# BREACH OF DUTY OF FAIR PRESENTATION UNDER THE INSURANCE ACT 2015 - COURT FINDS INSURER WAS ENTITLED TO AVOID POLICY

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## INTRODUCTION

In *Berkshire Assets (West London) Limited v Axa Insurance UK Plc* [2021] EWHC 2689 (Comm) the insured failed to disclose to the insurers of its Construction All Risks and Business Interruption policy that one of its directors was the subject of criminal proceedings in Malaysia at the time of policy renewal. Although the charges were dropped after the policy incepted, the High Court held that the charges were a material circumstance that should have been disclosed and the insured had therefore breached its duty of fair presentation under the Insurance Act 2015 (the 2015 Act). The Court was satisfied that the insurer would not have accepted the risk had it known of the charges, and accordingly was entitled to rely on the remedy of avoidance under the 2015 Act. The case highlights the need for individuals responsible for arranging insurance to make adequate internal enquiries regarding material circumstances when placing or renewing insurance contracts. Also, while the 2015 Act introduced new remedies for breach of the duty of fair presentation, this case serves as an important reminder that the Court may still uphold the insurer's remedy of avoidance.

## BACKGROUND

Berkshire Assets (West London) Limited (the Insured) was a joint venture vehicle used to purchase a property development project in west London (the Property), for which it had purchased Construction All Risks and Business Interruption insurance (the Policy) from AXA Insurance UK Plc (the Insurer). The Policy was first purchased for the period 30 November 2018 to 29 November 2019, and was then renewed.

On 9 August 2019 (before the Policy was renewed in November 2019) the Malaysian Attorney General filed criminal charges (the Charges) against one of the Insured's directors, Michael Sherwood. The Charges were in relation to an alleged scheme to defraud the Government of Malaysia and purchasers of certain bonds that had been underwritten by Goldman Sachs and issued by subsidiaries of 1Malaysia Development Berhad (1MDB), a company which was under heavy scrutiny for its alleged suspicious money transactions. Mr. Sherwood was a director of one of the Goldman Sachs subsidiaries allegedly involved in the underwriting of these bonds. The Charges against Mr. Sherwood (which were completely unrelated to his role with the Insured) were ultimately dropped on 9 October 2020.

When first quoting for the Policy in November 2018, the materials provided by the Insurer sought a declaration confirming that the Insured's partners or directors had not been charged or convicted of a criminal offence. At this

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time, Mr. Sherwood had not yet been charged. However, at renewal in November 2019, the Insurer's quotation noted that the premium was based on the information provided when the Policy was first purchased, but the Insured was required to inform the Insurer about any material changes since that information had been provided. The director involved with the Policy renewal, Mr. Garside, failed to disclose the Charges of which he was unaware.

On 1 January 2020, the Property flooded causing significant damage and the Insured claimed under the Policy. The Insurer denied the claim on the basis that the Insured had failed to disclose the Charges filed against Mr. Sherwood, and that this was a breach of its duty of fair presentation under the 2015 Act. The Insurer contended that, had the Charges been disclosed, they would not have underwritten the risk and were therefore entitled to avoid the Policy as a whole.

There were two issues for the Court to consider:

1. Whether the Charges were a material circumstance for the purpose of the duty of fair presentation?
2. If they were, and the Charges had been adequately disclosed, would the Insurer have agreed to insure the Insured under the renewed Policy?

## ISSUE 1 - THE MATERIALITY ISSUE

Section 3 of the 2015 Act requires insureds, before entering into an insurance contract, to make a “fair presentation of the risk” which, generally speaking, requires insureds to disclose to the insurer “every material circumstance which the insured knows or ought to know.” A “material circumstance” is defined by Section 7 as one that “would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.”

The Court considered that the authorities regarding material circumstances that pre-date the 2015 Act continue to be relevant. These authorities set out a number of principles relevant to material circumstances, including, in particular:

3. Materiality is to be judged at the time of placement, and not by reference to subsequent events.[1]
4. Facts raising doubts as to the risk are sufficient to be material. It is not necessary for the facts to be shown, with hindsight, to have actually affected the risk.[2]

In light of the above, the Court held that the Charges did represent a material circumstance within the meaning of the 2015 Act that should have been disclosed. The Charges arose from a dishonest and fraudulent scheme of huge scale. It was not relevant that the Charges were later dropped as the Insurer could not have been expected to know that at the time.

## ISSUE 2 - THE INDUCEMENT ISSUE

Section 8 of the 2015 Act provides that “the insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer: (a) would not have entered into the contract of insurance at all; or (b) would have done so only on different terms.”

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Amongst other things, the Insured relied on the fact that several other underwriters were prepared to cover Mr. Sherwood following disclosure of the Charges. The judge considered this was irrelevant as these were different types of policy and the Court was only concerned with what the Insurer in the present case would have done.

The Insurer pointed to the existence of an internal document regarding “disclosure of previous insurance, financial or criminal matters” (the Practice Note). The Practice Note provided that if a client made a disclosure falling within certain “negative criteria” (such as criminal charges), then the risk would not be acceptable and should be declined. The Court accepted this position, and found that the Insurer had been induced by the non-disclosure to enter into the Policy and was therefore entitled to rely on the remedy of avoidance.

## COMMENT

This case is a potent reminder that the remedy of avoidance remains available to insurers under the 2015 Act. The judgement confirms that allegations of criminal wrongdoing can constitute a material circumstance that should be disclosed to insurers, even if those allegations appear unrelated to the alleged wrongdoer's role with the insured party and are eventually withdrawn.

As mentioned above, Section 3 of the 2015 Act requires insureds to disclose to insurers “every material circumstance which the insured knows or ought to know” or, failing that provides sufficient information to put the insurer on notice. In the present case, the individual responsible for obtaining insurance coverage for the Insured, Mr. Garside, was unaware of the Charges. Furthermore, Mr. Garside had understood that only material changes in respect of the construction works on the Property would be relevant. It did not occur to him to check with his co-directors that none had been charged with a criminal offence.

Section 4 of the 2015 Act contains detailed provisions regarding what an insured “knows or ought to know.” Business insureds are taken to know that which is known to the individuals in the insured's senior management or who are responsible for the insured's insurance. Furthermore, an insured ought to know that which “should reasonably have been revealed by a reasonable search of the information available to the insured.” As a consequence, the court found that it was not sufficient that Mr. Garside had not made such enquiries of others within the company.

In light of the above, insureds should consider the following when obtaining / renewing their insurance policies:

5. If the insurer or broker provides a proposal form for the insured to complete (either when first purchasing the policy or at renewal), the duty of fair presentation may not be confined to answering the specific questions raised in the form. Insureds should consider whether sufficient information has been provided, even if the insurer has not specifically asked for that information.
6. Individuals responsible for arranging the insurance should consult with each other, and make enquiries of senior management regarding any material circumstances of which they might be aware. Indeed, certain questions on insurer proposal forms may explicitly require insureds to make enquiries of other individuals.
7. Finally, those enquiries should relate not only to issues obviously relevant to the risk. In the *Berkshire Assets* case, Mr. Garside mistakenly considered that the insurer of the Construction All Risks / Business Interruption cover would only be interested in material changes to the construction works. What constitutes a material circumstance will depend to a large extent on the type of policy but insurers may regard as material factors those which raise doubt concerning the integrity of the insured or its directors,

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including criminal charges, convictions and regulatory investigations involving the directors as well as director disqualification.

## FOOTNOTES

[1] *Versloot Dredging v HDI Gerling Industrie Versicherung (The DC Merwestone)* [2017] AC 1, per Lord Sumption at para 32

[2] *The Dora* [1989] 1 Lloyd's Rep. 69, per Phillips J at 93

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