

**LSLA**

Prepared by Kysen PR

**Date** 15 September 2015  
**Publication** Solicitors Journal  
**Type of publication** Legal Press

**SOLICITORS**  
JOURNAL

# Game-changing Act turns focus on inducement

New legislation encourages the courts to take a robust approach when testing underwriters' evidence in claims for breach of the duty of fair presentation, explains **Roger Franklin**



Roger Franklin is a partner at Edwin Coe and a member of the London Solicitors Litigation Association (LSLA) committee [www.lsla.co.uk](http://www.lsla.co.uk)

**T**he much-heralded Insurance Act 2015 comes into force on 12 August 2016. Among its many innovations is the introduction of a scheme of proportionate remedies for insurers in the event of an insured's breach of the duty of fair presentation.

The availability of those remedies will depend upon what the insurer would have done had a fair presentation been made. The issue of inducement (i.e. whether the underwriter was persuaded to offer the policy terms on the basis of facts misrepresented or not disclosed) will be of central importance to the resolution of future insurance disputes.

The requirement for an insurer to prove inducement is not a new development, albeit no mention of it appears in the Marine Insurance Act 1906. Under the 1906 Act, every circumstance or representation is material if it would influence the judgement

of a prudent insurer in fixing the premium, or determining whether he will take the risk. It was not until some 90 years later, in *Pan Atlantic Insurance Co Limited v Pine Top Insurance Co Limited* [1995] 1 AC 501, that the requirement of inducement of the actual insurer was introduced.

There is no presumption of inducement, but the early cases suggested the bar was not a high one. As Lord Mustill observed in *Pan Atlantic*, the facts may be such that it is to be inferred that the particular insurer was induced, even in the absence of evidence from him.

#### Robust approach

In recent years the English Commercial Court has taken a more robust approach when testing the evidence of underwriters on the question of inducement. The introduction of the Insurance Act 2015 encourages that development.

This will have a corresponding impact on the evolution of disclosure in insurance litigation. For example, in assessing what an underwriter would have done if the duty had not been breached, it seems inevitable the courts will have to admit evidence of similar risks written by that underwriter. This is currently discouraged by the courts (see *Marc Rich and Co AG v Portman* [1996] 1 Lloyd's Rep 430).

Some justification for this wider disclosure is found in the decision of Mr Justice Coleman in the case of *North Star Shipping Limited v*

*Sphere Drake Insurance plc* [2006] EWCA Civ 378.

Reflecting on what is needed to evaluate underwriting evidence, Coleman J said: 'In evaluating the underwriter's evidence it is important to keep firmly in mind that all their evidence is necessarily hypothetical and hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interest of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self consistency and to such independent evidence as may be available.'

#### Relevant evidence

How to obtain that independent evidence is likely to exercise policyholders considerably in the coming years. There is an obvious imbalance in the availability of evidence between an insured with access to one risk profile (his own) and an insurer with access to many.

The difficulty lies in the fact that inducement is a nebulous concept, and one that is dependent on a number of elements. What was the underwriter's attitude to risk generally? Was the insured a significant client in commercial terms? Was it a hard or soft insurance market? What was the



**This will have a corresponding impact on the evolution of disclosure in insurance litigation**

underwriter's capacity at the time? What was his relationship like with the broker?

These and many other factors go towards the underwriting decision. They are not matters which are immediately apparent when presented with the bare facts of an alleged misrepresentation, or, as we must soon call it, a breach of the duty of fair presentation.

Practitioners will therefore have to give careful consideration to what evidence is relevant to this issue, and what should be included within the insurer's disclosure. Access to underwriting notes, guides, rating schedules, and delegated authority agreements will become increasingly important in the resolution of such disputes. Historically, insurers have been reluctant to provide this information on commercial grounds. That attitude will have to change now that inducement has been brought to the forefront of the claims settlement process. **SJ**