

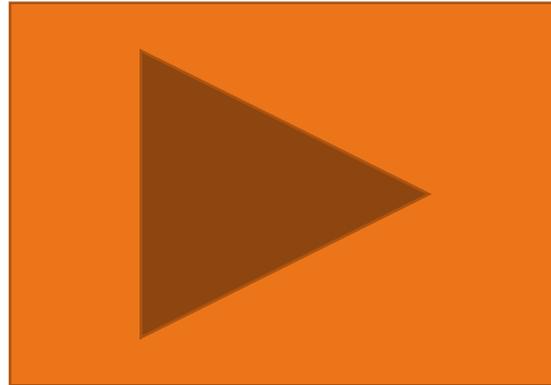
CLYDE & CO

Potential pitfalls of online underwriting platforms under the Insurance Act: A case study

Dominic How, Aditi Kumar and William Healy

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Potential pitfalls of online underwriting platforms



Introduction

1. **Insurance Act 2015 – recap of main changes to law**
2. **Dalecroft Properties v Certain Underwriters at Lloyd's – Background facts**
3. **Online Underwriting issues arising**
4. **Policy wording issues**
5. **Takeaway points**

William Healy, Associate
Clyde & Co

Insurance Act 2015 - Recap

- **Most significant insurance contract law reform since 1906**
- **Act applies to policies entered into on or after 12 August 2016**
- **Part 2 (fair presentation) also applies to variations of existing policies on or after 12 August 2016**
- **Significant changes to the remedies for misrepresentation/non-disclosure and new restrictions on relying on non-causative breaches of policy terms**

“Fair Presentation” (section 3)

Previous position:

- **Must disclose every material circumstance/material representations must be true**
- **But not asking obvious questions may be seen as waiver of duty to disclose**

New position

New concept of “fair presentation”:

- **Disclose every material circumstance know or ought to know**
- **OR “sufficient information” to put prudent insurer on notice that further enquiries are needed**
- **In manner which is “reasonably clear and accessible” (no “data dumping”)**

Remedies for Misrep/ND

| Type of Misrep/ND | Remedy |
|--|------------------------------|
| Deliberate / Reckless | Avoidance – keep premium |
| Negligent/Innocent & Underwriter: <ul style="list-style-type: none">○ Would have not written the policy at all | Avoidance – return premium |
| <ul style="list-style-type: none">○ Would have included a contractual term | Include contractual term |
| <ul style="list-style-type: none">○ Would have charged more premium | Reduce claim proportionately |

Terms Not Relevant to the Actual Loss (section 11)

Previous position:

- No need for causation: s.33(3) MIA 1906

New position:

- Act targets terms which tend to reduce the risk of particular kind or at particular location/time
- Insurer cannot rely on non-compliance if insured shows this could not have increased risk of *“loss which actually occurred in the circumstances in which it occurred”*

Dalecroft Properties – Factual Background



Dalecroft Properties – Factual Background

Dalecroft Properties Ltd v Underwriters Subscribing to Certificate Number 775/BA004/2008/OIS/00000282/2008/005 [2017] EWHC 1263 (Comm)

- In 2007 Dalecroft purchased the freehold of a five-storey premises in Margate. The premises were divided into a restaurant, amusement arcade and shop on the ground floor and a 27-room hostel on the remaining floors.
- Dalecroft obtained buildings insurance cover for the premises via a coverholder who underwrote the policy on behalf of various Lloyd's syndicates pursuant to a binding authority agreement.
- The policy was underwritten using the coverholder's online underwriting system which automatically generated quotations and policy documents where the answers corresponded exactly with the criteria in the underwriting guide.
- Where the answers did not correspond exactly with the underwriting guide, the risk was referred to an underwriter.

Dalecroft Properties – Factual Background

- When the Insured's broker obtained cover for the Insured in July 2007, she made the following representations:
 1. the property was in a good state of repair;
 2. it had no flat roof area; and
 3. It had never been subject to malicious damage or vandalism.
- In October 2007 and June 2008 a representative from the local Council visited the property and noted several defects including:

“fire alarm not working, separation poor in places, lack of emergency lighting, poor management, windows broken, windows falling out, roof leaking... Property in very poor state of repair... Open basement filled with rubbish and bed bases.”

Dalecroft Properties - Background

- **The policy was renewed in July 2008 and the information / declarations remained largely unchanged.**
- **In November 2008 the broker requested various changes to the policy and a further certificate was issued which was headed “CANCEL & REPLACE”**
- **The premises were destroyed by a fire in May 2009 and Insurers sought to avoid the Policy on the grounds of misrepresentation and/or non-disclosure relating to the condition of the premises.**
- **Insurers succeeded on all points after a very careful and thorough review of the underwriting evidence.**

Dalecroft Properties – Factual Background

- The judge also commented that, although the case was decided under the old law, the outcome would have been the same under the Insurance Act 2015.

"The old law embodied in the 1906 Act is insurer-friendly, and may sometimes operate harshly to the detriment of the insured. Looking at the matter in the round, however, I am satisfied that the application of the pre-2015 Act law works no injustice to Dalecroft in the present case. The evidence satisfies me that Dalecroft made no real effort to make a fair presentation of the risk (as that expression is now defined in the 2015 Act) to the underwriters at renewal, and thereafter made no real effort to comply with the Commercial Unoccupancy conditions of the insurance. It also satisfies me that underwriters would have declined the risk (ie would not have entered into the contract on any terms) had a fair presentation been made at renewal. It follows that, even under the 2015 Act, Dalecroft's claim would have failed."

Dominic How, Senior Associate
Clyde & Co

Dalecroft Properties: Online Underwriting issues arising

The on-line underwriting platform

- **Automated system where approved brokers can log-in and complete proposal/statement of fact directly or send separate proposal for insurers to populate;**
- **Linked to underwriting guide – automatically calculates rates and clauses to be applied, unless referral to underwriter generated;**
- **Quotation automatically generated and emailed to broker to check/accept**
- **If accepted, the online system automatically generates policy documentation including:**
 - **Policy certificate/schedule**
 - **Statement of Fact/Proposal**
 - **Policy Wording**
 - **Debit note**

Proposal / Statement of Fact

Disclosure

IMPORTANT NOTICE: Please check this proposal/statement of fact for insurance very carefully.

NON DISCLOSURE WARNING

The following Proposal Form / Statement of Fact together with any other information supplied to the Underwriters will form the basis of the Insurance and any non-disclosure or misrepresentation of a material fact could invalidate all or part of the Insurance contract. A material fact (or material disclosure) is a fact likely to influence Underwriters' acceptance and assessment of the risk. This applies both before the policy commences and during the policy. Furthermore all answers or statements on the Proposal Form / Statement of Fact, Claim Form or other Material Documents are the responsibility of the Proposer/Insured and the Proposer/Insured should therefore carefully check the accuracy of any information provided. Failure to fully comply with the above may prejudice the settlement of any claim. If you are in any doubt as to what constitutes a material fact or material disclosure you should disclose it and/or refer to your insurance advisor for assistance.

Insured

Name of the Proposer / Insured Dalecroft Ltd

Risk Address

254-258 Inclusive, Northdown Road
Margate
Kent
CT9 2PX

Is the Correspondence Address different from the Risk Address?

No

Risk Details

Was the property built less than 250 years ago?

Yes

Is it in a good state of repair?

Yes

Is it built of brick, stone or concrete, and roof made with slate, tiles, metal, concrete or flat roofed with asphalt, bitumen or concrete?

Yes

Has it got a listed building status?

No

Has it got any flat roof area?

No

Has it ever suffered from flooding or is it in an area troubled by flooding?

No

Has it ever been subjected to malicious acts or vandalism?

No

Approximately when did the insured purchase this property?(please select the month and enter the year e.g. 2003)

July

2007

Use of insured property

Residential

Are there any residential elements?

Yes

What type of tenants occupy the property?

Working people?

No

Owner occupied and / or long leasehold?

No

Students?

No

DSS referrals?

No

Local authority?

No

Asylum seekers and / or refugees?

No

Unoccupied?

Yes

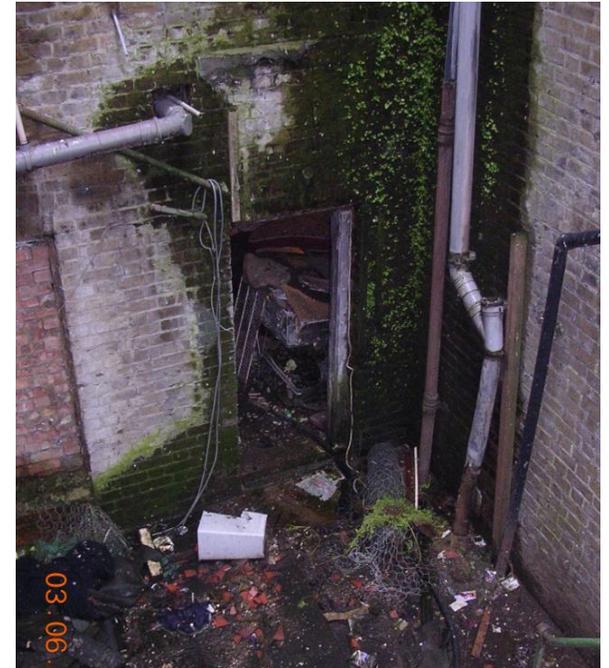
Cover in respect of unoccupied elements is restricted to fire, earthquake, explosion, lightning, aircraft, riot, impact, breakage/collapse of radio/tv aerials or satellite dishes, falling trees/branches/telegraph poles/lamp posts, flood, storm and subsidence/landslip/heave if specifically requested.

The misrepresentations

- **Good state of repair**
- **The EPO**
- **No Flat roof**
- **Not subject to malicious Acts or vandalism**
- **Vacant for refurb**

Good state of repair

- **What does it mean?**
- **Inconsistency with broking presentation**
- refers to property being in a good condition
- **Referral or declinature**
- **Deemed to know information in public knowledge – Google Maps street view?**



The EPO

- No specific question on Statement of Facts/Proposal – disclosable?
- Ensure there is a clearly worded Disclosure Notice and Declaration for any other material facts not specifically covered by a question
- Duty to give Fair Presentation – *“I have made a fair presentation of the risk and have disclosed all facts and circumstances which would be material to the underwriter’s assessment of the risk...”*
- Where follow up information required, should trigger a free text box with sufficient space to provide full information and in turn trigger referral to underwriter



Is there any further information or material facts you should or would like to advise Underwriters?

Declaration

To the best of my/our knowledge and belief the information provided in connection with this Proposal Form/Statement of Fact is true and I/we have not withheld any material facts. I/we confirm that I/we are at least 18 years of age unless a limited company or trust. I/we understand that non-disclosure or mis-representation of a material fact will entitle Underwriters to void the insurance. (N.B. A material fact is one likely to influence acceptance or assessment of this proposal by Underwriters: if you are in any doubt as to what constitutes a material fact you must disclose it). I/we understand that this Proposal Form/Statement of Fact does not bind me/us to complete this insurance but agree that, should a contract of insurance be concluded, this Proposal Form/Statement of Fact contains statements upon which Underwriters have relied in deciding to accept this insurance and the statements made therein shall form the basis of the contract.

VERY IMPORTANT: IF YOU CAN NOT CONFIRM THAT THE ABOVE PROPOSAL FORM/STATEMENT OF FACT IS TRUE YOU MUST CONTACT EITHER YOUR INSURANCE AGENT OR CARTER-MIDDLETON LIMITED T/A TRISTAR UNDERWRITING IMMEDIATELY

Flat Roof

- Rating loading applied and different conditions depending on % size – linked to underwriting guide
- Proportionate remedies under Insurance Act apply
- What is driving the rate (eg unoccupancy / trade) so would flat roof ultimately have made a difference to premium charged?
- Wording of the question – "any flat roof?"
- Link to further box specifying percentage area?



Not subject to malicious Acts or vandalism

- Automatic decline; or
- Subject to further information?
- Care taken if restrict answers to certain confines e.g. within last 5 years – waiver

Today's News

Hunt for police officer's attacker



The unconscious officer is wheeled on a stretcher into the back of a waiting ambulance.

1 2 3 4

by Mary Louis and Martin Jefferies. Pictures by Nick Evans

A police officer who was hit over the back of the head with a fire extinguisher v

Vacant for refurb

- **By email advised: "*we have been advised that the residential units are all vacant now for refurb, duration of works as yet unknown.*"**
- **Not followed up – risk of waiver**
- **More proactive underwriting required – need to follow up on certain information – can online systems cater for this?**

Aditi Kumar, Senior Associate
Clyde & Co

Policy wording issues

- "Cancel & Replace" vs endorsement

TRISTAR
Underwriting

TriStar Commercial Certificate Schedule - CANCEL & REPLACE

IMPORTANT NOTICE: Please check this Certificate Schedule and accompanying Proposal Form/Statement of Fact very carefully
The Proposal Form / Statement of Fact together with any other information supplied to the Underwriters must not be misleading or incomplete and shall form the basis of the contract with the Underwriters and shall be incorporated therein.

Agent / Intermediary: Oster Insurance Services
Certificate Number: 755/BA004/2008 / OIS/00000282/2008/004 replaces existing policy OIS/00000282/2008/003
Form: TriStar Commercial Wording 2007
Proposer: Dalecroft Ltd
Risk Address: 254-258 Inclusive, Northdown Road
Margate
Kent
CT9 2PX
Period of Insurance: Commencing 16:10 on the 19th November 2008 to 23:59 hrs on the 31st July 2009
(Both Days Inclusive)

| | | | |
|---------------------|---|------|-------------------------------|
| Premium: | £ | 0.00 | |
| IPT @ 5.00%: | £ | 0.00 | (IPT = Insurance Premium Tax) |
| Administration Fee: | £ | 0.00 | |
| Total: | £ | 0.00 | |

Underwritten By: Certain Underwriters at Lloyd's
Contract Number: 755/BA004/2008


Signed and dated in Beckenham, Kent, BR3 6NR on the 20th November 2008
For and on behalf of those Underwriters subscribing to the Certificate Schedule by
Carter-Middleton Limited t/a TriStar Underwriting

Policy wording issues (continued)

- **Trade / business description – drop down box of choices – free text if other?**
 - Late night bar vs night club
 - Consider adding wording such as "*If the above options do not accurately reflect your trade / business description, please provide further details here.*"
- **Linear / broad brush approach – inflexible?**
- **Inconsistencies between bolt-on clauses: Commercial Unoccupancy Conditions vs Residential Unoccupancy conditions – which one applies?**
 - Commercial Unoccupancy conditions (Only Applies To Empty Commercial Elements): "*.... Warranted premises shall be kept clear of all loose combustible material....*"
 - Residential Unoccupancy conditions (only applies to empty residential elements): - No such requirement to keep clear of all loose combustible material

Policy wording issues (continued)

- **Clearly identify as warranties and to which type of risk applies?**
 - Sprinkler system – fire?
 - Burglar alarm warranty – tricky to link it to a particular risk
- **Accessibility of documents - Ensure documents such as key facts are not buried in the system or other policy documents**
 - Key facts was on page 5 of the Policy Documents – Key Facts should be a standalone document and provide appropriate policy information
- **Confirmation of "Statement of Fact" – this requires confirmation of state of knowledge on the part of the insured**
 - Tick box to ensure that account holder of the online system has provided relevant documents to the insured and obtained their confirmation of facts?

Policy wording issues (continued)

- **Being too helpful – Providing documents such as Sample Demands and Needs Statement**

Demands and Needs Statement

Please note that this statement is also available to download from the last page on the ordering process when ordering insurance products.

Firm Name:

Date of Issue:

Title Indemnity Insurance: Statement of Needs and Suitability

As part of our service to you, we have examined the title to the property which you are now buying/selling/mortgaging/remortgaging * and have identified a matter of potential concern. Any problem with the title which is not resolved may affect the value of the property or your ability to buy, sell or mortgage it, and this may cause you added cost or eventual financial loss.

In order to deal with this, we recommend obtaining a title indemnity policy which addresses the identified problem. An explanation of the cover which the proposed policy gives, and a summary of the policy's main terms, conditions and exclusions, are set out in the Policy Summary and the Key Facts Statement which are attached.

The Financial Conduct Authority (FCA) requires us to ensure that the proposed policy is suitable for your particular needs.

Either include this statement:

We have approached a number of providers of title indemnity insurance in order to select a policy which best suits your needs. Please note that we have no contractual obligation to purchase insurance products on your behalf from any of these providers. Details of the terms of business under which we deal with the recommended provider are available on request.

or this statement:

After reviewing the range of providers of title indemnity insurance providers, we recommend policies only from [REDACTED]. The insurance provided by [REDACTED] is underwritten by [REDACTED] and subject to limited regulation by the Financial Conduct Authority and Prudential Regulation Authority. Please note that we have no contractual obligation to purchase insurance products on your behalf from [REDACTED]. Details of the terms of business under which we deal with [REDACTED] are available on request.

We believe that the insurance recommended is appropriate best meets your needs as a person buying/selling/mortgaging/remortgaging* residential property of this type for the following reasons:

- the policy best meets the needs of a person buying/selling/mortgaging/remortgaging* property of this type;
- the policy provides the cover required; and
- [REDACTED] is a suitable provider of title indemnity insurance products for the purpose of your transaction.

Takeaway points



- **Review wording of questions in Proposals/Statements of Fact**
- **Clear declarations reminding of duty of fair presentation and sufficient space to add further information**
- **More scrutiny on underwriting especially for proportionate remedies - consider setting up test platform to go through different outcomes with Judge at trial**
- **Ensure endorsements or bolt on clauses automatically triggered are not inconsistent with rest of policy wording**
- **Consider linking warranties if possible to certain sections only or if certain answers given in proposal (e.g. flat roof).**

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Partners, over 1,400 fee earners and 3,300 staff



Dominic How
Senior Associate
T: +44 20 7876 4520
E: dominic.how@clydeco.com

Dominic is a Senior Associate specialising in a wide range of property and construction related coverage disputes acting predominantly for the London Insurance Market, including a number of MGAs. This involves both initial advice on policy coverage and managing cases in the litigation process once matters turn contentious. Dominic also deals with a number of subrogated recoveries for insurers in addition to advising on building defects insurance policies and dealing with FOS complaints.

Dominic is also able to draw on his industry experience in order to provide commercially focussed and practical legal advice, having spent six months on secondment at a major global insurer and previously having worked as a placing Lloyd's broker at Marsh for four years. He acted as the lead associate successfully defending insurers at trial in the reported cases of *Dalecroft Properties v Certain Underwriters* [2017] and *Sugar Hut v Great Lakes Reinsurance* [2009] and has settled a large number of legal disputes through mediation and ADR.



William Healy
Associate
T: +44 20 7876 5519
E: william.healy@clydeco.com

Will Healy is an associate in Clyde & Co's property, liability and cyber insurance team in London. He has experience in advising London market insurers, Lloyd's syndicates and their cover-holders on all aspects of insurance policy coverage. Much of his work consists of policy advice in relation to property claims and he is experienced in advising on all aspects of insurance law including non-disclosure issues, breach of warranty/condition precedent, application of average and commercial settlement of disputes. He also has experience in drafting policy documents to comply with the Insurance Act 2015. Will has extensive experience in advising London market insurers on property claims involving, for example, fires in nightclubs, flooding in a gym, theft of stock from a warehouse, fires at commercial premises, liability claims following covered incidents and subrogation. He has advised on non-disclosure issues and breaches of policy terms including breaches of electrical circuit maintenance conditions, alarm warranties, compliance with statutory requirement conditions and reasonable precautions conditions. Will's cases have involved losses in the USA and Dubai, as well as in the UK and he has worked with clients based in the USA and France.



Aditi Kumar
Senior Associate
T: +44 20 7876 6178
E: aditi.kumar@clydeco.com

Aditi specialises in property, construction and liability insurance. She regularly acts for London Market and global insurer clients on a variety of liability defence, coverage and subrogated recovery cases and has extensive experience of property, product liability and construction and engineering claims. Aditi has experience in litigation, arbitration and mediation in the UK. Aditi also has experience of policy wording reviews and reviewing online underwriting systems. Aditi is also involved in providing a number of seminars for clients on product liability and important developments in the law of insurance such as the Insurance Act 2015 and Third Parties (Rights against Insurers) Act 2010 and has written articles on the same subject. She is also a member of the Managing General Agents' Association (MGAA).

Success examples include the reported case of *Escott -v- Tunbridge Wells Borough Council* [2016] EWHC 2793 which was led by Aditi for the Tunbridge Wells Borough Council where Aditi achieved a successful result for the Council as a claim of £1.5m was struck out and a costs order was also made in favour of the Council.



Toby Rogers
Partner
T: +44 20 7876 4535
E: toby.rogers@clydeco.com

Toby specialises in property, construction and liability insurance.

Toby's practice has a particular focus on complex policy coverage and business interruption advice. The subject matter ranges from small businesses up to multi-national companies. He recently assisted with the latest edition of *Riley on Business Interruption* and takes an active interest in industry developments.

Toby also specialises in complex subrogated recoveries on behalf of insurers arising out of large property losses. He has a track record of significant recoveries against architects, engineers, surveyors and contractors as well as the manufacturers of dangerous products and enjoys the technical as well as the legal aspects of these claims.