



Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured

Response to Consultation

November 2007

The Construction Industry Council (CIC) represents the professional bodies, trade associations and research organisations in the construction industry. A list of its members is attached.

CIC is pleased to have the opportunity to respond to the Consultation Paper by the Law Commission and Scottish Law Commission into Insurance Contract Law. We have read the Paper with interest as insurance has an integral part to play within the construction process.

CIC is broadly supportive of the changes that the Law Commissions have proposed. There is little doubt that the current arrangements for insurance law are often little understood, even by relatively informed buyers of insurance, resulting in unexpected, unfair and unjust outcomes – more so with some insurers than others. We have seen a number of cases within construction where policies of insurance have been cancelled *ab initio* or claims of great significance repudiated in circumstances which would never have been in the contemplation of a reasonable insured when cover was incepted.

Rather than complete the Questions in Part 12 of the Consultation Paper, CIC responds as follows.

1. As a general point the Consultation Paper has been clearly drafted and deals with several complex issues in an entirely understandable manner; the drafters of the Paper are to be congratulated for this.
2. The proposal to differentiate between consumers and businesses is supported; there are clearly differing levels of understanding and needs between these two classes of insurance buyers.
3. The concept of a hierarchy of breaches rising from innocent, to negligent to reckless with appropriate remedies available to insurers for each is a sensible one. Replacing the current rigid and draconian remedies available to insurers with a range of measures linked to the extent of the insured's culpability has to make sense. It should also help to encourage a greater pre-sale understanding by insurance buyers of the consequences of any breaches of warranty, non-

disclosure etc and this increased level of awareness might help to reduce the actual number of breaches seen in practice.

4. A system which seeks to put the reasonable expectations of the insured at its core (rather than the view of the prudent underwriter) represents a fairer balance between insured and insurer.
5. The ability of business insureds to opt out of the statutory default position is to be supported particularly if the consequences of any opt-out are clearly and specifically referred to in any relevant policy documentation. It is not for government to molly-coddle business.
6. Basis of contract clauses are often seen by insureds as being pernicious and provide insurers with significant remedies of which the insured may not be aware until after the trap is sprung and cover repudiated.
7. We have no comments to make in relation to Group Insurance, Co-Insurance or Insurance on the Life of Another.
8. In relation to the role of intermediaries, they do provide an important function within the construction industry. Few, if any, clients, contractors, consultants or suppliers fail to utilise the services of an intermediary. The law of agency in this area is complex as most brokers carry out tasks for insurers as well as advising their clients. However, the key distinction is the question of advice. Is the intermediary advising the insured or merely selling him the product of an insurer? In circumstances where advice is being provided, the intermediary must be the agent of the insured in relation to the advice. The test of whether the intermediary is “searching the market” in this context may prove to be confusing and irrelevant.
9. If the provisions of the Consultation Paper become law it is conceivable that insurance premiums might increase as a consequence as claims that might otherwise be repudiated fall to be paid. If that proves to be the case, so be it; more effective insurance arrangements should come at a price.

12th November 2007.

CIC MEMBERSHIP AT MARCH 2007

FULL MEMBERSHIP

ABE	Association of Building Engineers
ACA	Association of Consultant Architects
ACE	Association for Consultancy and Engineering
APM	Association for Project Management
APS	Association for Project Safety
BIFM	British Institute of Facilities Management
BRE	Building Research Establishment
BSRIA	Building Services Research and Information Association
CEBE	Centre for Education in the Built Environment
CIAT	Chartered Institute of Architectural Technologists
CIBSE	Chartered Institution of Building Services Engineers
CIOB	Chartered Institute of Building
CIRIA	Construction Industry Research and Information Association
GF	Ground Forum
ICE	Institution of Civil Engineers
ICES	Institution of Civil Engineering Surveyors
ICWGB	Institute of Clerks of Works of Great Britain
IHIE	Institute of Highways Incorporated Engineers
IHT	Institution of Highways & Transportation
IMBM	Institute of Maintenance and Building Management
IPHE	Institute of Plumbing & Heating Engineering
IStructE	Institution of Structural Engineers
LABC	<i>(formerly known as District Surveyors Association)</i>
LI	Landscape Institute
NHBC	National House-Building Council
RIBA	Royal Institute of British Architects
RICS	Royal Institution of Chartered Surveyors
RTPI	Royal Town Planning Institute
SCI	Steel Construction Institute
TSA	The Survey Association

ASSOCIATE MEMBERSHIP

ACAI	Association of Consultant Approved Inspectors
ACBS	Association of Consultant Building Surveyors
ACostE	Association of Cost Engineers
BACH	British Association of Construction Heads
BBA	British Board of Agrément
CHoBE	Council of Heads of the Built Environment
CIMCIG	Chartered Institute of Marketing and Construction Industry Group
COTAC	Conference on Training in Architectural Conservation
CQSA	Consultant Quantity Surveyors Association
FBE	Forum for the Built Environment
FPS	Federation of Property Societies
RSME	Royal School of Military Engineering
SCHOSA	Standing Conference of Heads of Schools of Architecture
SCL	Society of Construction Law
SPONGE	<i>(a network of young construction professionals focusing especially on sustainability)</i>
TAG	Local Government Technical Advisers Group
TECBAR	Technology and Construction Barristers' Association
TeCSA	Technology and Construction Solicitors' Association