# Good Faith and The Consumer Insurance Contract Act

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EVEN though we have been collectively distracted by COVID-19 over these past few months, very few of us will be unaware that certain sections of the Consumer Insurance Contracts Act 2019 [CICA] were commenced on the 1st of September 2020. The remaining sections are due for commencement on the 1st of September 2021 – this, ostensibly, is to allow the Insurance Industry a suitable 'lead in time' to get to grips with new obligations and changes to the law.

I have previously written (and spoken) about the importance of good faith in insurance contracts and I had suggested that there was an in-built 'ethical component' to the rule which was still of relevance for all of us in a Regulated insurance industry. Nevertheless, the CICA represents a significant change to the application of the principle of good faith, abolishing its pre-contractual effects, bringing legislative certainty to the respective duties of the Insurer and Policyholder alike.

The background to the CICA is, of itself, interesting and it will continue to have an impact on Brokers, Insurers, Policyholders and Policyholder Representatives for years to come.

Many Brokers will have a particular (or nostalgic) interest in the changes to the principle of Utmost Good Faith, or Uberrimae Fidei, and the **related duty of disclosure.** Insurance contracts are perhaps the best illustration of a class of contracts that are described as being of the utmost good faith. Section 17 of the Marine Insurance Act, 1906 provides that:

> *"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."*

In other words, before the contract is concluded, the parties to it are bound to volunteer to each other information that is material.

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**Judicial Precedent & Developments**

The rule was first identified in the celebrated case of *Carter v Boehm* as far back as 1766. Lord Mansfield CJ explained the principle of good faith as follows: *"Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary."*

More recently, in 1982, in *Chariot Inns Limited v Assicurazioni Generali S.p.a.,* Kenny J. confirmed that the correct answering of questions asked is not the sole obligation of the insured, instead he or she must disclose all matters material to the risk. The Justice explained that: *"a contract of insurance requires the highest standard of accuracy, good faith, candour and disclosure by the Insured when making a proposal for insurance…"*

In *Aro Road and Land Vehicles Limited v The Insurance Corporation of Ireland,* McCarthy J. reminded us that *"a contract of insurance is a contract of utmost good faith on both sides."* After Aro Road (and subsequently *Kelleher v Irish Life Assurance Company)* it could no longer be simply said that if the Insured could be shown by the Insurer to have committed non-disclosure or to have committed a misrepresentation before the contract was entered into, then the Insurer had the right to avoid the contract in its entirety.

These cases modified the duty for the Insured, requiring them to exercise a genuine effort to achieve accuracy using all available sources. Likewise, the Insurer must also have considered the possibility that the form of questions asked in a proposal form may ultimately limit the duty of disclosure arising.

In *Manor Park Homebuilders Limited v AIG*, Justice McMahon, reflected the analysis of Lord Mansfield in *Carter v Boehm.* Picking up on the subject of 'over the counter' policies, discussed in Aro Road, and the fact that good faith is a two-way-street, the judge clarified: *"The Insured's duty is balanced by a reciprocal duty on the Insurer to make its own reasonable inquiries, to carry out all prudent investigations and to act at all times in a professional manner" and "the Insurer should not use the duty of the utmost good faith as a crutch or an excuse not to carry out his own investigations which form part and parcel of the profession."*

With reference to case law, the Irish Courts have tended to apply the doctrine of (utmost) good faith somewhat less strictly than their English counterparts. The Consumer Insurance Contract Act could be said to crystalise this trend in Judicial interpretation.

**Consumer Insurance Contracts Bill & Act**

The Consumer Insurance Contracts Bill was a Private Members Bill, introduced by Pearse Doherty, TD, for Sinn Féin. On the 19th of January 2017, Deputy Doherty sought to introduce the Bill to the Dáil. His [edited] speech in the Chamber perhaps provides a useful analysis of the aims of the Bill and provides some context for the legislation:

> *"In recent years we have seen the insurance industry treat its customers with arrogance and, over the last couple of years, completely unjustified and unjustifiable increases in motor insurance premiums.*
>
> *This Bill seeks to level the playing field so that the consumer is better equipped to stand up to the insurer and argue the toss. It represents a major modernisation of insurance contract law in Ireland and is based on a report by the Law Reform Commission from July 2015.*
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> *… In this day and age, the insurance consumer is at a huge disadvantage when faced with the lawyered up, technically savvy insurer. We know the results: the insurer holds all of the cards. …. Likewise, the law on disclosure dates back to 1776, which is the year of the Declaration of Independence in the United States, such that the law on disclosures is as old as independent America. It gives huge discretion to insurers to decide what should have been disclosed after a claim is made. In its case studies the Financial Services Ombudsman has noted that: "Unfortunately, once non-disclosure takes place, for whatever reason, the legal effect of that can operate harshly." Innocent failure to disclose something an average consumer would not consider relevant should not be a get-out-of-jail clause for insurers.*
>
> *The Bill is detailed and complex but at its core is a simple function: to empower consumers so that no longer will farmers, pub owners, residents and other*

*consumers be denied what morally should be theirs because of outdated technicalities that can be exploited by insurers. Laws in force at the time of the American War of Independence - insurance laws based on the days of merchants trading across oceans rather than the modern needs of society - must be updated. The consumer alone loses when laws become archaic. The consumer, the victim, must get the benefit of the doubt when it comes to arguing the technicalities of insurance claims."*

The Bill did indeed garner support throughout the Dáil and, crucially, it was not opposed by the Government. When the Bill overcame the different Stages in the Houses of the Oireachtas and was passed as legislation, Deputy Pearse Doherty concluded:

*"Our Consumer Insurance Contracts Bill will shift the balance in favour of policyholders, by increasing transparency and strengthening the hand of the policyholder during their insurance contract. It is the only legislation that has been passed since 2016 that focusses on policyholders, increasing their protections. This legislation has been described as the most radical change in consumer law in centuries, and as a game-changer by the Alliance for Insurance Reform."*

It was interesting that Deputy Doherty signed off by reiterating that 'Sinn Féin will continue to stand up for workers and families.' Doubtless, this is what every Politician would/does say. Speaking as a Policyholder Representative, the concept is a familiar one: standing up for the little guy is what attracted me to Loss Assessing in the first instance.

**Law Reform Commission Report**

The bones of the proposed legislation were derived from an earlier report by the Law Reform Commission [LRC] report – 'Consumer Insurance Contracts' – published in July 2015. The topic was itself part of a larger body of work carried out by the LRC, Third Programme of Law Reform, that ran from 2008 to 2014. Issues with Consumer Insurance Contracts had been identified well in advance of the CICA.

Following on from its *Consultation Paper on Insurance Contracts* the Irish Law Reform Commission had made 105 recommendations in their report, summarised as follows: legislation to consolidate and reform law on insurance contracts for individual consumers and SMEs, including: to replace pre-contractual duty of disclosure with duty to answer specific questions; proportionate remedies for breach; replacement of insurance warranties with provisions that identify actual risks insured; to abolish requirement for insurable interest; and to allow third parties to claim directly against insurer in specified cases.

It appears, based upon the LRC's Report that they (the LRC) had provisionally recommended that the concept of utmost good faith in insurance contracts be retained. Upon reflection however, the LRC ultimately took a contrary view – suggesting that the foundations of the principle had been altered in favour of Insurers and to the detriment of policyholders because of innovations in the fields of communications, technology, information gathering, statutory corporate governance and risk management requirements. The Commission took the view that the certainty provided by legislative reform – of the principle of utmost good faith – was preferrable than ever-developing judicial rules. Such reform, defining the respective duties of the Insurer and the Policyholder, would benefit Policyholders as a whole in the context of a modern insurance market where the product is largely commodified.

**Section 8 of the Consumer Insurance Contracts Act**

This then is how a wide-ranging topic - resolutely and expertly researched by the Law Reform Commission - found its way into the Dáil as a Bill and ultimately became new law. Although the CICA is worthy of serious analysis and scrutiny, in the context of this inquiry, we are merely concerned with one section, specifically Section 8.

In simple terms, Section 8, abolishes the principle of utmost good faith and replaces it with a **statutory duty on consumers** to answer questions honestly and with reasonable care. An insurer shall be deemed to have waived any further duty of disclosure of the consumer where it fails to investigate an absent or obviously incomplete answer to a question.

Under the 2019 Act, consumers are required to answer specific questions on a durable medium that are in plain and clear language. The onus of proving that such questions are in plain and clear language rests with the insurer. Where there is an ambiguity or doubt about the meaning of any question posed, the interpretation most favourable for the consumer will prevail.

Consumers **are not required** to volunteer information over and above the questions asked of them.

> ***"The Act acknowledges that when contemplating whether a Policyholder has used 'reasonable care' one of the key factors to be considered is whether they were represented in their dealings (with the Insurer) by a Broker.***

**Conclusion**

It is not yet clear how Insurers, Agents and indeed Brokers will react with regard to their respective positions at the pre-contractual stage and clearly this will be an ongoing discussion for all of us, representing a body of work that the industry will need to come to terms with over the coming months. Will we see pages upon pages of question sets designed to cover every possibility or angle? Will the Insurers back-away from direct selling and better engage with the Broker market? After all, the Act acknowledges that when contemplating whether a Policyholder has used 'reasonable care' one of the key factors to be considered is whether they were represented in their dealings (with the Insurer) by a Broker.

We look forward to the impact the Act must have on decisions taken by the Financial Services and Pensions Ombudsman and, indeed, we can think of complaints previously rejected by the FSPO that would have been upheld had Section 8 of the CICA been current at the time.

Issues such as good faith and non-disclosure typically arise on foot of a claim. It is the fact of a loss that brings the manner in which the contract was brought about into sharp focus. It is the point at which underwriting, broking and claims all interact with one another. As Policyholder Advocates, we have witnessed the inequitable and sometimes devasting effects of alleged breaches of the duty of good faith. We hope, for example, never again to see an Insurer cancel a policy (for their elderly clients) where the Insured innocently (and correctly) answered an open-ended and subjective proposal form question as to the standard of maintenance of a property.

Some will be sad to see Utmost Good Faith confined to history or given the designation of 'interpretive principle' - as is the case in the United Kingdom. On balance, the reforms contained within Section 8 of the CICA were probably overdue and it will be interesting to see where the sweeping changes to the application of the principle of utmost good faith will lead us to. We acknowledge that this, and other provisions of the CICA, are likely to have an overall benefit for Policyholders and we look forward to the interesting challenges that are bound to arise in 2021 and thereafter.