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THE DUTY OF DISCLOSURE & FAIR REPRESENTATION

This note, and apologies for its length, is for information purposes only and reflects the law but it does not constitute legal advice

A Business insurance contract is any contract which is not a consumer contract.

A Consumer is taken out by an individual which is wholly or mainly unrelated to the individual's trade, business or profession.

Why did the law change? Fraud has been on the increase and many contexts of the original Insurance Act of 1905 carry little to no validity on today's world.

Commercial insurance has changed courtesy of the Insurance Act 2015 which came into effect on 12th August 2016

Consumer insurance contracts are referred to at the end

If your business is governed by the laws of England, Wales, Scotland or Northern Ireland, your policy document will always make clear under what laws it is covered.

We have tried to make the following as easy to read as possible.

Previously word of mouth, given in good faith was deemed sufficient, but now the Insurance Act of 2015 redefines obligations on the insured and the Insurers.

It may sound picky, but the law is just that and what was always accepted as 'Fair Representation' was always sufficient now it is viewed the Insured acts at all times with utmost 'Good Faith'.

Business Insurance Contracts

(i) Your Obligations:

You will find all new policies will expect that when varying the policy clause stating 'any change must be advised to the Insurers' with the addition most likely that 'all information and circumstances which are or thought to be known to you and constitute material information are declared and especially are complete and accurate and supplied in full'

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Trident Insurance is part of Advanced Insurance Centres Limited, 4 Clements Court, Clements Lane, Ilford, Essex IG1 2QY

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Further it is far better to supply everything pertinent and material regardless of whether your Insurer has asked for it.

If you are the party who arranges your Company Insurance, then any policy renewed or varied on or after August 12th 2016 will apply to the new Insurance Act 2015

You need to know the new obligations when arranging your commercial Insurance

You must disclose every material circumstance known by (i) your senior management (the Insurance Act 2015 defines 'senior management' as those individuals who play significant roles in the making of decisions about how the Insured's activities are to be managed and organised) and (ii) those individuals responsible for arranging your insurance – which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance.

There is now an assumption that you '**ought to know**' what should reasonably have been revealed by a '**reasonable search**' of information available to you. This means you must conduct a reasonable search for, and disclose all material that is available to you. Your information has to come from not only within your organisation but also from outside it, which may be held by your agents, and/or entities who are to be covered by the insurance,

The new standalone duty on the Insured is to present your requirements for insurance which are '**reasonably clear and accessible**'

(ii) What is 'Material'

Under English Law every circumstance is material if it would influence the judgement of a prudent Insurer in fixing the premium and/or the terms of the insurance and/or determining the risk. A circumstance may be material even if disclosure would not necessarily lead to an increased premium

If you are unsure whether a fact or circumstance should be disclosed, or whether the duty to disclose information continues throughout the period of a particular policy, it would seem a lot safer that you disclose the information anyway, as failure to do so may lead your Insurer reducing its claim payment, applying additional terms or even voiding the policy and leaving you with no cover.

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Examples of what may be considered material information are not limited to the examples below, but give a fair idea

- A) Special or unusual facts relating to the risk
- B) Any particular concerns which led you to seek insurance cover for the risk
- C) Anything which would generally be understood as being something that should be disclosed for the type of risk in question.

General information about your business would include:

- 1) Business activity (or any change to business activity) including processes, products and geographic presence
- 2) New companies, markets, acquisitions or disposals
- 3) Additional premises / likely insurable items
- 4) Changes to premises
- 5) Higher than ordinary degree of risk or liability (specific to your business)
- 6) Business financial status
- 7) Loss history experience, including any payments made, outstanding claims, potential claims, incidents and losses that were not reported as claims
- 8) Details of any criminal charges or convictions against your company, its directors or employees, regulatory investigations or enforcement and health and safety issues
- 9) Any declines from previous Insurers, refusals to renew, imposed terms specific to you, restrictions in cover even mid-term cancellations.

Material damage policies might include:

- 1) Changes in construction and/or purpose
- 2) New/amended processes
- 3) Changes in fire protections
- 4) Increased storage of hazardous materials/stock
- 5) Any attempted break-ins or arson attack
- 6) Use of temporary third party premises

Liability policies:

- 1) Changes to business activities including activities that have ceased
- 2) The creation or acquisition of new companies for which cover is required
- 3) Products exported to, or work in, overseas territories (especially USA or Canada)
- 4) Work in or on hazardous locations such as offshore installations
- 5) Health and Safety investigations/prosecutions

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Motor Fleet policies:

- 1) Driving convictions
- 2) Undisclosed accidents
- 3) Change to vehicle performance
- 4) Change of use of vehicle

Business personal accident and travel policies:

- 1) Change to business activities
- 2) Material differences in the travel pattern ie different geographies or number of journeys

Please accept the list provides examples only there are as you can imagine lots more

In short: **IF IN DOUBT DISCLOSE**

(iii) When to disclose

Your duty of disclosure applies throughout any negotiations preceding placing your risk until your Insurer has agreed to accept the risk and set the terms, price, level of participation (the full risk may need to be split and terms agreed with the other participants, and the contract has been finalised.

After the policy has effectively been placed, the duty of disclosure arises again if there is a need to make changes to the policy which would put extra risk on the Insurer. When there may be an extension of the policy period and obviously when a policy condition requires you to inform your Insurer of a specific increase or change of risk

The same obligations occur at the time of renewal

(iv) Failure to disclose

The consequences of failing to disclose a material fact or circumstance will depend on the precise terms of your insurance policy and on whether the policy was placed –or varied- before August 12th 2016 can be very painful.

The Insurance Act 2015 will apply to how the Insurer sees the non-disclosure and whether or not your failure to disclose was deliberate or reckless

If it is felt you have deliberately or recklessly failed to comply with your contractual duties your Insurer remedy will depend on what they can show they would have done had a fair representation of the risk been given.

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- a) If your Insurer can show they would not have entered into the contract on any terms by not having known the full liability that was deliberately or recklessly withheld, it can void the policy but must return the premium
- b) If your Insurer would have entered into the contract but on different terms (not relating to the premium) the contract may be treated as if it included those terms from the outset
- c) If your Insurer would have entered into the contract but would have charged a higher premium the amount paid on a claim may be reduced proportionately

The Insurance Act 2015 will apply to variations made to policies on or after 12th August 2016 even if the policy was inception prior to this date. Remember some policies can be three or more years in duration.

If however it can be shown there was a breach of the duty of fair representation to the variation made on or after 12th August 2016, depending on whether the breach was deliberate or reckless and what the Insurer can show it would have done, had the duty not been breached. Then the Insurer may treat the policy as if the variation was never made and so reduce the claim payment, apply additional terms or void the policy.

(v) In less complex language

- 1) **Always disclose all the facts and circumstances which could be seen as material risk**
- 2) **Be open and detailed and supply full disclosure**
- 3) **Don't try to be deliberately reckless by withholding any information, for sure it will come back and bite you where it hurt and cost dearly!!!**

Consumer insurance contracts

(i) Your obligations

If you are a consumer insured (a person taking out insurance for purposes wholly or mainly unrelated to your business, trade or profession) and the Insurance policy is governed by English law then you must:

- a) Take reasonable care to provide complete, accurate and honest answers to the questions we ask on behalf of your Insurers, and not misrepresent the facts when you take out, make changes to or renew your policy
- b) If on renewal of your policy you do not meet your Insurers request to confirm or change details you have previously given, this may amount to misrepresentation

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- c) Tell us if there are any changes to the information set out in the Statement of Facts Certificate of Insurance or on your schedule
- d) Revise the premium and/or change the compulsory excess
- e) Revise the extent of the cover

For motor insurance it is an offence under the Road Traffic legislation to provide incomplete or even a record inaccurate information to the questions asked in your application for the purpose of obtaining a certificate of motor insurance

Insurers always recommend you keep a record (including copies of letters and emails) of all information provided to them or us for your future reference

The above duties are there before the policy is placed, when it's varied, extended or renewed. The duties will also remain if the policy contains a condition which requires you to advise your Insurer of a specific increase or alteration in risk.

If you are not sure whether your Insurer needs particular information, it is both fair and reasonable to assume and accept you provide it to them anyway

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