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The Counter Terrorism and Security Act 2015 ("CTSA 2015") received the Royal Assent on 12 February 2015, having started in the House of Commons on 26 November 2014. The Act vastly extends the powers of the UK border authorities and police to investigate and take action against persons suspected of involvement in terrorism, as well as placing a duty on education, health, penal, and local government bodies to *"have due regard to the need to prevent people from being drawn into terrorism"* when exercising their functions.

The most important change for insurers, however, is the amendment to the Terrorism Act 2000 ("TA 2000"), contained in Section 42, regarding insurance against payments made in response to terrorist demands. The relevant section is set out below:

42 Insurance against payments made in response to terrorist demands

(1) After section 17 of the Terrorism Act 2000 insert—

"17A Insurance against payments made in response to terrorist demands

1. The insurer under an insurance contract commits an offence if—
    a. the insurer makes a payment under the contract, or purportedly under it,
    b. the payment is made in respect of any money or other property that has been, or is to be, handed over in response to a demand made wholly or partly for the purposes of terrorism, and
    c. the insurer or the person authorising the payment on the insurer's behalf knows or has reasonable cause to suspect that the money or other property has been, or is to be, handed over in response to such a demand.
2. If an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
    a. a director, manager, secretary or other similar officer of the body corporate, or
    b. any person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.
3. The reference in subsection (2) to a director, in relation to a body corporate whose affairs are managed by its members, is a reference to a member of the body corporate.
4. If an offence under this section is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
    a. a partner, or
    b. any person who was purporting to act in that capacity, that person, as well as the partnership, is guilty of the offence and liable to be proceeded against and punished accordingly.
5. In this section "insurance contract" means a contract under which one party accepts significant insurance risk from another party ("the policyholder") by agreeing to compensate the policyholder if a specified uncertain future event adversely affects the policyholder."

(2) In section 23 of that Act (forfeiture: terrorist property offences), after subsection (5) insert—

- "(5A) Where a person is convicted of an offence under section 17A the court may order the forfeiture of the amount paid under, or purportedly under, the insurance contract."

(3) The section inserted by subsection (1) applies to any payment made by an insurer on or after the day on which this Act is passed, even if made—

a. under (or purportedly under) a contract entered into before that day, or
b. (subject to subsection (4)) in respect of money or other property handed over before that day.

(4) The section inserted by subsection (1) does not apply to a payment made in respect of money or other property handed over before 27 November 2014.

Creation of a new offence

The effect of s. 42 CTSA 2015 is to create a new offense within Part III of the TA 2000. Section 17A(1) makes it a crime for an insurer to make a payment under, or purportedly under, an insurance contract if the insurer, or the person authorizing payment on the insurer's behalf, knows, or has reasonable cause to suspect, that the money will be handed over in response to a demand made wholly or partly for the purposes of terrorism, or is a reimbursement of money previously handed over for the same.

"Terrorism" in these circumstances is defined in section 1(1) of the TA 2000 as the use or threat of action designed to influence the Government or to intimidate the public or a section of the public, for the purpose of advancing a political, religious, racial or ideological cause.

An *"insurance contract"* is defined in subsection (5) as a *"contract under which one party accepts significant insurance risk from another party ("the policyholder") by agreeing to compensate the policyholder if a specified uncertain future event adversely affects the policyholder."* This is a broad definition that will include most forms of insurance, and the Explanatory Notes to the Act ("Explanatory Notes") clarify that this will also include contracts of reinsurance.

The reference to payments made *"under, or purportedly under"* an insurance contract is undefined and not addressed in the Explanatory Notes. It would seem to be intended to cover both payments for which the insurer is liable (as a matter of strict contractual analysis, objectively made) and payments perceived subjectively by the insurer to be payments which it is liable to make (whether or not that is strictly accurate as a matter of objective analysis). Ex gratia payments are not expressly referred to in the Act, nor are "without prejudice" payments. Similarly, the Explanatory Notes contain no guidance on how such types of payment are to be treated. It is possible that they are, in certain circumstances, both within the broad ambit of Section 17 TA 2000 (Funding Arrangements) in that they constitute "arrangements" as a result of which money is made available for terrorist purposes. Such circumstances may include, for example, where a ransom or other sum has not been paid prior to the making of the ex gratia or "without prejudice" payment, and is therefore wholly "funded" by the insurer. However, there is no certainty that this is so.

Section 17A(1)(c) adopts the same knowledge standard for liability as many of the other offences dealing with terrorist property. It may be satisfied either by subjective knowledge, or an objective test of *"reasonable cause to suspect"*. In either case, it is irrelevant that the insurer's intent may have only been to satisfy its contractual obligations. Furthermore, the offence is extended by subsection (2) to impose individual liability on any director, manager, secretary or other similar officer of the insurer, or any person purporting to act in any such capacity, if it can be proved that the payment was made with their consent, connivance, or neglect.

Penalty and scope

If a person is found guilty of the offence and convicted on indictment, the penalty is a prison term of up to a maximum of 14 years and/or a fine. If found guilty on summary conviction, the penalty is a prison term to a maximum of 6 months and/or a fine. In addition, the newly created subsection 23(5A) TA 2000 gives the courts the power to order the forfeiture of the amount paid, or purportedly paid, under the insurance contract. Detailed provisions regarding the implementation of such an order are set out in Schedule 4 to the TA 2000. The offence will have extra-territorial effect in accordance with section 63 TA 2000, such that if an insurer does anything outside the UK which would have constituted the commission of an offence under section 17A, it shall be guilty of the offence.

Section 42(3) CTSA 2015 further states that the new legislation will apply to any payment made by an insurer on or after 12 February 2015, even if made under, or purportedly under, a contract entered into before that day, or in respect of money handed over before that day. However, section 42(4) states that the section 42(1) offence will not apply to payments made in respect of money or other property handed over before 27 November 2014. The new offence will therefore not apply to payments made in satisfaction of, for instance, terrorist ransoms, which have been effected prior to 27 November 2014.

Reason for implementation

The Home Secretary explained the amendment as a means of putting it *"beyond doubt that UK insurance firms cannot reimburse payments made to terrorists in response to ransom demands."* (Hansard, 2nd reading: House of Commons, 2 December 2014.) The Explanatory Notes also highlight a belief within Parliament that *"with kidnap and ransom insurance the expectation that a ransom payment might be reimbursed might create an environment which facilitates the payment of terrorist ransoms."* Although it is possible that the reimbursement of terrorist ransoms by insurers would have been covered by the existing 'funding arrangements' offence in section 17 TA 2000, the amendment closes any potential loophole that may have existed previously.

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