6 THE DUTY OF FAIR PRESENTATION

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Introduction

Most contracts are based on the principle that all parties have an equal opportunity to understand what the effects of the contract will be. For example, if I arrange for my newspaper to be delivered to my house, I understand what will happen and the newspaper seller also understands what is expected.

Insurance is different because the proposer of the risk (the policyholder) is likely to know far more about the risk to be insured than the insurer. This is recognised in law by both the **Consumer Insurance (Disclosure and Representations) Act 2012** and the **Insurance Act 2015**.

The Insurance Act 2015 requires the proposer to provide a "fair presentation of the risk". This chapter explains what is meant by a fair presentation by the policyholder, the insurer's duties and what penalties may be imposed by the insurer where the policyholder has not provided a fair presentation of the risk.

The Consumer Insurance (Disclosure and Representations) Act 2012 legislates that representation is less onerous on consumers.

The Insurance Act 2015 was given Royal Assent on 12th February 2015 and the industry has welcomed and embraced the changes. As the statute is new, there is no case law to provide examples of its interpretation.

6.1 The Principle

Contracts, in general, are subject to the doctrine of caveat emptor (let the buyer beware). This means that each party must ask questions to ensure that they have all the information they need before signing the contract. Statutes such as the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977 provide protection.

Insurance contracts are subject to the principle of fair presentation and not caveat emptor.

Activity

Think about the type of information that might be relevant to an insurance company when deciding whether to accept a risk or calculating the premium to charge.

Consider a home buildings policy which provides cover against Fire, Theft and Flood. What features of the building would be relevant to the insurance company and why?

6.2 The Legal Position – Statute Law

The principles of fair presentation are set out in the Insurance Act 2015 and in the Consumer Insurance (Disclosure and Representations) Act 2012.

6.2.1 The Consumer Insurance (Disclosure and Representations) Act 2012

This Act relates to consumer insurance only.

Consumer insurance is defined as:

> *"insurance entered into by an individual wholly or mainly for purposes unrelated to the individual's trade, business or profession."*

Prior to this legislation, Consumers had to tell an insurer anything that would "influence the judgment of a prudent insurer" in fixing the premium or deciding whether to take the risk.

Non-disclosure and misrepresentation

In effect, this legislation encompassed the market practice already adopted towards non-disclosure and misrepresentation in consumer insurance.

The Act requires the consumer to take reasonable care to answer the insurer's questions fully and accurately.

6.3 The Insurance Act 2015

The duty of fair presentation

It is important to understand that this new duty of **fair presentation** applies to **non-consumer** insurance contracts only. "Consumer insurance contract" has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012, ie:

> *"consumer insurance contract" means a contract of insurance between:*
>
> *(a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and*
>
> *(b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000).*

The 2015 Act defines fair presentation as follows:

> *"(3) A fair presentation of the risk is one:*
>
> *(a) which makes the disclosure required by subsection (4),*
>
> *(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and*
>
> *(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.*
>
> *(4) The disclosure required is as follows, except as provided in subsection 5:*
>
> *(a) disclosure of every material circumstance which the insured knows or ought to know, or*

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if:

(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information."

Remember this only applies to non-consumer insurance contracts as consumer contracts are dealt with under the Consumer Insurance (Disclosure and Representations) Act 2012.

Activity

Taking note of the above, consider a restaurant policy which provides cover for contents, fixtures and fittings, and stock. Which of the following facts must the restaurateur disclose to his Insurers:

1. *The neighbouring properties are a hardware shop and a Post Office*
2. *The restaurant suffered a fire 2 years ago*
3. *A sprinkler system was installed after the fire*
4. *The value of the wines and spirits held on the premises*
5. *Agency waiting staff are used on a regular basis.*

Contracting out of the Insurance Act 2015

Section 15 of the 2015 Act states that any term within a contract that puts a consumer in a worse position than they would have been in under section 3 is effectively null and void. With regard to non-consumer insurance contracts, it is possible to "contract out" but only where the insurer satisfies section 17 of the 2015 Act, which requires compliance with the "transparency requirements".

Under these requirements, the insurer must bring the disadvantage of the contracting out term to the attention of the insured and this must be in a clear and unambiguous manner.

6.4 Knowledge of Insured

The 2015 Act breaks down the information the insured is deemed to know or ought to have known and which should therefore be considered as part of the fair presentation. Remember the insured is to make a fair presentation but he cannot present facts he does not know.

By way of example, an insured who is an individual as distinct from, say, a company is deemed to know what is known to the individual himself and what is known to one or more of the individuals who are responsible for the insured's insurance.

An insured who is not an individual, for example a company, is deemed to know what is known to the insured's senior management team or those who are responsible for the insured's insurance.

The type of information known includes what the insured should have known following a reasonable search of information available to the insured.

The insured is deemed to know information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance).

Activity

Obtain an insurance proposal form online and review the questions asked by insurers. Look for any additional statements that ask the proposer to provide any further information that is material or relevant.

6.5 Knowledge of Insurer

The insured is not required to present information known to the insurer. It is important to understand who at the insurer company needs to know the information and what information the insurer would be deemed to know.

The Act states under subsection (1) of section 5 that an insurer knows something "*only if it is 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 (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity)*". This would usually be the underwriting department or persons at the underwriting agency.

Further, the Act states that an insurer ought to know something only if:

> "*(a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or*
>
> *(b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).*"

Parliamentary guidance notes advise that this is intended to include, for example, information held by the claims department or reports produced by surveyors or medical experts for the purpose of assessing the risk.

The question therefore arises as to whether a loss adjuster would be considered an agent. Should the loss adjuster identify an underwriting feature if the insurer would be deemed to be aware of the feature? It would seem that information given to the claims department, for example in a loss adjuster's report, would fall within the information deemed to be known.

Activity

Consider the handling of a claim and how the process may reveal facts that were not disclosed at proposal stage. In particular, think about the type of information you obtain from a policyholder whilst considering a claim, either on the telephone, via correspondence or during a visit to their property. How would you check whether this information had previously been disclosed?

Ask your colleagues for examples of non-disclosed material facts. Find out how they dealt with the issue and whether it had an impact on the claim.

6.6 Remedies for Breach

Insurers only have a remedy for breach if:

1. They would not have entered into the contract of insurance at all, or
2. Would have done so on different terms.

The remedies depend on the type of breach.

Deliberate or reckless breaches

1. If a breach was deliberate or reckless, the insurer:
   (a) may avoid the contract and refuse all claims, and
   (b) need not return any of the premiums paid.

Other breaches

2. If, in the absence of the breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.
3. If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.
4. a) In addition, if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.
   b) "Reduce proportionately" means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 3), where:

$$X = \text{Premium actually charged}/\text{Higher premium} \times 100$$

Summary

This chapter has looked at two important UK statutes which have changed the requirements for disclosure of information that would affect whether an insurer would accept a risk and if so on what terms.

The Insurance Act 2015 is of particular interest as it introduces the concept of "fair presentation". In addition, the Act specifies that the insurer will be deemed to know information in certain circumstances. This could include observations by, say, a loss adjuster acting in the investigation of an insurance claim.