THE INSURANCE ACT 2015
A Client's Guide

The act came in to force on 12th August 2016. It reforms the law in relation to non-consumer policyholders. A 'consumer' in this context refers to insureds who are individuals that purchase insurance which is unrelated to their trade, business or profession. The Act applies to both business and consumer insurance, although the new duty to make a fair presentation only applies to business insurance contracts.

The Act updates and replaces the existing 'Duty of Disclosure', the duty on policyholders to disclose risk information to insurers before entering into an insurance contract.

The new duty is now described as a 'duty of fair presentation', effectively requiring non-consumer policyholders to undertake a reasonable search of information available to them, and defining what a policyholder knows or ought to know.

WHAT IS A 'FAIR PRESENTATION'?

A fair presentation of the risk is one that meets the following criteria:

- Disclosure of every material circumstance which you, the insured knows or ought to know, or 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.
- Disclosure in a manner which would be reasonably clear and accessible to a prudent insurer.
- 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.

The disclosure must be 'in a manner which would be reasonably clear and accessible to a prudent underwriter'

What do you, the insured know?

The law has always, as a matter of fairness, determined that an insured knows not only what the insured knows but also information that the insured might have knowingly turned a blind eye to (i.e. not enquiring because the insured knows the answer will be damaging). The insured is also taken to have known what he/she/it ought to know and this idea is developed by the Act

Whose knowledge is relevant?

In a large corporate entity, whose knowledge counts? Under the Act, when deciding what an insured knows, what matters is the knowledge of senior management (which will include the board of directors, but also those that undertake significant roles in the making of decisions about how the insured's activities are to be managed or organised). And of those responsible for arranging the insurance. In smaller business that may not have a board of directors it is the knowledge of the business owner, the employees and anyone else that may happen to be involved in arranging the insurance cover/s.

What knowledge is relevant?

The Act sets out what an insured should know. An insured must carry out a reasonable search for information. "Reasonable" depends on the size, nature and complexity of the business. The insured will be deemed to know what "should reasonably have been revealed by a reasonable search". So information held by non-senior management (but not by those who, say, perform a managerial role) may still be imputed to the insured where it would have been reasonable for the insured to seek out that information.

WHAT ARE THE CONSEQUENCES of a MATERIAL NON-DISCLOSURE OR MISREPRESENTATION?

In the event of a material non-disclosure or misrepresentation arising, insurers may do the following:

Avoid the Insurance:

If a qualifying 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.

For example, an insured deliberately conceals known and material information and does not even provide sufficient information to put the insurer on enquiry, this would make it an unfair presentation. This entitles the insurer to avoid the policy and does not oblige the insurer to return the premium.

Other (proportionate) Remedies:

In all other cases where the insured has made a non-deliberate/non-reckless breach (or even a simple innocent mistake), the following proportionate remedies will apply. These remedies are based on what the insurer would have done, if it had have known the true facts:

- **If the insurer would not have entered into the policy on any terms:** the insurer may avoid the policy and refuse all claims but it must return the premiums paid.
- **If the insurer would have entered into the policy on different terms (other than at a different premium):** then at the insurer's discretion, the policy operates on those different terms - even if you, the insured would not have accepted such terms.
- **If the insurer would have entered in to the policy at a higher premium (regardless of whether the policy terms would have been the same or different):** the insurer may proportionately reduce a relevant claim settlement

In the paragraph above, 'proportionately reduce' means that the insurer need only pay the X% of the claim that it would otherwise have been obliged to pay under the policy terms.

The calculation is as follows:

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

WARRANTIES AND OTHER TERMS

Under the current law, breach of a warranty in an insurance contract automatically discharges the insurer from liability completely from that point onwards, even if the breach is corrected. Currently, an insurer may avoid liability even if the breached term was entirely unrelated to the type of loss occurring which was actually suffered (for example, a warranty to maintain a working burglar alarm would be unconnected with a flood to the insured premises caused by extreme weather conditions).

Under the new Act breaches of warranty can be "cured"; all warranties become 'suspensive conditions'. This means that cover is suspended for the period during which the warranty is not complied with. This means that now, an insurer will be liable for losses that take place after a breach of warranty has been corrected, assuming that the correction is possible.

Therefore, for example, now, if an insured breaches a warranty that roof structures will be inspected every six months, that breach will be "cured" if the roof is inspected after seven months, and so coverage will have been suspended for only one month. Relevant losses occurring in that one month suspended period will not be paid.

INSURERS' REMEDIES FOR FRAUDULENT CLAIMS

The Act provides the insurer with clear statutory remedies when a policyholder submits a fraudulent claim. If a claim is tainted by fraud, the whole claim will not be paid, not even the genuine part of the claim is payable.

The Act also allows the insurer to refuse any claim arising after the date of the fraudulent act. The insurer can (with notice) terminate the policy from the date the fraud arose, without returning premium. Valid claims that arose prior to the fraudulent act are unaffected.