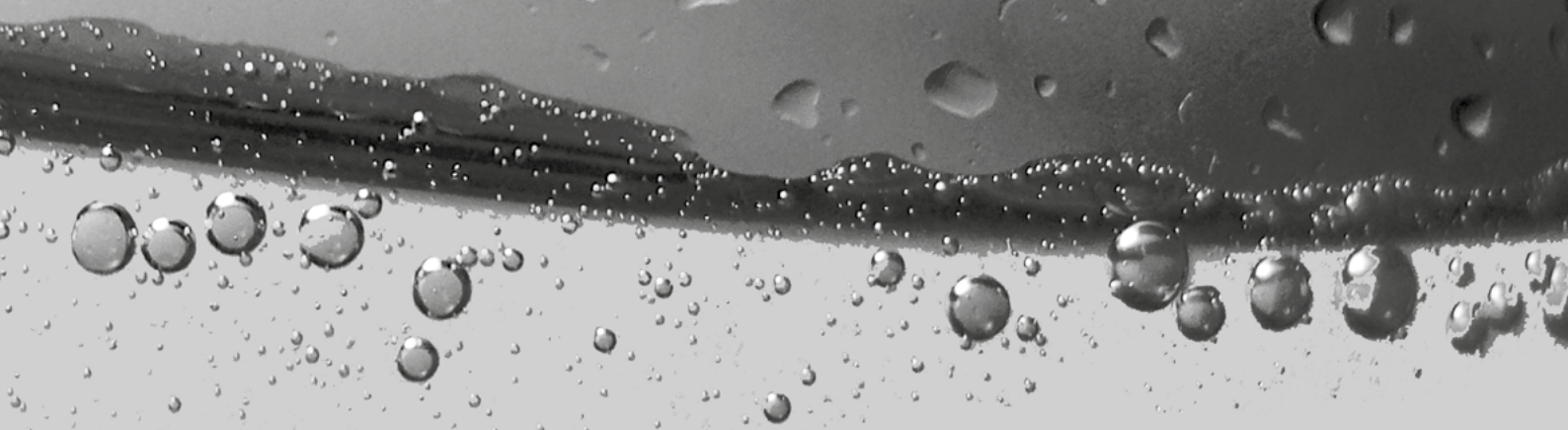
TAMING OF THE STRIFE – BY MEDIATION

In our last chapter we lightly delved into, one could say flirted with, the concept of mediation by considering what mediation means and its advantages. In this chapter we are exploring its inner depths and revealing why it is often so successful.

SO WHAT IS THE PROCESS AND WHAT DOES IT ALLOW?

The process is private and confidential; parties who mediate do so of their own free will.

- The mediator initially engages with both parties together and allows them to summarise their case in front of each other, he/she then has private and confidential sessions with each party
- The mediator goes between each party in their separate rooms talking and listening to them and only passes on information to the other party when he/she has permission from the party providing the information.
- The mediators role is to talk and listen not to be judgemental, he/she facilitates and probes when necessary to bring out facts and to understand the dispute.
- The mediator's role is to try to make each party see the others case, their own case's strengths and weaknesses through talking with them.
- The mediation process provides thinking time without distractions providing an opportunity for each party to assess whether their case is as strong as they first thought and encourages them to think about the litigious risk, associated costs and their real desires.
- The confidentiality allows commercially sensitive information to be discussed without the other party, theoretically, using the volunteered information in any litigation process.
- If settlement occurs the parties produce the settlement agreement, not the mediator, and any legal settlement can be agreed even ones that a court cannot order such as discounts on future transactions.



WHY DOES MEDIATION USUALLY WORK?

It frequently works for many reasons, some of which are outlined below:

- It is a private and confidential process allowing parties to communicate without restraints.
- Generally parties tend to settle a dispute with the expectation of making some concession and the process allows this to happen in a short period of time.
- Parties can tell each other their case without going through lawyers.
- Parties can explore mutual concessions to reach settlement.
- Parties can VENT their feelings and views and sometimes venting is more important to people than money or winning; it is often about the principle of getting their point across.
- It is not a court of law so it does not have the rigid procedural rules for each party to comply with although the mediator must comply with the rules of mediation as they must not provide opinion or take sides.
- Mediator does not act as a judge or as an arbitrator they are an independent person to facilitate discussion and hopefully help parties to resolve their dispute resolution then a binding agreement is drawn up by the parties themselves and signed by the parties.
- At any time either party may choose to terminate the mediation process and continue with or start the litigation process.
- Hopefully at the very least the mediator will be able to assist the parties in narrowing the dispute to the key issues which can often have become blurred over time.

Sadly it is common for a conflict to have been going on for many months, or even years before mediation occurs, often badly affecting all parties involved in some way or another; time involved, stress and costs can be tremendous strains on individuals, partners and firms.

Attending mediation is a positive step to progressing to resolution under the skilful guidance of a mediator and perhaps, I like to think that occasionally results in personal and business relationships not being damaged and friendships kept.

"The role of a Mediator is to be an independent, unbiased third party who facilitates discussion between two or more parties at conflict with the aim of reaching a resolution"

If you would like more information on the mediation process or would like to speak with a mediator please contact us.

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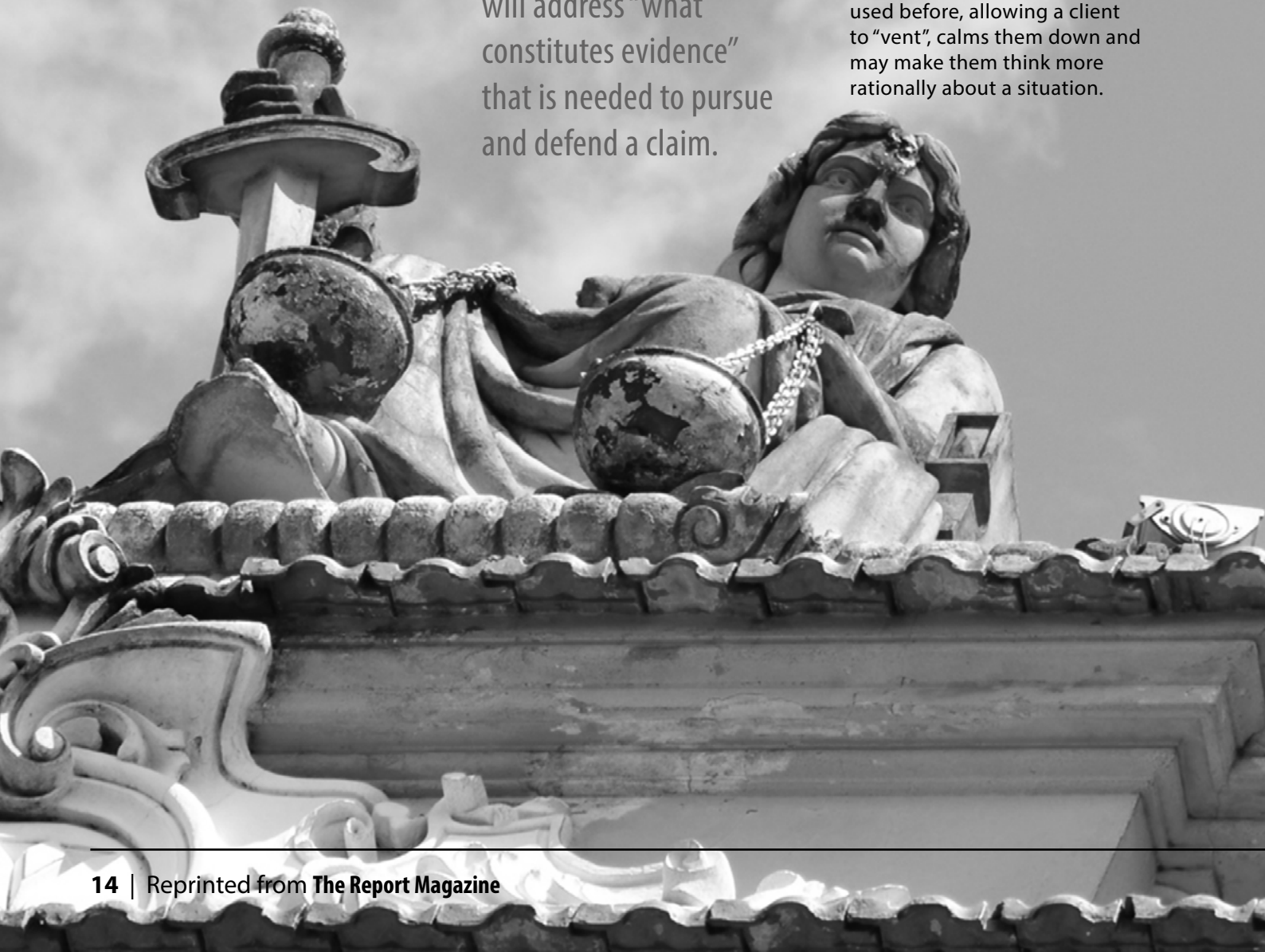
Fifty Shades of Insurance: Chapter 9

THE CLAIMS PROCESS – JUSTICE IN LAW?

We hear so often the words "that's not fair". The legal system does not always seem fair but often this arises from the lack of evidence to defend a claim. In this article we summarise the claims process and in our next article we will address "what constitutes evidence" that is needed to pursue and defend a claim.

WE WILL START AT THE BEGINNING.

You receive an unexpected email or a telephone call from a disgruntled client. What do you do? Keep clam and listen at first as often, a phrase we have used before, allowing a client to "vent", calms them down and may make them think more rationally about a situation.



Never feel pressurised in to admitting any liability as this could affect whether insurers will indemnify you.

At this stage you have an occurrence that may give rise to a claim and you should notify your broker or if you insure direct with an insurer, your insurer.

Sometimes insurers with small value claims may ask to "sit behind the scenes" and this usually means they provide draft correspondence for insured's to send out as this can sometimes prevent a matter from escalating; often insurers are seen as a "soft touch" by claimants. Most of the time insurers will take control of handling a claim, although some only do so when a formal claim by a claimant has been received by an insured and submitted to them.

We will assume for our example that an insurer has taken control of a claim against an insured. They may handle the claim internally within the insurance company or elect to engage a solicitor. In either case it is normal practice to send out an expert to undertake an independent survey or occasionally undertake a "desk top" review of documents received.

Insured's are obliged to provide assistance to insurers to defend a claim as insurers only "step into the shoes" of an insured as they are not the ones that are named in litigation.

Unfortunately it is not unusual for all concerned in a claim to find their lives consumed by it as it takes a significant amount of time to find all relevant documents needed to defend a claim, to produce witness statements and liaise with those who are representing you.

Hopefully you will have kept all the relevant documents and other evidence required to provide a strong defence. Even with the latter nothing is certain in litigation as there is only one person, the Judge, who has to be persuaded on the evidence provided, hence why many claims settle before they reach Court. Parties are now encouraged to undertake mediation before commencing litigation or during the litigation process.

We cannot stress enough how important it is to identify and gather your evidence at an early stage. Keep contemporaneous notes and make sure all information however incidental it may appear is provided to your insurers or to whom they have engaged to defend you.

It is always a good idea immediately you are aware of an incident that may give rise to a claim or as soon as you receive a formal claim to write a document listing dates and times of what occurred in date order. In this document it is helpful to include emails sent and received, letters, reports, telephone calls, contemporaneous notes, photographs and when meetings occurred. This document can be the basic list which may expand or contract of what may constitute your evidence for your defence. Also for your benefit and those defending you, write a resume of your understanding of what occurred as this is very helpful and sets the scene. Also most people's memories fade!!

So what is in your list? What can be used as evidence? What needs to be included? What will be excluded? Well this is now into the realms of the experts; by this we mean your lawyer or counsel as evidence is one of the most complex areas of law on which there are some very large books for "bed time reading". So in our next chapter we can only hope to skim over the essential elements of the mystery of "what constitutes Evidence".

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Fifty Shades of Insurance: Chapter 10

INNOVATION?

ALICE THROUGH THE LOOKING GLASS?

Many of you know Lewis Carroll's "Through the Looking Glass". In it there are these words:

"'The time has come', the Walrus said, 'to talk of many things - of ships and shoes and sealing wax - of cabbages and kings'".

Lord Denning

We hope you spend some time with us today to "dally" on some of the greatest innovations of recent times...

We hope you spend some time with us today to "dally" on some of the greatest innovations of recent times. As we wind our way through the path we hope your mind will wander and consider the far reaching effects on all of us.

Innovation and Lord Denning are synonymous; sometimes controversial but definitely innovative; probably one of the most famous and influential judges and a champion of innovation of law that affects you and me as individuals and in business.

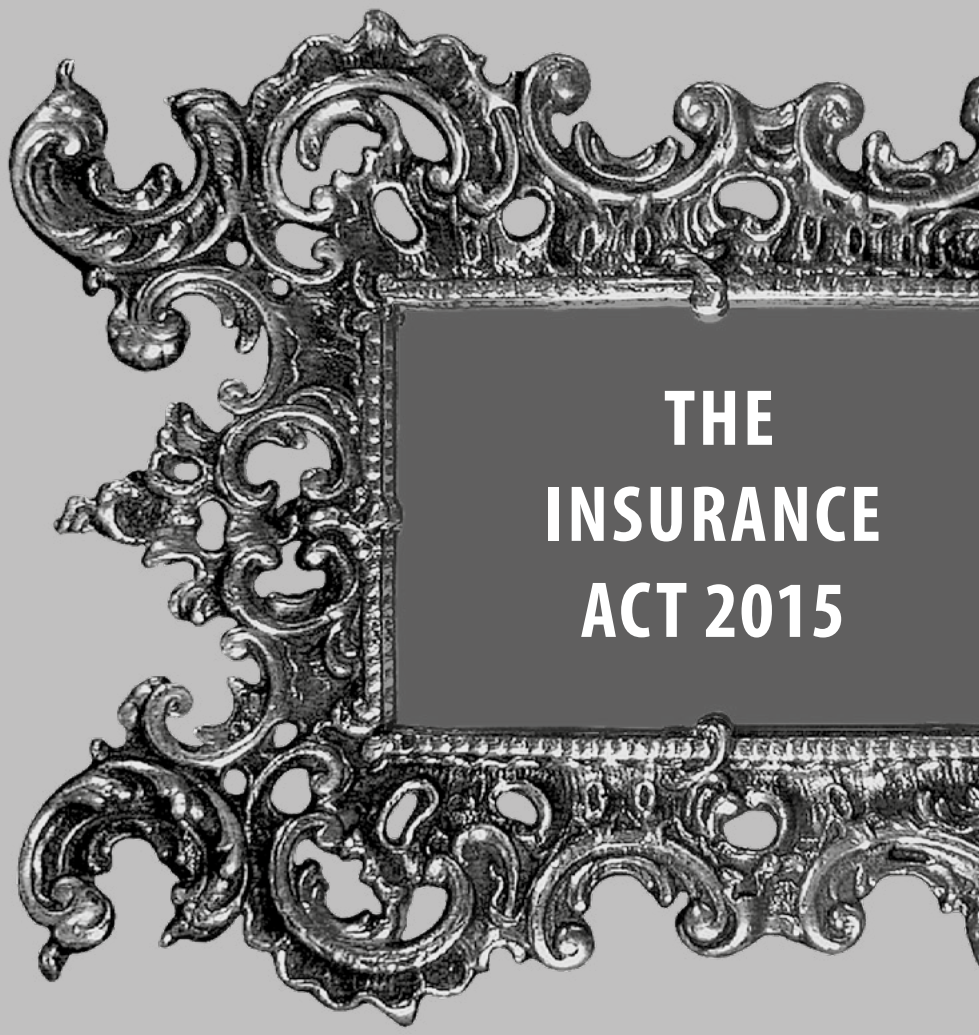
Today we are going beyond the immense changes made by Lord Denning and are in to the 21st Century, in fact 2016, and the effects of what we believe are the two most important Acts that have come into force this year – Third Parties (Rights Against Insurers) Act 2010 and The Insurance Act 2015.

Today we only have time to "touch on" the rudimentary elements of these Acts; sufficient hopefully to "whet" your appetite to read our further articles on the fascinating subject of innovation, Acts and how they affect you.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010 – SOME ASPECTS

Before the change in law the old 1930 Act aim was to protect insurance proceeds from the effects of an insured's insolvency. It was not straight forward, the company had to be resurrected and it did not reflect the current trading world although it did provide for automatic transfer of an insured's rights to a third party on the happening of any one of a series of specific insolvency events. The new Act retains the automatic transfer of rights to a third party that qualifies to proceed but enables third party's to pursue their claim in a single set of proceedings and makes it easier to find out information about the insurance policy from an early stage and has expanded the list of insolvency procedures that are included under the new Act to reflect the changes in the insolvency law since the 1930's.

- If a person decides to voluntarily dissolve a company to avoid a liability you have the right to bring an action direct against insurers now which was not possible before
- You only have to issue one set of proceedings against insurers if you wish
- The declaration will bind an insurer
- The transfer rights are not subject to any conditions that require the insured (dissolved/insolvent etc.) to provide information or assist insurers



WHAT ABOUT THE INSURANCE ACT 2015? – SOME ASPECTS

The 1906 Marine Act gave the fundamental principle of utmost good faith which placed the onus on the insured when presenting their risk for insurance. The new Act replaces utmost good faith with "a duty of fair presentation" to prompt transparency and improve the customers journey along the path of obtaining insurance and hopefully when a claim arises.

- Non-Disclosure/ misrepresentation
  - o Providing an insured discloses sufficient information to put a prudent underwriter on notice that they need to make further enquiries it is up to the underwriter now to do so – quite a change!
  - o An insured is not obliged to disclose:
    - anything that diminishes the risk
    - information already known to the insurer (such as information existing on claims files)
    - anything which the insurer ought to know
    - what insurers are presumed to know
    - or if an insurer has waived the need for certain information
  - o Where a fair presentation has not been made then the remedy an insurer can apply changes from the single 'all or nothing' principle of avoidance of the policy to a response that varies depending on whether or not the breach of fair presentation was deliberate or reckless.
    - 1. Deliberate/reckless allows insurers avoidance of a policy, refusal of all claims and retention of customer's premium (just as previously).
    - 2. Not deliberate/ reckless requires a proportionate remedy

- Basis of The Contract Clause
  - o It is no longer possible for insurers to convert the proposal information into warranties on which they can rely

- Warranties
  - o Under previous law, breach of a warranty in an insurance contract automatically discharged the insurer from liability from that point onwards, even if the breach was subsequently remedied or completely unrelated to the type of loss occurring.
  - o Under the new Act, breaches of warranty can be remedied (if it can) – cover is suspended for the period during which the warranty is not complied with. An insurer will again be liable for losses that take place once a breach of warranty has been remedied, unless the loss is attributable to something happening after the warranty was breached and before it was remedied

That is all for now but please wander a little more with us in our next article; perhaps even through the looking glass...

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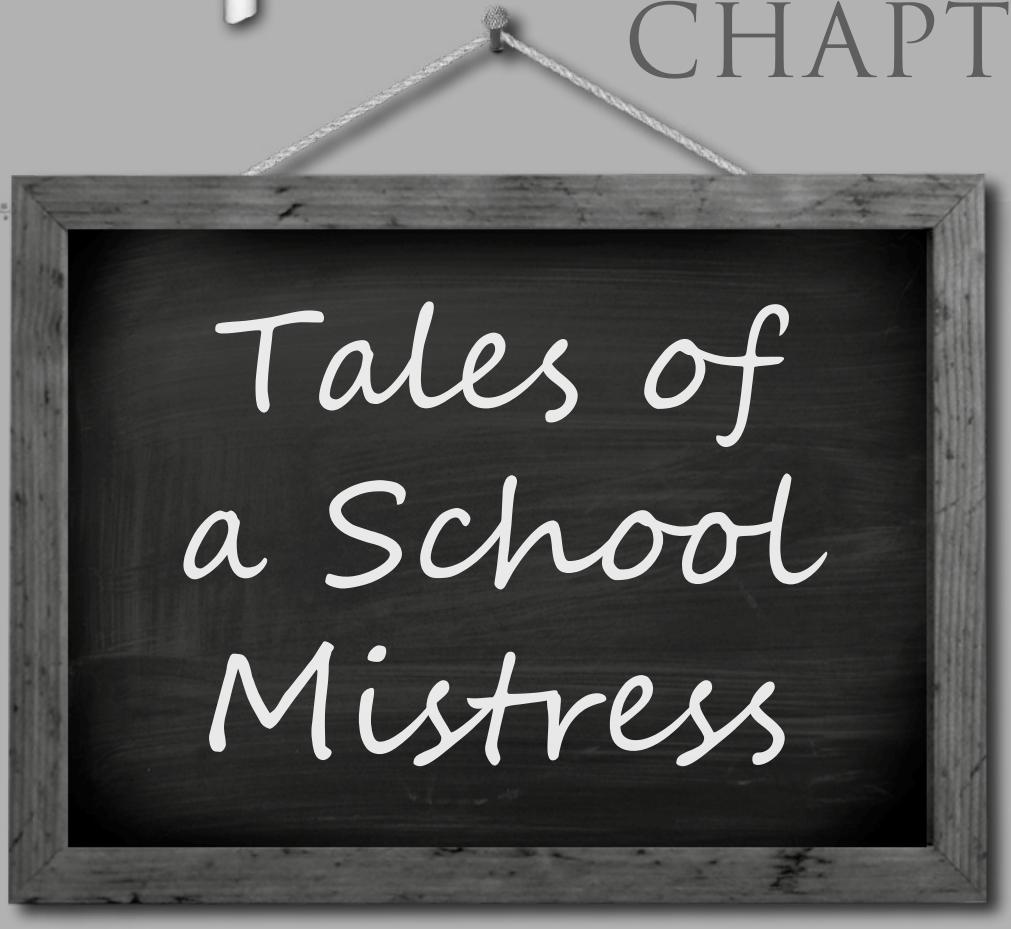
Fifty Shades of Insurance: Chapter 11



The school mistress's tale to her prodigy:

"Sentences start with a Capital Letter.
These letters make the start better.

A full stop is used to mark the end.
It closes every sentenced penned.

The comma is for short pauses and breaks.
Also for lists a writer may make.

Dashes and brackets are for thoughts of the day.
They give extra information away.

Colons provide pauses to compare.
They can list, explain and prepare.

The semi-colon an unused sole is handy for breaks; followed by known clauses.
It does the job of words that link and also forms short pauses.

Possession and apostrophe go hand in hand and other things.
It is also used for shortenings.

Strong feelings are shown by an exclamation mark!
So where now do we start!"

He replies: "Why punctuate! Why bother! Why care! Aren't rules made to be broken he cries!"

She replies: "These rules are important so learn them well as without them you may well find yourself courting my expensive twin sister *sue*."

We care about punctuation and grammar as it is a requirement for good report writing. No doubt at some time in your life you have wondered where to place a punctuation mark to make your point clear. So in this Chapter we consider the use of some of the common punctuation marks.

THE COMMA

It is such a simple mark on a page. So what could go wrong with its use we ask?

Examples

- The vessel's colours are red, white and blue.

Does this mean three separate colours or red, and white and blue in some sort of combination? It's possible both so it would be good idea to follow white with a comma to avoid confusion.

- The drinks she liked most were lemonade, champagne and cranberry juice and cream soda.

There could be a drink called champagne and cranberry juice and another cream soda. To make it clear place a comma after the champagne if you wish it to be a drink on its own.

DABBLING WITH THE SEMI-COLON

It is a common quandary whether to first tackle the colon and then the semi-colon; or the other way around. The colon was the first on the scene but as the use of semi-colons considerably outnumber in everyday use its older sibling we will start with the semi-colon.

The semi-colon has been said to be:

"The semi-colon is used to break up a long sentence; it relates clauses or sentences which have too strong a relationship to be separated by full stops."

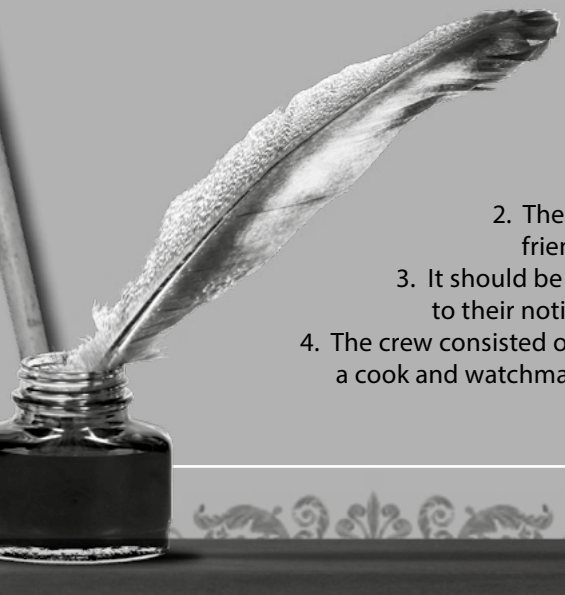
Examples

1. The MV Semicolon was once a poor vessel. Now it is a beautiful example.
2. The MV Semicolon was once a poor vessel now it is a beautiful example.
3. The MV Semicolon was once a poor vessel, now it is a beautiful example.
4. The MV Semicolon was once a poor vessel but now it is a beautiful example.
5. The MV Semicolon was once a poor vessel; now it is a beautiful example.

Hopefully it is obvious that the second and third examples are wrong. Using a conjunctive "but" is in danger of giving the sentence a different meaning. It has been said that the two statements scream to be together; the obvious conclusion is to write as in example 5 above.

As time is running short we invite you to prove to yourself that you have grasped the principles of commas and semi-colons and invite you to choose between commas and semi-colons in the following sentences. We will provide comments and answers in our next Chapter.

1. Everyone is wary of the waterfall; the face of which has weathered alarmingly.
2. The surveyor scarcely knew anyone at the meeting, and was slow to form friendships; having little enthusiasm for such events.
3. It should be stressed that certain behaviour is not acceptable, it should be brought to their notice immediately.
4. The crew consisted of qualified men, unqualified men, two female trainees and a cleaner, a cook and watchman and a skipper and deputy skipper.



Fifty Shades of Insurance: Chapter 12

TALES FROM MISS HISTORY THINGS YOU SHOULD KNOW

"It burnt for 5 days
As no fire brigades
What shall we do?
Said King Charles to
Nicholas Barbon
Was quite a smart one
He formed a company to protect
And resurrect
Compensation was great
It spread past our gates
Now a worldwide need
That's insurance – indeed"

Miss History

She asks "Are you interested in history? Do you like to know the past? Or are you only a future person? But the future is soon the past." say Miss History to the class.

"The story today is the history of insurance, disclosure and important changes in the rights and obligations of insureds."

Lloyd's of London started in the 17th Century in a coffee house near the River Thames. The first class of business was marine insuring against things such as storms and piracy. The ship owner gave information about the risk to the merchant on a slip of paper and the merchant decided if he was to accept the risk by writing his name on the slip of paper under the details that is where the word "underwriter" came from.

In the past the declarations signed by the proposer formed the basis of the contract and hence a warranty. This has now all changed since the implementation of the 2015 Insurance Act.

So how does this affect you?

What is the duty of fair presentation

There is now a duty of fair presentation and this means a duty to disclose to Insurers every material circumstance which you know or ought to know that would affect the underwriting of the risk. Or an Insured must give the Insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries in order to reveal material circumstances. A matter is material if it would influence the judgement of a prudent insurer as to whether to accept the risk, or the terms of the insurance (including premium); disclosure should be in a reasonably clear and accessible way; and insured's should insure that every material representation of fact is substantially correct, and that every material representation of expectation or belief is made in good faith. Provided you as an insured comply with the requirements of fair presentation you have a right to be indemnified by insurers if they have not made sufficient enquiries after you gave them adequate information to do so. In these circumstances they can no longer then decline to pay a claim on the grounds of non-disclosure. Critical information must be true and accurate at time of inception of the insurance contract.

What are you expected to know?

If an Insured is an individual, what is known to the individual and anybody who is responsible for arranging his or her insurance policies.

If an Insured is not an individual, what is known to anybody who is part of the Insured's senior management; or anybody who is responsible for arranging the Insured's insurance.

Whether an Insured is an individual or not, what should reasonably have been revealed by a reasonable search of information available to the Insured. The information may be held within the Insured's organisation, or by any third party (including but not limited to the broker, subsidiaries, affiliates or any other person who will be covered under the insurance). If an Insured is insuring subsidiaries, affiliates or other parties, the Insurer expects that the Insured will have included them in its enquiries, and that the Insured will inform the Insurer if it has not done so. The reasonable search may be conducted by making enquiries or by any other means.

Breach of warranty is now suspensory

If an Insured breaches a warranty in an insurance contract, the Insurer's liability under the contract shall be suspended from the time of the breach until the time when the breach is remedied (if it is capable of being remedied). The Insurer will have no liability to an Insured for any loss which occurs, or which is attributable to something happening, during the period when the Insurer's liability is suspended. Once the breach is remedied you have the right to cover for losses occurring or attributable to something happening after the remedy date.

Failure to comply with terms not relevant to the actual loss does not give the right to insurers not to pay.

Where: (i) there has been a failure to comply with a term (express or implied) of this insurance contract, other than a term that defines the risk as a whole; and (ii) compliance with such term would tend to reduce the risk of loss of a particular kind and/or loss at a particular location and/or loss at a particular time, the Insurer cannot rely on the breach of such term to exclude, limit or discharge its liability if the Insured shows that the failure to comply with such term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

Fraudulent claims clause

If an Insured makes a fraudulent claim under an insurance contract, the Insurer is not liable to pay the claim; and may recover from the Insured any sums paid by the Insurer to the Insured in respect of the claim; and may by notice to the Insured treat the contract as having been terminated with effect from the time of the fraudulent act.

Remedies for breach of the duty of fair presentation
If, prior to entering into this insurance contract, an Insured breaches the duty of fair presentation, the remedies available to the Insurer are set out below.

> Deliberate or reckless breach:

- The Insurer may avoid the contract, and refuse to pay all claims; and,

- The Insurer need not return any of the premiums paid.

> Not deliberate or reckless,

The Insurer's remedy shall depend upon what the Insurer would have done if the Insured had complied with the duty of fair presentation:

If the Insurer would not have entered into the contract at all, the Insurer may avoid the contract and refuse all claims, but must return the premiums paid.

If the Insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms from the outset, if the Insurer so requires.

In addition, if the Insurer would have entered into the contract, but would have charged a higher premium, the Insurer may reduce proportionately the amount to be paid on a claim (and, if applicable, the amount already paid on prior claims). In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/ higher premium) x 100.

> Breach of duty of fair presentation prior to entering into a variation of contract,

The remedies available to the Insurer are:

- If an Insured's breach of the duty of fair presentation is deliberate or reckless the Insurer may by notice to the Insured treat the contract as having been terminated from the time when the variation was concluded; and the Insurer need not return any of the premiums paid.

- If an Insured's breach of the duty of fair presentation is not deliberate or reckless, the Insurer's remedy shall depend upon what the Insurer would have done if the Insured had complied with the duty of fair presentation:

- If the Insurer would not have agreed to the variation at all, the Insurer may treat the contract as if the variation was never made, but must in that event return any extra premium paid.

- If the Insurer would have agreed to the variation to the contract, but on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms, if the Insurer so requires.

- If the Insurer would have increased the premium by more than it did or at all, then the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation. In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/higher premium) x 100.

- If the Insurer would not have reduced the premium as much as it did or at all, then the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation. In those circumstances, the Insurer shall pay only X% of what it would otherwise have been required to pay, where X = (premium actually charged/ reduced total premium) x 100.

Karen Brain
Managing Director – solicitor non-practising

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Fifty Shades of Insurance: Chapter 13

Passion and Fury - Dash to the Rescue

We are passionate about our business, insurance broking - our service, our writing, our training; are you passionate about yours?

And one of our great passions is punctuation. An occasional little "dash" - a much maligned mark - can work wonders. So here we will join the growing number of defenders to consider the use of the "dash"!

It has been said that the dash is "the most exciting and dramatic punctuation mark of them all".

So let's consider its use against other punctuation marks:

Example:

BRACKETS

It was (not unexpected) in poor condition being a fifty year old yacht

COMMAS

It was, not unexpected, in poor condition being a fifty year old yacht

SEMICOLONS

It was; not unexpected; in poor condition being a fifty year old yacht

DASHES

It was - not unexpected - in poor condition being a fifty year old yacht

Which example is the strongest and most dramatic?

Dashes have other uses – to parenthesise a statement:

Example:

The bolts were too old and rusted – they were over 50 years old – so as expected we could not remove them.

Are you as versatile as the "Dash"

Dashes can be used as:

- A linking device
- As a pause
- Signalling surprise or paradox
- Indicating disruption and interruption
- Separating lists
- After thoughts

Some others use dashes to introduce subjects - some people refuse to use them at all - and others are infuriated at their use. The simple dash can cause such emotion. What do you use your "dashes" for - if at all?

As this is all for now – *the dash is short* - for those interested you may consider delving into the depths of one of the well-known *Usage and Abusage* books - of course for English purposes only.

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