A matter of some interest

Is it time to update insurance law in the light of the Gambling Act 2005? asks **Shantanu Majumdar**

IN BRIEF

- Contracts of insurance were not enforceable unless the insured had an insurable interest.
- The Gambling Act 2005 has changed this rule for indemnity insurance.
- The rules remains, however, for non-idemnity insurance.

What is the difference between insurance and gambling? Historically, the legal answer was that the insured must have an insurable interest in the subject matter of the insurance whereas the gambler can bet on just about anything so long as bookmaker and odds are available. The distinction was important since contracts of wager were unenforceable by reason of s 18 of the Gambling Act 1845 and insurance effected by an insured without such an interest was a contract of wager. Like so much of English Law, its piecemeal development by a patchwork of statute (principally the Life Assurance Act 1774 (LAA 1774) and the Marine Insurance Act 1906) and case law has meant that the result is uneven and to some extent illogical. In particular, although generalisation is difficult and imprecise:

- in indemnity insurance—where recovery is measured by the existence and extent of the insured's actual loss, the rule was that *by the time of any loss* the insured had to have an insurable interest but not necessarily before then;
- in non-indemnity insurance—where the insured will be paid an already determined amount on the happening of the insured event such as the death of the insured or onset of critical illness—the rule (see *Dalby v India and London Life Assurance Company* (1854) 15 CB 365) is the reverse *ie* that an insurable interest is essential at inception but not at the time of loss.

It also seemed that the definition of insurable interest might be different both as between indemnity and non-indemnity insurance, but also between different types of indemnity insurance, although the obvious desirability of a common approach has found judicial expression in recent cases most notably by the Court of Appeal in *Feasey v Sun Life Assurance Company of Canada and another; Steamship Mutual Underwriting Association (Bermuda) Ltd v Feasey* [2003] 2 All ER (Comm) 587.

However, by legalising contracts of wager the Gambling Act 2005 (GA 2005) has, seemingly accidentally, made contracts of indemnity insurance enforceable even though the insured has no insurable interest. In practice, by continuing to require that the insured must have suffered loss in order to recover under the policy, the indemnity principle will in any event entail the insured's having an insurable interest by the time of loss.

UNBALANCING ACT

Yet GA 2005 has left a serious imbalance between indemnity and non-indemnity insurance, since the latter is still governed by LAA 1774. Insurable interest is essentially concerned with minimising "moral hazard", that is the risk that some personal attribute of the insured will increase the likelihood and/or extent of the insured loss occurring, and in this context the fear was nothing less than that being able to insure the lives of people with whom one had no or no sufficient connection would encourage murder.

LAA 1774 itself does not define the nature of the required interest. Instead this has evolved and may be said to comprise four separate categories, namely interests arising from:

- natural affection;
- potential financial loss recognised by law;
- other statutory provisions;
- various disparate interests which have been established by the authorities.

LAA 1774 imposes other restrictions: s 2 requires the names of those interested in the policy to be specifically identified in it (although in the case of group policies, case law has relaxed this requirement to the identification of the class insured) and s 3 limits the amount of the insured's recovery, where his interest is not based on natural affection, to the value of his interest.

ONGOING REFORM

The questions whether and to what extent these restrictions can still be justified are the latest to exercise the Law Commission in its ongoing insurance contract law reform project. Its current "issues paper" invites views (by 11 April 2008) on possible reform of the law of insurable interest.

In 15 years' practice I have seen the point taken only twice and this doubtless reflects, among other things, the general hostility of the court when it is. Even so, the comparative lack of practical disadvantage is no reason not to reform the law if its principle is unsatisfactory. As the commission says, the relevant law is difficult to discern, technical in application and often unjust in effect. It has also failed to keep pace with social changes, eg, spouses (and now civil partners) can insure each other's lives but cohabitees cannot.

One is also entitled to wonder how truly useful or necessary such a requirement may be at all; spouses can insure each other's lives and yet they are also amongst the most likely people to kill each other; and how on earth do you go about insuring the life of a stranger?

Moreover, since no insurable interest is needed when the insured comes to claim then policy assignment is an easy (and much practised) way of escaping the formal requirements of the 1774 Act.It might also be thought desirable to put the changes to indemnity insurance impliedly made by the Gambling Act 2005 on a more "deliberate" footing.

The Law Commission says it has a genuinely open mind on the extent of necessary reform and what it says in its characteristically thoughtful issues paper (*www.lawcom.gov.uk/docs/Insurance_Contract_Law_Issues_Paper_4.pdf*) is therefore tentative. There is thus a real opportunity to influence the future development of the law.

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