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**The Insurance Act 2015: what constitutes a
"fair presentation of risk"? What do
construction clients need to know?**

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A. Introduction

- UK Govt: “*biggest reform to insurance contract law in more than a century*”.
- In force: 12 August 2016.
- Governs B2B/commercial insurance contracts – or any “*non-consumer insurance contract*”! A “*consumer insurance contract*” = where the insured is an individual who contracts wholly or mainly for purposes unrelated to their trade, business or profession.
- Law Commission Report, “*Insurance Contract Law: Business Disclosure, Warranties, Insurers' Remedies for Fraudulent Claims and Late Payment*”, Law Com No 353; http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc353_insurance-contract-law.pdf

A. Introduction: then, now and next

- IA 2015 passed 18 months ago.
- To allow for preparations by:
 - Insurers – policy wordings, procedures & relevant individuals.
 - Insureds – procedures (for the new “duty of fair presentation”: (1) collating relevant data; and (2) standard forms for each “presentation”) & relevant individuals.
 - Brokers – re all of the above.
 - Insurers, insureds and brokers – “protocols”.
- Disputes expected.

A. Introduction: headlines re “duty of fair presentation”

- Abolishes remedy of avoidance for breach of duty of utmost good faith. But insurance contracts still based on utmost good faith, despite no remedy. -> interpretation.
- Changes rules re before concluding a B2B insurance contract on:
 - Misrepresentation [section B]
 - Non-disclosure [C]
- Changes law on knowledge of:
 - Insured [C]
 - Insurer [C]
- New remedies for breach of “duty of fair presentation” [D]

B. Duty of fair presentation: representations

- Representations...
 - ... of fact – must be “*substantially correct*” (change).
 - ... of expectation or belief – must be made in good faith.

C. Duty of fair presentation: disclosure

- Non-disclosure relevant only *“if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms”*. No change: Pan Atlantic v Pine Top [1995] 1 AC 501.
- 3 examples given:
- (1) *“special or unusual facts relating to the risk”*
- (2) *“particular concerns which led the insured to seek insurance cover for the risk”*.
- (3) *“anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question”* (change):
 - Law Comm, #6.14: *“We hope that insurers, brokers and policyholders will work together to develop guidance and protocols about what should be disclosed, to put flesh on the bones of this structure”*. Non-compliance may suggest breach.
 - E.g. subsidiaries, directors’ experience/qualifications/proceedings, turnover, business/client types, fees, insurance refusal, any circs -> claim, claims history.
 - Construction lines – PI, PL, CAR, etc. Size of contracts, nature of subject matter, info re vetting of subcontractors/subconsultants?

C. Duty of fair presentation: disclosure

Fulfilling the duty of disclosure - two ways:

Way 1 - Knowledge of insured:

- what knows (**changed test**):
 - Insured (who is not an individual) knows only what is known by an individual who is part of the insured's "*senior management*" ("*those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised*") (narrower than current test) or responsible for the insured's insurance
- or "*ought to know*" (**changed test**):
 - "*what should reasonably have been revealed by a reasonable search of information available to the insured*". Law Comm, #8.42: "*detailed protocols agreed by market participants*" would help insureds. Higher burden for insureds. Currently, for a company = what it ought to know in its ordinary course of business; more subjective, e.g. allows for poorer information collection.
 - Includes "*information held within the insured's organisation or by any other person (such as the insured's agent ...)*". E.g. subcontractors/subconsultants?

C. Duty of fair presentation: disclosure

Fulfilling the duty of disclosure – two ways (continued):

- Way 2 - give the insurer “*sufficient information to put a prudent insurer on notice that it needs to make further enquiries*” (change):
 - Currently, may have waiver of non-disclosure by insurer.
 - IA 2015: fulfil duty of disclosure. What if deliberate non-disclosure of information known to insured?
- Either way: must disclose “*in a manner which would be reasonably clear and accessible to a prudent insurer*” (change):
 - Form, rather than substance of presentation.
 - Data dumps, e.g. lots of contracts.

C. Duty of fair presentation: disclosure

Knowledge of the insurer

Needn't disclose info diminishing risk, when waived or that the insurer (change):

(1) knows (*"known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms..."*)

(2) "ought to know":

- if *"an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information"*; or
- if *"the relevant information is held by the insurer and is readily available".*
Eg. claims history? Subjective?

(3) "is presumed to know":

- *"things which are common knowledge"*; and
- *"things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business"*.

D. Remedy for breach of duty of fair presentation

- Deliberate or reckless -> avoidance, refuse all claims and no return of premiums paid.
- Otherwise (**CHANGE**):
 - If insurer wouldn't have contracted on any terms -> avoidance, refuse all claims but return premiums paid
 - If insurer would have contracted on different terms (apart from premium, eg. higher deductible or exclusion):
 - contract may be treated as if made on those different terms; and/or
 - Different premium -> reduce proportionately the sum paid for a claim
E.g. premium should have been double, ∴ pay half of sum otherwise due for the claim.
- Evidence will be needed from insurer as to what it would have done had there been a fair presentation. -> disclosure of underwriting practices.

E. Contracting out

- Can contract out of the foregoing, e.g. re the “*manner*” of disclosure being “*reasonably clear and accessible*”
- But can only do so and put the Insured in a worse position if clause fulfils transparency requirements:
 - insurer takes “*sufficient steps*” to draw the clause to the insured’s attention before the contract is concluded (unless insured has actual knowledge); and
 - the clause is “*clear and unambiguous as to its effect*”.

F. Other IA 2015 changes

- “*Basis of contract*” clauses banned:
 - Representations made by insured, eg. in proposal form.
 - Converted into warranty by clause of contract (“*basis of contract*” clause).
 - Mere breach of a warranty in an insurance contract -> discharges insurer.
 - Cannot contract out of ban.
- Breach of warranty = suspends rather than discharges insurer’s liability.
- Breach of term but insured shows it “could not have increased the risk of the loss” which occurred in the circumstances in which it occurred.
- Fraudulent claims.

G. Third Parties (Rights against Insurers) Act 2010

- In force: 1 August 2016. (The 1930 Act 1930 will continue to apply where both the liability was incurred and the state of insolvency entered pre-1/8/16.)
- 3P can sue insurer directly without 1st establishing the insured's liability.
- If the insured is a company that has been removed from the Companies Register, there is no need to restore it
- 3P who reasonably believes that an insured has incurred a liability to it is entitled, within 28 days of a written request, to info re the cover available from the insured or another (eg. insurer or broker):
 - if there is insurance that might reasonably be regarded as covering the supposed liability
 - who is the insurer
 - the policy terms
 - if the insured has been told that the insurer denies liability under the policy
 - if there are any proceedings between the insured and the insurer (and, if so, details)
 - if the indemnity limit has been eroded by other claims
 - if there is a fixed charge to which sums paid by the insurer would be liable.