

INSURANCE ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: the Duty of Fair Presentation

Section 3: The duty of fair presentation

39. **Section 3(1)** introduces a requirement on the insured (at this stage, the person or party who would be the insured if the contract were entered into) to make to the insurer a “fair presentation of the risk” before the contract is entered into.
40. The duty of fair presentation replaces the existing duties in relation to disclosure and representations contained in sections 18, 19 and 20 of the 1906 Act.¹ However, it retains essential elements of those provisions. It is important that potential insureds provide insurers with the information they require to decide whether to insure a risk, and on what terms.
41. Like the existing duties, the duty of fair presentation attaches before the insurance contract is entered into. Since the law regards renewals as new contracts, the duty also applies when an insurance contract is renewed. This is in accordance with the current law.
42. The duty falls on “the insured”, defined in section 1. In some situations, one party may enter into a contract on behalf of others. Who is “the insured” in such cases is, and will continue to be, a determined by reference to the particular contract.
43. **Section 3(3)** sets out the three elements of a “fair presentation of the risk”.
44. The first element of a fair presentation is a duty of disclosure, introduced in section 3(3)(a) and further defined in section 3(4), which provides two ways to satisfy the duty of disclosure. Section 3(4)(a) effectively replicates the disclosure duty in section 18(1) of the 1906 Act. Its key features are that the insured must disclose “every material circumstance”² which the insured “knows or ought to know”.³
45. The second way to satisfy the duty of disclosure, set out in section 3(4)(b), is intended to operate where the insured has failed to satisfy the strict duty in section 3(4)(a) but has nevertheless disclosed enough information to put the insurer on notice that it needs to ask for further information from the insured before it makes the underwriting decision. This reflects the approach already taken by the courts in some cases.⁴
46. The second element of a fair presentation, in section 3(3)(b), relates to the form of presentation rather than the substance. It is intended to target, at one end of the scale, “data dumps”, where the insurer is presented with an overwhelming amount of

¹ Sections 18, 19 and 20 of the 1906 Act are repealed by clause 21(2) of the Act.

² Defined in section 7(3).

³ Defined in section 4.

⁴ For example, *CTI v Oceanus* [1984] 1 Lloyd’s LR 476; *Garnat Trading and Shipping v Baominh Insurance Corporation* [2011] EWCA Civ 773.

undigested information. At the other end, it is not expected that this requirement would be satisfied by an overly brief or cryptic presentation.

47. The third element of the duty of fair presentation is the duty not to make misrepresentations. It is contained in section 3(3)(c) and is based on section 20 of the 1906 Act.

Exceptions to the duty of fair presentation

48. As in section 18(3) of the 1906 Act, section 3(5) of the Act provides exceptions to the insured's duty of disclosure. The exceptions do not apply to the requirement to make the disclosure in a clear and accessible manner, nor to the duty not to make misrepresentations. Anything which is the subject of an exception does not have to be disclosed by the insured to the insurer, unless the insurer makes enquiries about that matter.
49. Exceptions (a) and (e) replicate the relevant provisions in the 1906 Act almost exactly. The rest of the exceptions relate to circumstances which the insurer "knows", "ought to know" and "is presumed to know". They replace similar provisions in the 1906 Act. Each of these categories of "knowledge" is expanded on in section 5.