

WARRANTIES NOW AND IN THE FUTURE



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On 11 August 1956, Elvis Presley released the track “Don’t be cruel”. There can be very few who have not heard this forlorn track; melancholy Elvis sitting glumly at home inconsolable as his love ignores his pain.

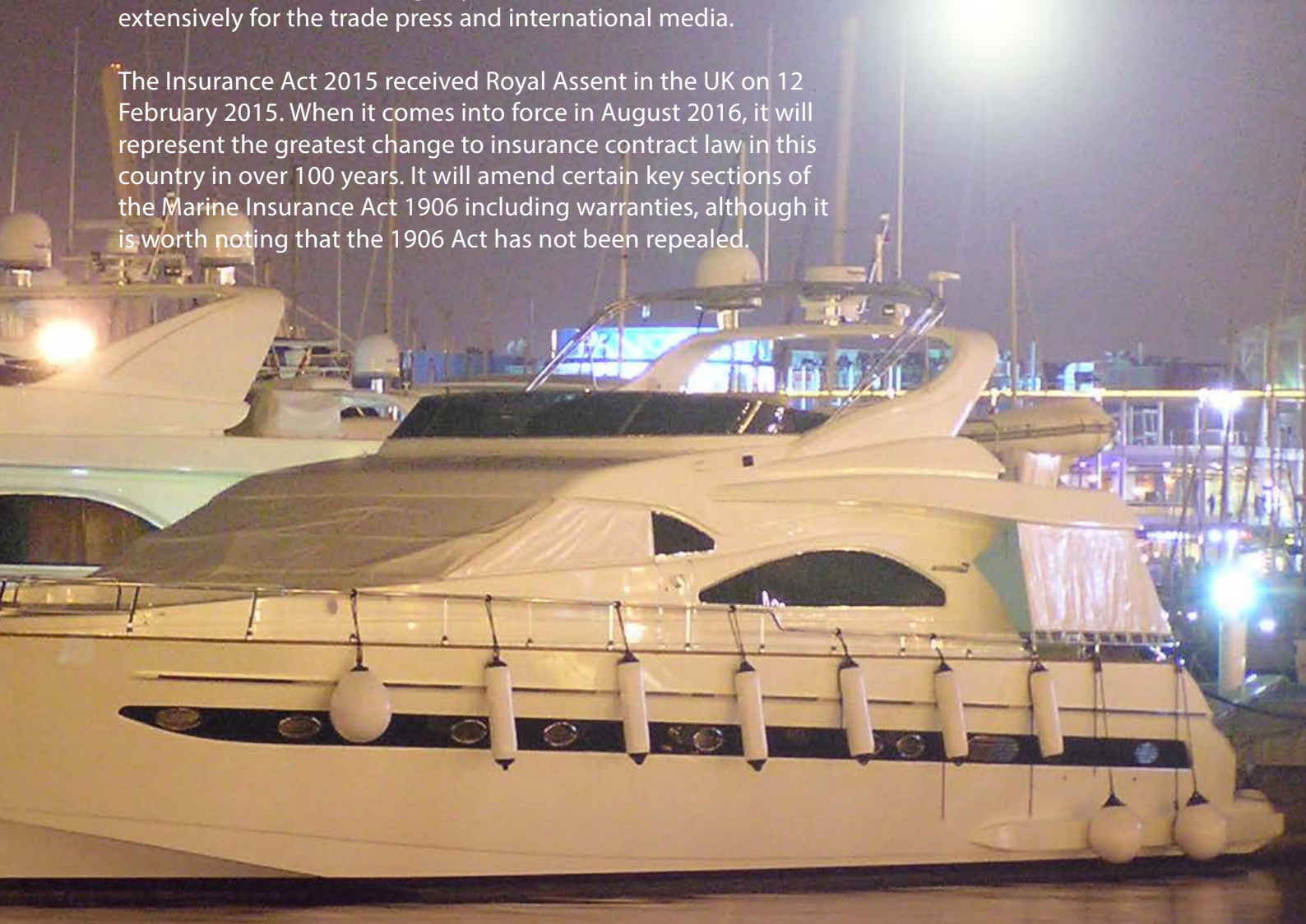
Under the Marine Insurance Act, 1906, any breach of a policy warranty gives insurers the option to walk away from any loss. That is any loss whether related to the breach or not. Worse still insurers are “off risk”, from the date of the breach. Coverage cannot be reinstated by remedying the breach.

An insured cannot wander in and out of coverage as if he or she is calling in for a cup of tea. Very little has been as divisive and resented as breaches of warranty since the Marine Insurance Act came into effect 110 years ago. Like Elvis, many Insureds have felt abandoned by their insurers. The current (some say harsh) treatment of breach of warranty ends on 11 August 2016, sixty years to the day that Elvis sang, **“Please let’s forget the past, the future looks bright ahead”.**

So what is a warranty? The Marine Insurance Act 1906 says this...

Nick joined Charles Taylor Adjusting in February 2007. Between 1986 and 1999, Nick was Head of Yacht Claims at Lloyd's Claims Office. In 1999, he formed Global Claims and Co. with offices in London, Tortola, Fort Lauderdale and San Diego. The business serviced both London and US domestic yacht insurers. Nick lectures on matters relating to yacht insurance claims and writes extensively for the trade press and international media.

The Insurance Act 2015 received Royal Assent in the UK on 12 February 2015. When it comes into force in August 2016, it will represent the greatest change to insurance contract law in this country in over 100 years. It will amend certain key sections of the Marine Insurance Act 1906 including warranties, although it is worth noting that the 1906 Act has not been repealed.



“A warranty ... is a condition which must be exactly complied with, whether it is material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach.”

The full text can be found at Section 39 of the Act. The implications for insureds is patent-breach a warranty and you lose your insurance cover for the remainder of the term of the policy.

Although apparently inflexible the Act does allow excusable breaches of warranty. Say an insured was sailing from Antigua to Florida. He knows that a major hurricane is barrelling towards him. He puts into a port in Cuba as a port of refuge. Cuba is outside of his navigating warranty, in fact it is warranted no entry into Cuban waters. His actions are an excusable breach. The Act explains:

“Non compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable

to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.”

Oddly this appears at Section 34 of the Act, five sections before “Warranty” is defined.

There are only two types of warranty; express and implied. Let’s deal with “Express” warranties first as by their nature they are easier to follow.

An express warranty is written into the policy. It may appear more

than once. It may appear in the schedule of the policy and in the policy wording. There may be more than one express warranty. The most common express warranties that readers of this journal may encounter are some or all of the following:

- ***Class warranties. These may warrant that a yacht was built to the rules of a particular IACS classification society. The warranty may or may not require the yacht to be classed and class maintained.***
- ***Full compliance with any pre-risk survey recommendations either before policy inception or within a period stipulated by insurers.***
- ***Minimum crew qualifications and experience and in compliance with local laws in the waters the yacht is navigating.***
- ***Maximum design speed.***
- ***Private pleasure use only.***
- ***Laid up (not under refit or repair).***

Two express warranties that have led to litigation in the last few years are manning warranties and refit and repair.

In the case of the “RESOLUTE” the policy had an express warranty that stipulated that the vessel (a fishing boat) should be manned at all times. Whilst the entire crew was ashore the vessel caught fire and was a Constructive Total Loss. The assured claimed under the policy. The insurers declined the loss for breach of warranty. It was held that there was an excusable breach as there was virtually no accommodation on the boat. It would have been impossible for crew to live on board.

The reverse occurred in the case of “NEWFOUNDLAND EXPLORER”. Her policy also contained an express warranty that required at least one crew member on board at all times. Unlike “RESOLUTE”, “NEWFOUNDLAND EXPLORER” had considerable accommodation. When the writer took a statement from the captain he was told that at the time the fire alarms were activated he was fifteen miles away, ironically having a barbecue at home. It was held that insurers were entitled to avoid the claim.

Refit and repair clauses may appear as express warranties, subjectivities or conditions precedent. The latter two are topics for another article and other songs by the King. However express refit and repair clauses have the same requirements. If a yacht enters a yard for more than routine maintenance or hot work is involved, the insurers must be told. The insurers will also want to see any contracts with the yard. Other than ICOMIA contracts, usually lurking somewhere on the back of the contract in very small print, are words that restrict the rights owners and insurers have should the yard damage the yacht. Often next to this is a woefully inadequate sum (tens of thousands against values of tens of millions) that limits the yard’s liability if the limitation language can be defeated. Insurers usually sign up for navigating risks. They are not in the business of insuring yard liabilities.

“There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.”

In the case of the “DORA” the yacht had been used for smuggling. The assured had breached the implied warranty above which can be found at Section 41 of the Act. Incidentally this is the only breach of warranty that cannot be waived by insurers.

“In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.”
(Section 39.5 MIA)

Proving “privity” is notoriously difficult particularly where a yacht is corporately owned.

So what changes on 12 August 2016 when the Insurance Act 2015 comes into force? Quite a lot is the answer! Under the new Act a breach of warranty has a “suspensory” effect on coverage. There is still no cover for losses during the breach, but unlike under the current system, cover resumes once the breach is remedied. This change potentially benefits insureds enormously.

Under the current system statements made by insureds can be turned into warranties under what is known as “Basis of Contract” claims. Under the new Act these have been abolished.

Only time will tell if the new Act reduces the number of disputes between insureds and insurers. There is not the space to discuss the case here but had certain aspects of the “GALATEA” case been decided under the Insurance Act 2015 rather than the Marine Insurance Act 1906, the result would have been in the insured’s favour rather than insurers.

To summarise, there is a major change in marine insurance, at least in England, in the summer of 2016. The result should be to reduce the number of breach of warranty claims insurers can walk away from. As the King crooned:

“Don’t stop thinking of me, don’t make me feel this way, Come on over here and love me, you know what I want you to say.”

