The pitfalls that face a sportsperson or a sports organisation in arranging and claiming under insurance cover

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If something goes wrong in professional sports and there is an insurance policy, it should not be assumed that the policy represents money in the bank. Things can go wrong under the policy, just as much as things can go wrong in sports. There are legal risks with respect to any claim under an insurance policy, whether the policy insures professional sports or anything else. Those risks must be managed and they can be managed in a large part by two important steps: clarifying and understanding the scope of the insurance cover and ensuring the risk is presented fairly to the insurer.

Both of these steps, however, will be affected by the Insurance Act 2015 ("2015 Act"),[1] when it enters into force on 12th August 2016. This Act will introduce radical changes to these areas of the law. In particular, by sections 3-6, the scope of the insured's duty on presenting the risk is very likely to be greatly expanded, thus increasing the burden on the insured. On the other hand, the ability of the insurer to rely on terms of the policy in defence of an insurance claim will be somewhat, not completely, diminished by two statutory provisions (sections 10-11) which will deprive the insurer of a remedy where the loss occurs after any breach of warranty is remedied and where non-compliance with certain terms (whose compliance is designed to reduce the risk of loss) could not have increased the risk of the loss which actually occurred in the circumstances which occurred. It is possible to contract out of most of the provisions of the 2015 Act, but this requires clear and unambiguous language and the insurer must take sufficient steps to draw the insured's (or its agent's) attention to the provision (sections 16-18).

In the context of the 2015 Act, this article will discuss the pitfalls that face a sportsperson or sporting organisation in arranging and claiming under insurance cover that is intended to minimise the impact of risks confronting professional sports as a business.

[1] Insurance Act 2015, http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted

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Sport as an insurable business

Professional sports have developed into a very sophisticated business. Saying the words "professional sports" carries with it the booming sound of risk. Whatever the sport, the athlete or player has aimed at performing at high levels in challenging environments. Spectators watch these players overcome and succumb to risk and, with that, comes the inevitable flow of commerce, which also carries risk. Risks arise in a variety of ways: there are risks of injury and death, there are risks of property damage, there are risks of legal liabilities to third parties, and there are risks of financial loss.

For centuries, insurance has been taken out to meet these risks. If used properly, an insurance policy can operate to transfer the risk of losses otherwise borne by players and sporting organisations to insurers. By an insurance policy, the insurer promises to pay the player or organisation ("the insured") money in the event that the risk of injury, death, damage or loss materialises. The principles of insurance law are well established and have been worked out in a large array of cases dealing with many types of commercial transaction. However, certain of these principles will be fundamentally changed when the 2015 Act comes into force on 12th August 2016.

Insurance comes in a variety of forms. There is contingency insurance that pays a specified sum of money in the event that something bad occurs. That sum of money may bear no relation to the loss actually suffered by the insured. If a player dies and the insurer agrees to pay £1 million, that is an example of a contingency insurance. No one would suggest that the player's life is worth only £1 million. Another form of insurance is indemnity insurance, by which the insurer pays money to compensate the insured for a loss. In other words, the insurance indemnity is aimed at putting the insured in the same position as if the loss did not occur. For example, if as a result of an injury the player loses income for a year, an indemnity policy will pay a sum of money representing that loss of income, no more, no less. There are three principal types of indemnity insurance: insurance against property damage or loss, insurance against legal liabilities to third parties, and insurance against financial loss (e.g. the loss of profits or income or the incurring of expenditure).

Insurance products for professional sports

Insurance products have developed widely and exotically over the years to adapt to the varied methods of performance in professional sports and of carrying on the business of sport. When it comes to professional sports, the first major issue confronting the insured is to identify who is to benefit from the insurance and what type of insurance protection is required. The persons who can benefit are principally the professional player and the team or organisation that employs the player. There are however other persons who can take out the insurance either on their own or in combination with others (as co-insureds), such as professional sports agents, managers, financial advisers, professional sporting associations or unions, governing bodies, and tournament or competition organisers. Players and other individuals taking out insurance cover may want protection against personal injury, death, permanent total disablement which brings the player's professional career to an end, medical expenses, travel expenses, loss of income, as well as various types of liability.

Organisations and companies will want to obtain insurance against property damage, loss of income and unusual expenditure and against liability to the players, members of the public and their commercial counterparts. The types of insurance available to organisations and companies may also include event cancellation insurance, for example if a tournament or match is cancelled by reason of external forces, such as natural disasters, war, political interference, kidnapping, terrorism, sickness, and the like. In addition, governing bodies or associations who are responsible to pay money prizes for the winners of a league or

tournament can insure against that liability, provided that there is a "risk" attached. If the association promises to pay £1 million to the winner, whoever it is, the association will have to pay that money in any event. In that case, the insurance will not pay out. Insurance provides protection against fortuities or risks, not certainties. The insurance will pay where the association only has to pay in more limited circumstances or only if the policy provides that a named player or players will win (*Newbury International Ltd v Reliance National Insurance Co (UK) Ltd*[2]). The professional team may also take out insurance against the loss of income arising if the team is relegated from a premier division (*Toomey v Banco Vitalicio de Espana sa de Seguros y Reasseguros*,[3] where Atletico de Madrid was insured against relegation from the Spanish Professional Football League). Insurance may also be available to cover the additional costs that result from winning a national competition![4] (*Jordan Grand Prix Ltd v Baltic Insurance Group*,[5] where a company was insured against its liability to make bonus payments to its employees if its motor racing team finished in the top six of the Formula One World Championship). This is an odd form of insurance as in the vast majority of cases the insurance is taken out against something happening which the insured does not want to happen, rather than something that it is striving to achieve.

Legal risks of insuring sports: defining the cover

There have been relatively few cases before the English Courts dealing with claims under insurance policies arising out of professional sports, but there have been some, arising mainly in the context of professional football, motor racing, and cricket. These cases throw a light on the principal issues which confront players and organisations who require insurance cover to deal with the risks of the sport and who have to litigate their claims under the insurance policies.

There are a number of major issues that have arisen in the cases concerning the scope of insurance cover. Consider two examples of such issues. First, the definition of the sport in question. This is an important issue. Many ordinary insurance policies will include provisions excluding cover for injuries sustained in certain types of sport or high-risk sport. Accordingly, when a professional player takes out insurance cover against the risks of death or physical injury, the insurer will often be prepared to cover the player's own professional sport, but not other sports. The definition of the sport in that event and what types of activity are covered becomes critical. Thus, the availability of the insurance cover depended in one case on whether the player, after his injury, had been "*a playing member of any form of professional football*" (in *Alder v Moore*,[6] the Court held that this meant that the player had to be a member of the players' union).

In another case, the cover depended on whether the insured who died in a sprint event at Silverstone was involved in "*motor racing*" (he was: *Scragg v United Kingdom Temperance & General Provident Institution*[7]). In a third case, the policy insured a professional footballer

[2] [1994] 1 Lloyd's Rep 83.

[3] [2005] Lloyd's Rep IR 423.

[4] Sean Cottrell, Saul Paine, 'The evolving business of football: Insuring against the cost od success' LawInSport.com, 27 November 2014, last viewed 22 July 2015, http://www.lawinsport.com/features/item/the-evolving-business-of-football-insuring-against-the-cost-of-success?highlight=WyJoZWRnZWhvZyIsImZpbmFuY2UiLCJmaW5hbmNlJ3MiLCInZmluYW5jZSJd

[5] [1999] 2 AC 127.

[6] [1959] 2 Lloyd's Rep 487.

[7] [1976] 2 Lloyd's Rep 227.

against disablement following an injury provided that he did not play in five or more games during the 12 month period from the date of that injury. The Court held that "*games*" included reserve matches and not just first-team matches (*Howells v IGI Insurance Co Ltd*[8]). If therefore the player is a professional footballer, does the cover extend to any competition he or she plays in or only a certain competition, such as the Premier League? Does it extend to any event where the player is paid or any event where he or she uses his or her skill as a footballer? Obviously, the player will want to broaden the cover, but the insurer will want to ensure that the cover is closely defined, in order to manage its own risk.

Second, many players insure themselves against permanent total disablement so that a lump sum will be paid if the insured is injured and can no longer play in the future or at least for a specified time in the future. Many policies will pay out if the player suffers an accidental personal injury which prevents the insured from engaging in his or her usual occupation as a professional sportsperson and which lasts for a certain period of time, usually one or two years, and at the end of that time is beyond hope of improvement. However, such policies often provide that the injury must be sustained solely as a result of accidental injury and independently of any other cause. There is commonly an exclusion in such policies so that the insured cannot recover where the disablement is attributable, even in part, to pre-existing or arthritic or other degenerative conditions. Such provisions have been construed quite strictly so that if the disablement does not result solely from the accidental bodily injury, there will be no cover (*Southampton Leisure Holdings plc v Avon Insurance plc*[9] and *Blackburn Rovers Football and Athletic Club plc v Avon Insurance plc (No 2)*[10]). Indeed, the Court has also held that where the disablement arises from any degenerative condition that is suffered by a high proportion of the population at the same age, there will be no cover. Therefore, the mere fact that the footballer suffered from a degenerative condition of the lower spine which contributed to the disablement and that 75% of the male population of the same age suffered from the same condition did not mean that the degenerative condition was to be ignored; the insured could not recover (*Blackburn Rovers Football and Athletic Club plc v Avon Insurance plc*[11]).

The impact of the 2015 Act on the insurer's ability to rely on such exclusions is a matter of much debate at the moment, although it seems unlikely that such an exclusion will be affected by that Act. Section 11 of the 2015 Act provides that the insurer cannot rely on a term, compliance with which tends to reduce the risk of loss, where non-compliance could not have increased the risk of the loss that was actually suffered. However, this restriction will not apply to terms "*defining the risk as a whole*". It is unclear what this exception means, but it is likely to embrace an exclusion based on the peril causing the loss. The 2015 Act will probably have more impact on warranties and other terms that require the insured to undertake various activities (whether relating to medical examinations, precautions against injury, training regimes and the like) or to notify the insurers of changes in the risk or the suffering of injuries. The current law is that where such terms are expressed to be promissory warranties or conditions precedent to liability, their non-compliance may give the insurer a complete defence to any insurance claim. Under the 2015 Act, the insurer may be prevented from relying on such defences in certain circumstances, for example where the breach of warranty has been remedied or where non-compliance with the term could not have increased the risk of loss which was actually suffered.

[8] [2003] Lloyd's Rep IR 803.

[9] [2004] EWHC 571 (QB).

[10] [2007] Lloyd's Rep IR 1.

[11] [2005] Lloyd's Rep IR 447

Legal risks of insuring sports: non-disclosure and misrepresentation

The two issues above are concerned with carefully defining the scope of cover and of exclusions under an insurance policy. Issues also arise as to the insured's duty of fair presentation of the risk. As the insurer knows relatively little about the risk and the insured knows a great deal about the risk, the insured is under a dual duty to ensure that he or she fully discloses to the insurer all material information relating to the risk of which the insured is aware or ought to be aware and to ensure that he or she does not misrepresent material information. This is often referred to as the duty of utmost good faith.[12] If the insured fails to discharge this duty and if the insurer in reliance on the risk presentation enters into the insurance contract such that if full and accurate disclosure had been made the insurer would not have entered into the same contract on the same terms, the insurer will be entitled to avoid the policy, meaning that the insurer can withdraw from the contract and set it aside as if it never existed. The result of such avoidance is that the insured is left without insurance cover.

Such principles have been well established since the 18th century. The 2015 Act makes some important changes to these principles in two key respects.

1. The first change is to define what is known to the insured or ought to be known to the insured for the purposes of disclosure. This includes information of which the insured ought to be aware following the carrying out of a "*reasonable search*" of information held by the insured or any other person (*e.g.* sports agents, financial advisers, medical advisers, sponsors, team managers). The 2015 Act therefore has the potential to increase substantially the range of information which the insured must disclose to the insurer.

2. The second change relates to the insurer's remedy for any failure to present the risk fairly. The universal remedy of avoidance will be replaced with a range of remedies, which one depending on whether the insured's failure is deliberate or reckless or on the extent to which the insurer has been induced to enter into the insurance contract by that failure. The remedies include avoiding the insurance policy, re-writing the policy or proportionately reducing the amount recoverable under the policy.

Issues of non-disclosure and misrepresentation regularly arise in respect of insurance claims; this includes sports insurance claims. In order to deal with such legal risks, the insured must ensure that the material information provided to the insurer is complete and accurate. The player must remember that if the information provided to the insurer is contradicted by from the information available elsewhere (for example on the player's own webpage), the player is at risk of losing his or her cover. The duties are just as important as far as corporate insureds are concerned: they must ensure that any representation, for example as to compliance with regulatory requirements, is accurate (*International Management Group (UK) Ltd v Simmonds*,[13] which concerned television rights of the Sahara Cup for cricket) or that full disclosure is made about team or player performance if it is relevant to the risk (*Newbury International Ltd v Reliance National Insurance Co (UK) Ltd*[14]). Under the 2015 Act, a company will be obliged to disclose information that is known to at

[12] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501.

[13] [2004] Lloyd's Rep IR 247.

[14] [1994] 1 Lloyd's Rep 83.

least one member of its "*senior management*". This may have the effect of enlarging the circle of individuals whose knowledge will be taken to be the knowledge of the company for the purposes of disclosure.

The insured is not obliged to disclose information which the insurer knows or ought to know, but the class of information which the insurer ought to know is narrower than that which the insured ought to know (this is also the case under the 2015 Act). There is some scope for arguing that the insurer should undertake some searches on internal and possibly external databases,[15] but such exceptions cannot always be relied on to preserve the sanctity of the insurance cover.

Final word on managing legal risks

The careful use of language in defining the scope of cover and the careful presentation of the risk to the insurer are two important considerations which arise in connection with insurance cover for professional sports. They are, however, not the only considerations. Sports are big business and insurance is about the transfer of risk from one business to another business. Professional sportspersons will not be treated as consumers in such cases and therefore the principles of insurance law will apply as they apply to any commercial entity. The legal risks relating to insurance cover must be negotiated like any risk arising from the professional sport. Insurance is used to manage the risk of loss or injury in sport. Legal risks relating to the insurance against such risks must also be managed.

As part of that risk management process, the following points should be considered:

- Who is to benefit from the insurance cover?
- What sports, games, competitions and activities are to be covered?
- How is the insuring provision formulated?
- How are policy exclusions, warranties and conditions precedent formulated?
- What steps has the insured taken to comply with the duty of disclosure and fair presentation?

The 2015 Act will herald new fundamental changes in insurance law. Insurers are taking steps to understand and deal with those changes. Professional sportspersons and organisations should also be prepared and manage the legal risks in dealing with insurance.

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[15] *Sea Glory Maritime Co v Al Sagr National Insurance Co (The Nancy)* [2014] 1 Lloyd's Rep 14.