British
Insurance
Law
Association

INSURANCE CONTRACT LAW REFORM

Recommendations to the Law Commission

A Report of the Sub-Committee of the
British Insurance Law Association
1 September 2002

Chairman of the Sub-Committee
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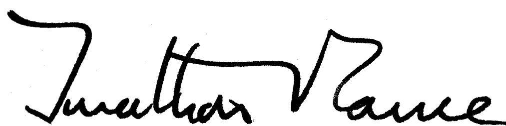
1 September 2002

Foreword

As President of the British Insurance Law Association ("BILA"), it is a pleasure to introduce this Sub-Committee Report, and to commend it for consideration by the Law Commission to whom it is addressed as well as consultees by whom it is read.

BILA serves as a forum for practitioners from all sides of the insurance market and the law as well as academics interested in insurance law. BILA holds regular conferences, lectures and lunch-time talks, undertakes research projects and publishes a journal as well as a web-site. Its members have diverse backgrounds and interests. But its aim as an association has always been to encourage discussion and facilitate synthesis.

I hope in that context that the present Sub-Committee Report will become a valuable stimulus to wider discussion and action in the area of insurance law. It is an area where distinguished commentators have long identified serious inequities which merit legislative attention.



The Rt Hon Lord Justice Mance
1 September 2002

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INSURANCE CONTRACT LAW REFORM
A Report of the BILA Sub-Committee

Formation

1. This Sub-Committee was formed in January 2001 to examine areas of insurance law causing concern in the insurance market and in insurance disputes, and to make recommendations to the Law Commission as to the desirability of drafting a new Insurance Contracts Act in respect of Marine and Non-Marine Insurance and/or other reforms to current legislation. The members of the Sub-Committee are set out in Schedule 1[1].

2. At the opening meeting, 5 sub-groups were formed to consider Marine Insurance, Utmost Good Faith, Reinsurance, Intermediaries and Claims. After the provisional findings of these sub-groups, this Report was prepared by the Sub-Committee. Although it does not necessarily represent the views of all BILA members, we are confident that those selected for the Sub-Committee are credible practitioners best able to speak with authority on the subject matter of our Report.

3. Our over-riding objective has been to put forward ideas for consideration by the Law Commission, in the context of the wider perspective the Commission is able to form from its consultations with interested parties.

4. We are satisfied that there is a need for reform. This is supported by the excellent report of the National Consumer Council in 1997[2]. We believe that it is important to start by the speedy implementation of the recommendations of the 1980 Law Commission, which we believe to be non-controversial. We hope that it can be updated by some revisions along the lines we suggest.

The 1980 Law Commission Report

5. As indicated above, the first priority in the reform of insurance law must be the implementation of the Law Commission Report of 25 July 1980[3]. It is important to recognise the limits of the terms of reference:

> "To consider the effect on the liability of an insurer, and on the rights of an insured, of:
>
> (a) non-disclosure by, or on behalf of, the insured;
>
> (b) misrepresentation by, or on behalf of the insured;
>
> (c) breach of 'warranty' by the insured;

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[1] Pages 35-36
[2] Insurance Law Reform : the Consumer Case for a Review of Insurance Law
[3] Insurance Law : Non-disclosure and Breach of Warranty, Report No. 104, Cmnd. 8064

(d) special conditions, exceptions and terms;

(e) increase and decrease of the risk covered;

particularly in the light of the Fifth Report of the Law Reform Committee (1957)[4]…and to make recommendations."

6. The Law Reform Committee (1957), whose composition was of great distinction, including 5 future Law Lords (Jenkins, Parker, Devlin, Diplock and Gardiner) as well as the future Sir Robert Megarry V-C, had recommended, inter alia:

"(1) that for the purposes of any contract of insurance no fact should be deemed material unless it would have been considered material by a reasonable insured;

(2) that, notwithstanding anything contained or incorporated in a contract of insurance, no defence to a claim thereunder should be maintainable by reason of any mis-statement of fact by the insured, where the insured can prove that the statement was true to the best of his knowledge and belief."

7. The Law Commission of 1980 also had a distinguished composition, and included the late Sir Michael Kerr as its Chairman. They, of course, confined themselves to matters raised by their terms of reference, and there is therefore no significance in the fact that they did not recommend reforms outside their terms of reference.

8. Careful consideration was given by the Commission, and their report makes recommendations, and includes a draft Insurance Law Reform Bill. We do not think it useful to seek to summarise them here, but there is a useful summary in Lord Justice Longmore's Lecture[5] referred to in the next paragraph.

9. This report has been widely praised, but its implementation has not been forthcoming. We append hereto the Pat Saxton Memorial Lecture to this Association by Lord Justice Longmore on 5 March 2001[6]. We respectfully adopt what is said in this lecture, which is also reproduced in this Association's Journal No.106 of June 2001. Longmore LJ summarises the history of inactivity, and concludes *"...this is not just good enough."*[7] We agree. We also refer to Lord Justice Rix's speech to BILA on 19 December 2001, of which a copy is appended[8], discussing potential areas of law for reform.

10. This Sub-Committee's view is that the starting point for reform should be the implementation of this Report, and the enactment of the draft Bill, with only such alterations as are sufficiently non-controversial as not to delay this enactment.

11. We agree whole-heartedly with the Commission that Statements of Practice, particularly limited to those insuring in their private capacity, are not sufficient to protect insureds. Nor do we think that the fact that the Ombudsman is bound to act in

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[4] Fifth Report : Conditions and Exceptions in Insurance Policies, Cmd. 62
[5] Appendix A, pages 11-24
[6] ibid
[7] ibid, at page 16
[8] Appendix B, pages 25-30

accordance with what is fair and reasonable and therefore does not always apply the strict letter of the law, removes the need for law reform. Many disputes are not settled by that route. The appropriate course is to remove unfairnesses in the law, not simply to alleviate the unfairnesses.

Possible Alterations To The Draft Bill

12. The first area that requires consideration is the types of insurance covered. Our view is that the Commission got it broadly right. We consider that there should be no limitation to insureds in their private capacity. A tradesman insuring his business is in as much need of protection as when he is insuring his home. By restricting the duty of disclosure to that required of a reasonable insured, this would enable the court to differentiate between the duty of a large industrial company with a professional insurance department, as compared to a small company on an industrial estate where the insured's knowledge of insurance law may well be very limited.

13. The excluded types of insurance are the subject of Clause 1 of the Bill and the Schedule – Marine, Aviation and Transport ('MAT') insurance. There is a power for the Secretary of State to add to or exclude from the classes of insurance excluded by statutory instrument.

14. The types of insurance excluded are essentially those where the insured will be insuring in a market where he will be professionally represented by a broker (para.2.8 of the Law Commission Report). Apart from the possible inclusion of private yacht owners, or aircraft owners, we would prefer to leave this part of the Bill as it is, rather than delay its implementation by long processes of consultation.

15. So far as reinsurance is concerned, this is covered by Clause 13 of the draft Bill, which excludes reinsurance from the ambit of the Bill, except that a reinsurer shall have no greater rights against the reassured than the reassured (as insurer) would have against the insured in either of the circumstances:

    (a) if as a consequence of the non-disclosure of a material fact by the insured, the reassured fails to disclose that fact to the reinsurers; or

    (b) if the reassured substantially repeats a warranty broken by the insured.

16. Reinsurance is again dealt with in a market where professionals are involved on both sides, and where the reassured, through his broker, is able to bargain for the terms of the contract of reinsurance. We accept the Law Commission's formulation.

17. Longmore LJ in his Saxton Lecture, suggests 6 topics[9] for the Law Commission to consider. We take each in turn on the basis that the reforms are limited to the types of insurance covered by the draft Bill:

    17.1 "1. Whether a doctrine of utmost good faith should be retained and if so, what its content should be."

[9] Appendix A, pages 11-24, at page 20

We think that the answer should be yes, but with modifications, which we shall discuss in paras. 19-23 below. Utmost good faith should apply to the whole period of the contract. The nature of the duty will vary with the phase and circumstances of the relationship: "The Star Sea"[10] [2001] 1 Lloyd's Rep 389 at p. 392, para 7, per Lord Clyde and at p.400, para 48, per Lord Hobhouse.

17.2 "2. The appropriate test for an insurer or reinsurer who wishes to defend a claim on the basis of non-disclosure and misrepresentation before formation of the contract."

The House of Lords in Pan Atlantic v. Pine Top[11] [1995] 1 AC 501 decided (i) that the test of materiality was the objective one of whether the non-disclosed (or misrepresented) matter would have been taken into account by a prudent insurer when assessing the risk and (ii) by a new departure, that subjectively, the actual insurer had to prove that he was induced to enter into the contract on the relevant terms by the non-disclosure (or misrepresentation).

Longmore LJ mentions 6 possible formulations for reform[12] in his Lecture. We prefer his third alternative ("whether a reasonable insured would have considered the undisclosed matter to be material to a prudent insurer"), which is the solution recommended by the Law Commission and included in the draft Bill. It has also been adopted in Australia by the Insurance Contracts Act 1984, and is the proposed solution in the Australian Law Reform Commission ('ALRC') report[13] reviewing the Marine Insurance Act 1909 ('MIA 1909'). We observe and agree with the views of Mr Justice Carnwath (as he was then) sitting in the Court of Appeal in The "Mercandian Continent"[14] (2001) 2 Lloyd's Rep 563 at p.577 that this "…report would be a very useful starting point for any consideration of law reform in this country."

17.3 "3. The remedies which would be open to an insurer or reinsurer if he wishes to defend a claim on the grounds of non-disclosure or misrepresentation."

17.3.1 The sole remedy currently available for non-disclosure or misrepresentation is the draconian remedy of avoidance of the contract of insurance, whether the misrepresentation or non-disclosure was fraudulent, negligent or innocent. This position has been the subject of sustained criticism from the courts (e.g. in Pan Atlantic v. Pine Top, supra) and from academic lawyers. We consider that reforms are necessary for the protection of the insured.

17.3.2 In the first place we would retain the right to avoid where there has been fraudulent or reckless misrepresentation or non-disclosure. We would

[10] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Européene ("The Star Sea") [2001] 1 Lloyd's Rep 389

[11] Pan Atlantic Insurance Co. Ltd. and Another v Pine Top Insurance Co Ltd [1995] 1 AC 501

[12] Appendix A, pages 11-24, at pages 20-21

[13] Review of the Marine Insurance Act 1909, Report 91, April 2001

[14] K/s Merc-Scandia XXXXII v Certain Lloyd's Underwriters subscribing to Lloyd's Policy No. 25T 105487 and Ocean Marine Insurance Co Ltd and Others ("The Mercandian Continent") [2001] 2 Lloyd's Rep 563

equate blind eye recklessness (not caring whether a representation is true or false) with fraud.

17.3.3 More difficult are the remedies which should be available for innocent or negligent misrepresentation or non-disclosure. We believe that principles of proportionality should be introduced if possible, despite the 1980 Law Commission's reluctance.

17.3.4 We would recommend a solution on the lines of Recommendation 25 of the ALRC:

"**Recommendation 25.** The MIA should be amended to insert new provisions which provide that if the insured has breached its duties relating to non-disclosure and misrepresentation

(1) if the breach is fraudulent, the insurer is entitled to avoid the policy from its outset with no return of premium.

(2) if the breach is not fraudulent:

(a) where the insurer would not have entered into the contract if it had known of the undisclosed circumstances or the truth of the misrepresented circumstances, the insurer is entitled to avoid the policy from its outset but with a return of premium.

(b) where the insurer would have entered into the contract but on other conditions, the insurer is not entitled to avoid the policy but:

(i) is not liable to indemnify the insured for a loss proximately caused by the undisclosed or misrepresented circumstance;

(ii) is entitled to vary its liability to the insured to reflect the amount of any variation in premium, deductible or excess that would have been imposed if it had known of the undisclosed circumstance or the truth of the undisclosed circumstance; [and

(iii) is entitled to cancel the policy in accordance with the other provisions of the MIA on cancellation which are the subject of recommendation 18.]

(Recommendation 18 outlines other rights of cancellation. Clause 11 of the draft Bill adequately covers the position. Accordingly we do not consider that sub-sub recommendation 25(2)(b)(iii) need be included.)

17.4 <u>"4. The right approach to breach of warranty by the insured"</u>

The draft Bill covers this in Clauses 8-12 inclusive.

17.5 "5. The right approach to proposal forms and answers given being declared to be the basis of the contract"

We agree with the views of the 1980 Law Commission, which would be implemented in Clause 9(1)(b) of the draft Bill.

17.6 "6. The question whether damages should be payable for insurers' refusal to pay a valid claim."

17.6.1 We agree with Longmore LJ that this is a topic to be considered by the Law Commission[15]. Very often the speedy payment of an insurance claim is critical to an insured. Express terms may alleviate the situation, such as terms in householders' policies to pay for alternative accommodation during rebuilding. But insureds may be driven into bankruptcy by delay, whether they insure in a business or a private capacity.

17.6.2 The situation could be improved by provisions along the following lines:

(1) That a claim under an insurance contract is to be treated as a debt, and it is an implied term of the contract that the debt will be paid within a reasonable time, having regard to all the circumstances;

(2) That it should be an implied term of an insurance contract that each party shall act towards the other party with utmost good faith.

(3) That there shall be no right of avoidance in respect of a post-contractual failure to act with utmost good faith, except where the breach is materially fraudulent.

17.6.3 An alternative to treating the claim as a debt, would be to have a provision that breach of that duty gives rise to damages covering types of loss that an insurer should have had within reasonable contemplation.

18. We recommend that the following co-insurers should be deemed to be induced by misrepresentation or non-disclosure, if all the leading insurers were so induced: see Recommendation 27 of the ALRC report and draft Section 26D of the proposed amendments.

19. The law on post-contract duty of utmost good faith has been the subject of 3 important decisions: "The Star Sea"[16] and the "Mercandian Continent"[17] and Agapitos v Agnew[18]

The duty of utmost good faith applies after the conclusion of the contract. Lord Clyde in "The Star Sea" says that the contrary is "past praying for". Lord Clyde goes on to

[15] Appendix A, pages 22-23
[16] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Européene ("The Star Sea") [2001] 1 Lloyd's Rep 389
[17] K/s Merc-Scandia XXXXII v Certain Lloyd's Underwriters subscribing to Lloyd's Policy No. 25T 105487 and Ocean Marine Insurance Co Ltd and Others ("The Mercandian Continent") [2001] 2 Lloyd's Rep 563
[18] Agapitos v Agnew [2002] 2 Lloyd's Rep 42

point out that: "...the idea of good faith in the context of insurance contracts reflects the degree of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made."

Post-contract the duty in respect of claims is a duty of honesty - ie not to be fraudulent. The duty of utmost good faith raises a strict duty of disclosure in respect of variations and renewals. It is potentially applicable in respect of a material change in risk, but it is important that the contract of insurance should include a specific condition for notification of material change of risk.

20. These cases underline the problem caused by the much-criticised law that says avoidance is the only remedy for a failure to act with utmost good faith. That can never be of assistance to an insured treated by his insurer without utmost good faith. He wants his claim to be satisfied by payment or an award of damages – not the cover avoided.

21. The difficulties and problems caused are usefully set out in the ARLC Report at pp.222-232. We refer particularly to the observations of Lord Hobhouse in "The Star Sea" at [2001] 1 Lloyd's Rep at pp. 400, para. 52, cited in the ALRC Report at pp.224-5. He points to the appropriate remedy when he says:

"[Post-contractual duties of good faith] …can derive from express or implied terms of the contract; it would be a contractual obligation arising from the contract and the remedies are the contract remedies provided by the law of contract. This is no doubt why judges have on a number of occasions been led to attribute the post-contract application of the principle of good faith to an implied term."

22. The remedy lies in what we have already recommended in para. 17.6.2(2) and (3) above, namely that there should be an implied term that each party shall act towards the other party with utmost good faith. The remedy for breach would be damages to compensate the wronged party for his actual proved loss, according to ordinary principles of damages. Avoidance will only be available in respect of a materially fraudulent breach.

23. As to what constitutes the duty of utmost good faith in the post-contract situation, we see no reason why there should be statutory interference with the law as it is developing, most recently in "The Star Sea"[19], the "Mercandian Continent"[20] and "Agapitos v Agnew"[21]. If the breach is a materially fraudulent breach of the implied term in the sense that the fraud would have an effect on the underwriters' ultimate liability, and the gravity of the fraud or its consequences were sufficient, this would

[19] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Européene ("The Star Sea") [2001] 1 Lloyd's Rep 389

[20] K/s Merc-Scandia XXXXII v Certain Lloyd's Underwriters subscribing to Lloyd's Policy No. 25T 105487 and Ocean Marine Insurance Co Ltd and Others ("The Mercandian Continent") [2001] 2 Lloyd's Rep 563

[21] Agapitos v Agnew [2002] 2 Lloyd's Rep 42

enable the underwriters if they wished to do so, to terminate for breach of contract. It is desirable that insurance law should develop along the lines of general contract law.

(A) Observations Re Insurable Interest

24. In general, the technical rules of insurable interest have not proved a problem for claimants. We would, however, recommend a change to a test of "insurable relationship", on the lines of Sections 16 and 17 of the Australian Insurance Contracts Act 1984 (ALRC Report paras. 11.25/6, p 240), so that economic disadvantage is the test, not legal or equitable interest in the property.

(B) Observations Re Claims And Intermediaries

25. It is felt that the insured's rights when making a claim should be clarified and strengthened. Provisions as considered in para. 17.6.2 above should assist. In addition we recommend that statutory provisions should be made for codes to be issued by the FSA regulating the rights and obligations of insureds and insurers together with the conduct of intermediaries, in a similar manner to the code laid down by the GISC. In particular these could make provision for:-

    (1) The information to be provided by the insurer to the insured as to his rights and duties when a claim is notified;

    (2) Regulations as to the reservation of rights by insurers, specifying a time limit for such reservation to apply in the absence of special circumstances, and requiring the reasons for the reservation to be clearly set out.

    (3) Time limits for the payment of claims;

    (4) Part payments to be made when only the amount of the claim is in dispute;

    (5) Statutory interest on overdue payments;

    (6) The entitlement of the insured to ADR;

    (7) Information to be supplied by intermediaries as to their relationship with insured and insurer, so that the insured can understand clearly for whom the intermediary is acting in any particular activity. It should be made clear that, when the broker is acting under a binding authority, he is acting as the agent of the insurer;

    (8) The rights of the intermediary to withhold payment of a claim, or part thereof, where the insured client owes a debt to the intermediary under terms of credit with the intermediary for the premium.

26. The Intermediaries sub-group recommend a further change in the law, namely that as part of the mutual duty of utmost good faith, the insurers should be under a duty to ask reasonable questions concerning each risk presented to them insofar as the insured’s presentation does not provide information or sufficient information on a topic which the insurers regard as material. Best practice in the modern market involves both the

insured, with the help of his broker (if any), and the insurers, co-operating to ensure that the risk is fairly presented on all material topics.

(C) Observations Re Marine Insurance

27. We refer to para. 14 above.

28. We do not recommend wholesale amendments to the Marine Insurance Act 1906 ('MIA 1906'). The MIA 1906 is of great importance in the international market, which is dominated by UK and US Insurers. It is a highly competitive market where the insured is represented by skilled brokers who are well able to represent the insured in negotiating terms with the insurers. Proposal forms are rare. Disclosure is very important, as are warranties. By negotiation in the market the old Lloyd's SG Policy Form scheduled to the MIA 1906 has been abandoned and new Lloyd's Forms introduced in 1982, together with new Institute Clauses. Attempts to introduce tougher Institute Clauses in 1995 failed, because the market would not accept them. Overall, wordings are the subject of regular revisions to meet the needs of the market. Thus Clauses have been introduced for containerisation of cargo and for oil exploration, with terms including warranties tailor-made for the particular risks. Accordingly, in the marine market, the insured can normally negotiate for acceptable terms without statutory protection.

29. The views of the members of the Sub-Committee involved in the marine market on a number of areas of possible reform were as follows:

29.1 Utmost good faith/Warranties – Although this is a potential area of reform, it is not felt that the arguments for reform are as powerful as in the case of consumer contracts. It is important that the Institute Clauses are drafted to secure a balance between the interests of the insured and insurer.

29.2 Insurable interest – It is not felt that Sections 4-16 of the MIA 1906 have caused significant problems, so reform is not regarded as essential in respect of marine insurance. It is, however, recognised that the case for reform needs to be examined in the light of the useful comments in ARLC Chapter 11, pp 233-260.

29.3 Illegality – Reconsideration of Section 41 of the MIA 1906 is recommended. The warranty of legality is best covered by the Institute Clauses. Recommendations 13-15 of the ALRC, at p 187 of the report, are adopted.

29.4 Inherent Vice – Some clarification of Section 55(c) of the MIA 1906 is desirable.

29.5 Electronic Transactions – Section 22 of the MIA 1906 needs amendment to include a reference to electronic trading. This could be achieved either by a specific amendment of the Section, and/or by delegated powers to the appropriate Minister, to up-date the methods of making a marine insurance policy in accordance with modern techniques.

(D) Observations Re Reinsurance

30. Most of the observations in para. 28 above apply also to reinsurance. The limited effect of Clause 13 of the draft Bill is considered in para. 15 above. We would not recommend delaying the enactment of the draft Bill with modifications, pending a review of the law relating to reinsurance.

31. Further consideration by the Law Commission is recommended in respect of:

    31.1 Good Faith – While we recommend no change in the objective test of materiality, it is appropriate to consider whether to adopt for reinsurance the test of 'whether a reasonable reassured would have considered the undisclosed matter to be material to a prudent reinsurer': see para 17.2 above. The case for this reform is greatly reduced by the facts that (i) the reassured is an insurer and (ii) a broker always represents the reassured. On balance we do not recommend any change in the law. The reassured's protection lies in appropriate terms of the contract of reinsurance.

    31.2 Post-contract duty of utmost good faith – The anomalies caused by avoidance being the only remedy for post-contractual breaches of the duty of utmost good faith, also apply to reinsurance. A reassured who is the victim of such a breach of duty wants compensation, not avoidance of his rights. We recommend reform along the lines recommended in paras. 17.6.2(2) and (3) and para. 22 above.

    31.3 Warranties – These can be dealt with in the terms of the contract of reinsurance, but there is a strong case for reforms similar in effect to Clauses 8-12 of the Bill, so that reinsurers cannot repudiate for a breach of warranty not causative of the loss.

    31.4 Insurable interest – Some consideration can be given to reform in due course: see para. 24 above.

Summary

32. The priority is to implement the reforms recommended by the 1980 Law Commission[22]. We hope that some amendments can be incorporated along the lines suggested in paras. 12-23 above.

33. We have made some other recommendations in paras. 24-31 above, but it is not thought that large-scale reforms are appropriate in respect of marine insurance or reinsurance.

34. We do not believe that it would be helpful to attempt to codify fully the law of insurance at the first stage. This would appear to be a recipe for delay.

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[22] Insurance Law : Non-disclosure and Breach of Warranty, Report No. 104, Cmnd. 8064

Appendix A

An Insurance Contracts Act for a new Century?
The Rt Hon Lord Justice Longmore
The Pat Saxton Memorial Lecture
5 March 2001

1. I need hardly say what a great honour it is to be invited to give this lecture to you this evening in honour of Pat Saxton.

2. I regret that I did not know him personally. By all accounts he was a remarkable and much loved man. His insurance career began, I think, with the Caledonian Insurance Company; he later joined Willis Faber and broked French Marine Hull risks, in particular. He thus had experience on both sides of the insurance fence, both broking and underwriting. He joined the Chartered Insurance Institute as a Careers Advisory Officer and became its secretary. He was a tireless and humorous organiser of the British Insurance Law Association and was also chairman of the BILA Charitable Trust meetings under whose auspices I am lecturing this evening. In 1975 he published "Allured to Adventure"[23] a book which explained to young people how alluring an adventure the insurance world could be. He had a strong religious faith and, I understand, compared service in the Merchant Navy to the service Jesus required of his disciples who were, after all, themselves fishermen.

   With all the burdens that he willingly undertook I doubt if he would have altogether approved of the Aesop fable which I would like to take as a slight theme running through this lecture, the fable about one master being as good as another. It is well-known.

3. A timid old farmer was grazing his ass in a meadow when all of a sudden he was alarmed by the shouting of some enemy soldiers. "Run for it' he cried "so they cannot catch us". But the ass was in no hurry and said slowly to his master "Tell me, if I fell into the enemy's hands, do you think they will make me carry a double load?" "I should not think so" replied the old farmer. To which the ass replied

   > 'Well then, what does it matter to me what master I serve as long as I only have to bear my usual burden."

4. It is thought by scholars that the fable dates from the time of the death of Tiberius whose back everyone was glad to see, until they realised that in his successor, Caligula, they had an even more capricious tyrant. Be that as it may, my theme will be that, whatever government is in power, the ass (or as I shall now call him - the insured) has had to bear the same burden for too long. The time has come when, whatever master he has, the burden should be a lighter one.

5. There are numerous areas where reform would be useful and some where it is essential. Piecemeal proposals for reform have not worked well in the past; reform

[23] Pat V Saxton, Allured to Adventure, A Career in Insurance (Educational Explorers, 1975)

elsewhere in the world is made more difficult by the fact that the City of London remains the leading insurance centre of the world. Other countries are somewhat reluctant to adopt reforms if the risk is likely to be reinsured by a significantly different law. The time has come when, in my view, both the law and the market should adopt sensible reform across the board. There has been some reform in the area of what I may call insurance by consumers as a result of the Unfair Terms in Consumer Contracts Regulations 1994/9[24] but it does not extend to business insurance or to the general law of avoidance for non-disclosure or misrepresentation; proposals for reform of business insurance have fought shy of reforming marine and aviation insurance as well. Part of the problem in England has been the fact that marine insurance is codified. As everybody knows, 3 important things happened in 1906, the first of which was the return of a reforming Liberal Government after many years in opposition, and the second being the enactment of the Marine Insurance Act 1906. In its time, the Act was never intended to reform the law but was a brilliant synthesis of a maze of common law decisions; the Bill was first introduced in 1894 and was thus as well considered as any Act of Parliament, despite one MP saying rather oddly that the Bill was 20 times more complicated than Arnould. Now, a century later, it is operating as too tight a straitjacket. The best way of celebrating Sir Mackenzie Chalmers' considerable achievement would be to have an Insurance Contracts Act of say 2002 or even, if necessary, 2006 to mark the centenary of the 1906 Act so that it might be possible to enact sensible reform for insurance law as a whole.

6. One of the milestones in the twentieth-century development of the law of insurance was the publication of the Law Commission's Report 1980 entitled 'Insurance Law: Non-disclosure and Breach of Warranty"[25], much of the work on which must have been done personally by the Chairman Mr Justice Kerr, himself one of the leading practitioners in the law of insurance. The last Labour Lord Chancellor before the present one (and those words show how long ago it must have been) had asked the Law Commission "to consider the effect on the liability of an insurer, and on the rights of an insured, of

(a) non-disclosure by, or on behalf of, the insured;
(b) misrepresentation by or on behalf of the insured;
(c) breach of warranty by the insured;
(d) special conditions, exceptions and terms;
(e) increase and decrease of risk covered"

all particularly in the light of a proposed EEC insurance Directive which, in fact, never materialised. The eventual report confined itself mainly to considerations of non-disclosure and breach of warranty and to castigating the proposed Directive as unworkable in England and Wales largely because it thought the proportionality principle espoused by the Directive was impractical. The Law Commission stated that the law of non-disclosure and breach of warranty was undoubtedly in need of reform and that such reform had been too long delayed. As far as any competing reform of the law along the lines contained in the proposed Directive they stated:-

"It is highly desirable, in our view, that an early decision be taken as to

[24] SI 1999/2083 as amended, revoking and replacing SI 1994/3159
[25] Insurance Law : Non-disclosure and Breach of Warranty, Report No. 104, Cmnd. 8064

whether the proposed Directive is likely to prove satisfactory and whether it is worth holding up much needed law reform here for what may be a remote prospect of agreement on a satisfactory Community instrument. On no view, we suggest, should reform of our law be delayed indefinitely."[26]

Well, the Directive has not been enacted; I do not know what the Law Commission had in mind by their firm view that reform of the law should not be delayed "indefinitely". So far it has been 21 years.

7. The main proposals of the Law Commission report are well-enough known and it is not possible for me to do them proper justice in a talk of this kind; for present purposes I will summarise them in six propositions by saying

(1) The duty of disclosure should remain but a fact should only have to be disclosed if

(a) it is material in the sense it would influence a prudent insurer in deciding whether to accept the risk and, if he accepts it, on what terms;

(b) it is known to the insured or would be ascertained by a reasonable person applying for the insurance;

(c) it is something which a reasonable person in the position of the applicant would disclose to his insurers. One might call this the reasonable insured test.

(2) The standard required for answers by an applicant for insurance to questions in proposal forms should also be that of a reasonable insured on the above basis; explicit warnings should be given of that standard and also in relation to the duty of disclosure, apart from the proposal form, a copy of which should always be left with the insured.

(3) A provision whereby answers in a proposal form become an agreed basis of the contract, thus allowing the insurers to escape liability for any minor departure from that basis. should be ineffective, so far as it related to past or present fact.

(4) Only terms material to the risk should be capable of being warranties in the technical sense in which that word is used in insurance policies; and insurers should not be able to rely on a breach of warranty when the breach of warranty would not have increased the risk that the loss would occur in the way in which it did occur.

(5) Voluntary measures of self-regulation such as the Statements of Insurance Practice whereby insurers volunteer not to rely on their strict entitlement under the law are no substitute for proper law reform.

[26] ibid, at page 10

(6) The recommendations would not apply to marine, aviation and transport insurance, save to the extent that the Secretary of State might make special provision for private consumers such as yacht-owners. This was because the Law Commission thought the law worked satisfactorily in that area since MAT contracts were generally effected by professionals operating "in a market governed by long-standing and well known rules of law and practice who would reasonably be expected to be aware of the niceties of insurance law" (para. 2.8). For much the same reason re-insurance was also exempted save that insurers would be bound by any new law as to non-disclosure and breach of warranty in the same way as it applied to their reinsured.

8. It is instructive to ask what has happened to this comparatively modest, though very well thought through, proposal for reform by the Law Commission. The answer seems to be nothing at all. With what might seem commendable speed, the Department of Trade on 31 October 1980 circulated a consultation paper seeking views on the recommendations of the Law Commission but poured a substantial douche of cold water on them by stating that it would "seem better" (note the weasel word "seem") not to introduce domestic legislation in advance of any decision by the Council of Ministers on the adoption of the proposed Euro-directive "until the results of substantial discussions by the Council of Ministers and its supporting bodies can be judged".

9. A short debate took place between 10.48 and 11.50 at night on 3rd June 1981 in the House of Commons when Mr Reginald Eyre, the Under-Secretary of State for Trade, invited the House to take note of both the current draft of the European Directive and the Law Commission report. Members on both sides of the House complimented the Commission on its work but Mr Eyre would not be drawn by opposition members to state when he would conclude the consultations apparently begun by his Department in October 1980.

10. In November 1981 the Department reported to the Law Commission as recorded in the Law Commission's 16th Annual Report:

> "consultations have ... confirmed the wide divergence of opinion between consumers and others who want legislative reform, and insurers who see no call for radical or urgent change in the present law and practice of insurance. We have been informed that further discussions will probably be needed before the Government can reach firm conclusions on our report."

I think the "we" in that sentence must refer to the Law Commission itself.

11. The result of those discussions was that the Department did, 3 years later, promote a Bill in 1984 based on the Law Commission's recommendations save that the insurance industry persuaded the Department that it should not merely be marine, aviation and transport insurance that should be excluded from its scope. Also excluded were all forms of business insurance, leaving only private consumer contracts to be covered by the Bill.

12. Even this modest proposal never got very far. On 20th December 1984 the Parliamentary Under-Secretary in what was now the Department of Trade and

Industry informed the House of Commons (and wrote to the Law Commission to explain) that he was embarking on discussions within the insurance industry and that a review had been put in place to see whether legislation would be appropriate and feasible in the light of discussions with the insurance industry. A decision had apparently been made to wait to see whether changes could be made to the Statements of Insurance Practice to deal with the problems in the areas of non-disclosure and breach of warranty. This provoked Mr Peter North (as he then was), one of the Law Commissioners who signed the 1980 report, to ask in Volume 101 of the Law Quarterly Review what on earth the Under-Secretary thought his Department had been doing for the last four years; he added

> "The suspicious observer might conclude that the insurance industry lobby has been active behind closed doors and has in fact won." [27]

This cynical observation derives considerable support from the Under-Secretary's statement that the discussions at that stage were with the "insurance industry" and thus not, presumably, with any bodies outside that industry.

13. More than a year then elapsed before Mr Channon, now the Secretary of State for Trade and Industry, gave a written answer in the House of Commons on 21st February 1986 to a question asking what progress he had made in his review of the position on nondisclosure and breaches of warranty in contracts of insurance. That answer is worth quoting from Hansard for that day columns 356-357:-

> "The insurers have informed me that they are willing to strengthen the non-life and long-term statements of insurance practice on certain aspects proposed by the Department. These concern the limitation of the duty of disclosure, warranties, disputes procedures and, in the case of the long-term statements, the payment of interest on life insurance claims. The statements apply to insurance taken out by private consumers. Copies of the texts of the revised statements have been placed in the Library.
>
> These changes are in the right direction. I am well aware of the arguments, advanced amongst others by the representatives of consumers, in favour of legislation on non-disclosure and breach of warranty. But I consider that on balance the case for legislation is out-weighed by the advantages of self-regulation so long as this is effective. I look to all insurers, whether or not they belong to the Association of British Insurers which has promulgated the statements, to observe both their spirit and their letter.
>
> In the light of the insurers' undertakings I do not consider there is any need for the moment to proceed with earlier proposals for a change in the law. My Department will however keep the situation under review in order to-ensure that self-regulation is working adequately and will reconsider the question of legislation if problems continue to arise."

14. So what had the report of the Law Commission achieved? A report which the Labour opposition spokesman on Trade and Industry, Mr Clinton Davis, had described in

[27] Peter North, Law Reform : Processes and Problems (1985) 101 LQR 338

1981 as "a work of great skill and scholarship which deserves consideration", the Under Secretary of State himself agreeing with Mr Clinton Davis entirely as to the great value of the report and being grateful to him for his tribute (see columns 1031 and 1041 of Hansard for 3 June 1981). The answer seems to be very little. Some fairly minor amendments to the voluntary Statements of Practice had been made. That is all that Mr Channon thought it worthwhile mentioning 5 years after publication of the report. He might I suppose have added, though he did not apparently think it worthwhile to do so, that the insurance industry had agreed to set up and finance an Insurance Ombudsman Bureau in 1981, subsequent to the Law Commission report. Of course he would have to add if he were a fair-minded man (and no one suggests Mr Channon was not fair-minded) that even an Ombudsman has to operate within the confines of the existing law.

15. There, subject to the matters dealt with in the recent Consumer Regulations, matters have effectively remained ever since. In my view this is not just good enough.

16. Developments subsequent to 1980

(A) Non-Disclosure

Pan Atlantic v. Pine Top [1995] 1 AC 501 settled two points which were up to then controversial. It confirmed the nature of the objective test of materiality by stating the test to be whether the non-disclosed matter would have been taken into account by a prudent insurer when assessing the risk; the House of Lords also declared, however, that there was also a subjective part of the test viz. that the particular insurer would have taken the matter into account, if it had been disclosed, when he assessed the risk. The same is true of misrepresentation where it has always been the law, outside insurance, that a misrepresentation will not avoid a contract unless it has been acted on by the person to whom the representation was made.

17. Actual inducement of the actual insurer was a new departure and could be said to have been something of a gloss upon the 1906 Marine Insurance Act which mentions nothing about actual inducement on the part of the insurer at all. But in principle there can be nothing objectionable about it, since, as I have said, it has long been the law in relation to misrepresentation outside insurance. The fact, however, that it is not mentioned in the Act at all does show that even in this fairly minor respect there is room for new legislation.

18. The question of inducement is worth pausing over. The concept is not free from difficulty in two respects. Lord Mustill said, if the matter not disclosed was objectively material, there would be a presumption of inducement. If that is to be regarded as a convenient excuse entitling the insurer in the event of a trial, not to go into the witness box to say he was induced and to be cross-examined on that assertion but instead permitting the insurer to rely on the presumption, then much of the benefit of the requirement of inducement from the point of view of the insured will be lost. It was for that reason that in Marc Rich v. Portman[28] [1996] 1 Lloyd's Rep. 430 I ventured to suggest that, unless there was a good reason for the insurer who wrote the risk not to be called to give evidence (e.g. that he was dead), the presumption would

[28] Marc Rich & Co. AG and Another v Portman and Others [1996] 1 Lloyd's Rep 430

be unlikely to apply, since the court would decide the point on the evidence that was before it rather than on the basis of any presumption.

19. Secondly, there is the difficulty that the requirement of inducement can be a little inconvenient if there is a long list of insurers on, for example, the slip. The reality is that later subscribers to the slip will have been induced not so much by the non-disclosure or misrepresentation as such but by the fact that one or more leading underwriters have written the risk, themselves no doubt induced by the non-disclosure or misrepresentation as the case may be. Here there may well be scope for a useful reform of the law to say that a following underwriter will be presumed to be induced by any non-disclosure or misrepresentation made by a leading underwriter.

20. (B) Utmost Good Faith

In the years since the Law Commission report in 1980, this concept, sanctified by its statement in general terms in section 17 of the Marine Insurance Act, has been relied on more and more by insurers who have sought to say that the need for good faith applies not only before the contract is made but also while the contract lasts. While it has always been accepted that the obligation to disclose and not to misrepresent material facts before the contract was made entitled an insurer to avoid the contract and that such obligations are also part of the wider principle of good faith that attaches to insurance contracts, the ambit of good faith during the contract has recently attracted the attention of the courts. This obligation can, of course, be spelt out specifically, especially in the context of making a false or fraudulent claim and it is by no means uncommon to find express clauses purporting to avoid the contract if a false or fraudulent claim is made. But, it is sometimes urged that such clauses exemplify the application of a general principle of good faith assumed by both parties to the contract, that that obligation means that neither party should act unconscionably towards the other during the performance of the contract and that, if they do, the contract can be avoided.

21. Here also the House of Lords has recently clarified the law in "The Star Sea" (2001)[29] which has held that whatever the precise extent of a post-contract good faith duty, it does not apply once litigation has begun, when the duties imposed on the parties by the Rules of Court (now the Civil Procedure Rules) take over. Of course negotiations about a claim may occur over a long period before litigation begins or without any litigation at all. Here, I think, the House of Lords has decided that the duty of an insured is limited to a duty of honesty - certainly that was the view of Lord Scott of Foscote.

22. One of the difficulties about relying on the doctrine of good faith is that the remedy for breach is avoidance of the entire contract; there is no claim for damages. A reading of the speeches in "The Star Sea"[30] makes one feel that there is now in process something of a retreat from the widest assertions of an expansive doctrine of the utmost good faith and this is an area which, in my view, calls for attention from law reformers. Lord Hobhouse's conclusion is worth emphasising. He said this (para. 79):-

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[29] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Européene ("The Star Sea") [2001] 1 Lloyd's Rep 389
[30] ibid

> "It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of English law which allow an insurer to avoid liability on grounds which do not relate to the occurrence of the loss. The most outspoken criticism of the English law of non-disclosure is to be found in the judgment in the South African case, of the Mutual and Federal Insurance [1985 (1) SA 419] to which I have already referred. There is also evidence that it does not always command complete confidence even in this country: CTI v Oceanus[31] [1984] 1 Lloyd's Rep 476, Pan Atlantic v. Pine Top [1995] 1 AC 501. Such authorities show that suitable caution should be exercised in making any extensions to the existing law of non-disclosure and that the courts should be on their guard against the use of the principle of good faith to achieve results which are only questionably capable of being reconciled with the mutual character of the obligation to observe good faith."

23. The majority of the judges in the South African case referred to even committed themselves to the proposition that the concept of utmost good faith should be abolished. It is perhaps easier for this criticism to come from the South African bench in a country which is used to the Roman idea that contracts should be performed in good faith and which anyway has a requirement of disclosure in contracts of insurance quite apart from the doctrine of the utmost good faith. Even the single judge who favoured retention of uberima fides thought it an odd expression. How he asked can an insured be more honest than honest? The idea of levels of honesty is absurd.

24. In this context it is also interesting to note that there is developing a reluctance, at any rate among judges at first instance, to extend the concept of good faith outside a contract of insurance. Thus, it has been held that the duty of disclosure does not apply to contracts of indemnity in general, nor to a contract for insurance such as a line slip or the granting to an underwriting agent of a binding authority.

25. So, in the light of the way the law has developed in the last 20 years, can one say that Mr Channon's view of 1986, that the case for legislative reform was out-weighed by the advantage of self-regulation so that there was no need to proceed with what he called the earlier proposals for a change in the law, has been justified. My answer to that is a resounding No. I am glad to see that I am not alone.

26. Australia has enacted an Insurance Contracts Act 1984, which brought into the law the proposal of their own Law Reform Committee that the duty of disclosure should extend only to facts which the insured actually knew or which a reasonable insurer would have known would be relevant to the insurer's assessment of the risk. It has also made other useful reforms such as reduction of liability on the part of the insurer commensurate to what his position would have been if there had been proper disclosure. These reforms do not apply to marine insurance and the Law Commission there is currently considering whether they should.

[31] Container Transport International Inc and Reliance Group inc. v Oceanus Mutual Underwriting (Bermuda) Ltd. [1984] 1 Lloyd's Rep 476

27. The City of London Law Society on 12 December 2000 published a compelling paper supporting reform to the test of materiality and the current law about the consequences of both non-disclosure and misrepresentation. It also suggests that basis of contract clauses should be abolished.

28. It is, I think, fair to say that consumer associations have never been satisfied with the Government's reluctance to promote law reform in this area. Many insurance practitioners are becoming increasingly concerned at the current state of insurance law and this applies even to those whose instinctive loyalties and insurance experience incline to the insurer side of the divide between insurer and insured. In a short but perceptive article on 21st February 2001 in the journal Insurance Day, Mr Hanson of Barlow Lyde and Gilbert says rather charmingly that it is time that some of the burden of balancing the need to enforce clear contractual language and, at the same time, providing a fair result should be taken away from the judges. Your own association is in the vanguard of activity on this front having your own forum reviewing the present state of the law. Mr Cole in his article in "Legal Week" in September of last year has pertinently asked whether it is not time that the Law Commission reconsidered the whole question of the reform of insurance law building on the experience of other countries and offering a lead, as the insurance industry itself has done in the marketing and innovation of insurance provided for the last 3 centuries. I can only say I profoundly agree.

29. Codification or Piecemeal Reform?

There is an argument for codification of insurance law in general just as Chalmers codified the law of marine insurance in 1906. I would have no principled objection to such a proposal but it would be an enormous task and invite yet further delay. In this context, Sir Mackenzie Chalmers' own thoughts are worth reading. The Marine Insurance Bill was first introduced to Parliament in the early 1890's. It took 12 years to reach the statute book. He published the originally proposed Bill as a Digest of the law relating to marine insurance. In 1901 he said this:

> "The future which awaits the Bill is uncertain. Mercantile opinion is in favour of codification, but probably the balance of legal opinion is against it. As long as freedom of contract is preserved, it suits the man of business to have the law stated in black and white. The certainty of the rule laid down is of more importance than its nicety. It is cheaper to legislate than to litigate; moreover, while a moot point is being litigated and appealed, pending business is embarrassed. The lawyer, on the other hand, feels cramped by codification ... No code can provide for every case that may arise, or always use language which is absolutely accurate. The cases which come before lawyers are the cases in which the code is defective. In so far as it works well it does not come before them. Every man's view of a question is naturally coloured by his own experience, and a lawyer's view of commerce is perhaps affected by the fact that he sees mainly the pathology of business. He does not often see its healthy physiological action."[32]

[32] MD Chalmers CSI and Douglas Owen, A Digest of the Law of Marine Insurance (William Clowes & Sons Ltd 1901), at page viii

I would prefer the Law Commission to consider what reform is really necessary and attempt to reengage Government to enact those reforms. I suggest 6 topics in particular:-

(1) Whether a doctrine of the utmost good faith should be retained and, if so, what its content should be;

(2) The appropriate test for an insurer or reinsurer who wishes to defend a claim on the basis of non-disclosure and misrepresentation before formation of the contract;

(3) The remedies which should be open to an insurer or reinsurer if he wishes to defend a claim on the ground of non-disclosure or misrepresentation;

(4) The right approach to breach of warranty by the insured;

(5) The right approach to proposal forms and answers given being declared to be the basis of the contract;

(6) The question whether damages should be payable for insurers' refusal to pay a valid claim.

30. I have said enough already on the first topic of the utmost good faith. But I would like to say something more about the appropriate test for evidence of non-disclosure and misrepresentation.

31. Test for Avoidance

The current law in relation to the objective part of the test is settled by Pan Atlantic v. Pine Top[33] and I hope I summarise it correctly by saying it is whether the non-disclosed or misrepresented fact would have been taken into account by a prudent insurer when assessing the risk.

32. My own view is that, even after the addition of the subjective part of the test (actual inducement), this tilts the matter too heavily in the insurers' favour. Mr David Higgins of Herbert Smith has observed that it does not reflect the way in which insurance business is actually underwritten to suppose that an insurer just sits silently while a presentation is made to him and then, without speaking a word, signs a slip or other contractual document. As Staughton LJ said recently (Kausar v. Eagle Star (1997) CLC 129)

> "Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for .... I do consider there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases."

[33] Pan Atlantic Insurance Co. Ltd. and Another v Pine Top Insurance Co Ltd [1995] 1 AC 501

Any rational discussion of this thorny topic needs to take into account alternative formulations. Six possible alternative formulations spring to mind and, no doubt, others can be considered.

1) whether a prudent insurer would have considered that, if the relevant matter had been disclosed, the risk was a different risk; this is the formulation preferred by the Court of Appeal in St Paul Fire and Marine v. McConnell[34] (1995); they obviously did not consider it any different from the Pan Atlantic test; but I do wonder; a prudent insurer may take something into account without it being a factor that would make the risk different in any sensible use of the word "different"

2) whether, if the matter had been disclosed, the prudent insurer would have declined the risk or written it in different terms (the decisive influence test which was espoused by the minority but rejected by the majority in Pan Atlantic v. Pine Top);

3) whether a reasonable insured would have considered the undisclosed matter to be material to a prudent insurer. (This is the solution adopted by statute in Australia and was recommended here by our own Law Commission);

4) whether the actual insured ought to have considered the undisclosed matter to be material to a prudent insurer;

5) whether the undisclosed matter was a matter which a reasonable insured would realise was within the knowledge only of himself (or those for whom he is responsible) rather than a matter which could have been independently investigated and verified by insurers;

6) whether the duty on an insured should be merely to answer correctly any question asked by the insurer; this would be to abandon any requirement of disclosure at all.

33. While I would not favour the total abolition of the requirement of disclosure, my own view for what that is worth is that option 5 has much to commend it viz that the insured should only be expected to disclose what a reasonable insured in his position should have appreciated was material and within his own knowledge rather than a matter which could have been independently verified.

34. This seems to have been the law in the aftermath of Lord Mansfield's famous decision in Carter v. Boehm[35] (1760) in which, it is sometimes forgotten, the insured actually succeeded. In 1817, it was expressly held in Friere v. Woodhouse[36] "What is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence may learn from ordinary sources of information need not be disclosed."

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[34] St Paul Fire & Marine Insurance Co. (UK) Ltd v McConnell Dowell Constructors Ltd. and Others [1995] 2 Lloyd's Rep 116

[35] Carter v. Boehm (1766) 3 Burr 1905, 97 ER 1162

[36] Friere v Woodhouse (1817) Holt 572

Of course, ordinary sources of information are far more extensive now that in the early nineteenth century but that seems to me to make stronger rather than weaker the case for a professional underwriter having to equip himself with knowledge of matters that can be independently investigated and verified.

35. Remedies

I have already remarked that one of the difficulties about a doctrine of avoidance for non-disclosure and representation in insurance law is that it is such an extreme remedy. That was a major reason why the House of Lords in The Star Sea declined to extend the doctrine of good faith in its widest form to post-contract dealings. The remedy would be worse than the disease.

The remedy may, however, be equally extreme in relation to pre-contract non-disclosure and misrepresentation. This was, of course, considered by the Law Commission in their 1980 report. They rejected, for good reasons as it seems to me, the notion of proportionality as espoused in some European countries and in the then proposed European Directive. But I feel they may have rejected too readily the idea that the court should be vested with a discretion in a suitable case to adjust the parties' respective responsibilities. It is a concept that appealed to at least one member of the Court of Appeal when it decided Pan Atlantic. It would not be so necessary, no doubt, if there were to be reform of the law to adopt the reasonable insured test since, if an insured cannot recover on that test, he would only have himself to blame; it may well be for this reason that the Law Commission did not consider the proposal in any substantial detail. But if the tests for disclosure and misrepresentation are to remain as they are, a discretionary apportionment of the loss has much to recommend it. It would, of course, lead to some uncertainty but that, after all, was a reason against the introduction of the concept of contributory negligence which, in the event, is a concept that has worn the test of time very well. In these days when the incidence of costs in litigation may depend on well or ill-informed guesses made by the litigant, at the time they are obliged to serve pre-action protocols, uncertainty is endemic, yet the court, and litigants, are quite good at getting used to it. Moreover, the Insurance Ombudsman Bureau apparently uses its discretion on occasion to apportion the loss and appears to have no difficulty with the concept.

36. I do not think I need say anything in particular about the 4th and 5th topics on my list; breach of warranty and basis of the contract clauses. The evils of the present law are, I think, well enough known and universally acknowledged and it is about time that the law was changed to accord with an ordinary person's expectations.

37. Mind you, the doctrine of warranty sometimes works against insurers. I expect that most of you know of the recent case about the man from North Carolina who insured a box of 2 dozen expensive cigars against, among other risks, fire; having smoked the entire stock and without even having paid the premium for the policy, he sued the insurers on the basis that the cigars had been lost "in a series of small fires"; the company refused to pay but the judge held the company liable on the basis that it had warranted that the cigars were insurable and had not stipulated what they considered to be an unacceptable fire. So the company had to pay the claim amounting to $15,000. However the story has a happy ending because once the insured had cashed the cheque, the insurance company had him arrested on 24 charges of arson and the

insured was convicted of intentionally burning the insured property, which resulted in 24 months in jail and a fine of $24,000.

38. The question of delay in paying valid claims is a newer topic, which, it seems to me, does merit consideration. The courts have set their face against there being an implied term of an insurance contract that valid claims will be met and thus do not award damages against an insurer even if his delay in negotiating the claim means that the insured goes out of business. In a sense this is part of a wider point viz whether interest is truly compensation for delayed payment of claims for damages. But it has always been an oddity that a claim under an insurance policy is treated by the law as a claim for damages rather than a straight debt. This is a doctrine that could be usefully considered, I suggest, by the Law Commission.

39. Where Do We Go From Here?

In terms of legal principle and abstract justice, the case for reform in the areas about which I have been talking is extremely strong.

40. Opposition to reform may come from the insurers' side of the insurance industry who like to rely on the content of the present law and, perhaps, from Government on the grounds of inertia rather than principle. Siren voices will say "Show us the law is working unjustly in practice before we take any interest in proposals for reform." On the assumption that, unlike Odysseus's crew, we should not consent to have our ears stopped with sealing wax, there are perhaps two separate ways to deal with these siren voices. The first is to do some empirical research in order to discover whether insureds have suffered injustice in the areas I have been considering. In this respect the records of the Ombudsman Bureau will be an early port of call. The experience of Law Commissions eg in Australia and Canada can be investigated. London firms of insurance brokers and of solicitors will be able to help, but it may be even more important to consult out of London brokers and solicitors. Barristers will be much less help because for every insured whom counsel has, regretfully or otherwise, to advise that he is likely to lose, there will be many insureds who have already given up the struggle in correspondence, well before there is any question of obtaining counsel's opinion. The judiciary are even less well placed to give examples of injustice since no insured will want to fight a case he knows he will probably lose. Despite the difficulties, I would urge the Law Commission to undertake a research project. I doubt if they would find that there is any widespread devotion to the present state of the law.

42. But secondly there is the question of principle. How can it be right that a lawyer insuring his home and household possessions can rely on a more relaxed test of non-disclosure under the Statements of Practice, but the small trader, eg the garage owner or the fishmonger insuring his premises, cannot. The truth is that the same standard should apply to both and it should, at least, be the standard of the reasonable insured.

43. The very fact that insurance companies are so anxious to persuade people that the best form of self-regulation is to ensure that the law is not enforced in its full rigour shows that insurers are worried that, if the law if reformed, they would have to pay more claims. If they accept that for the consumer, why should the law not be the same for

the small business as indeed a wealthy business. The very acceptance by the insurance industry of the Statements of Practice shows that the law ought to be different from what it is. If even insurers accept that, surely it is time that the rights of not merely consumers but of all insured persons should be enforceable as a matter of right, not as a matter of discretion. Surely we should be able to look forward to a better day.

44. And the third event of importance in 1906? A short note[37] was published in the Classical Review for that year. The author pointed out that the last word of the Latin manuscript of the version of the fable about one master being as good as another should be "unicas" not "meas" and he thus restored sense to the fable that had been missing for centuries. "What difference does it make to me whose slave I am, so long as I only have to carry one burden at a time". Like the ass, the insured should not have to carry more than a single burden. The author of that note was A.E.Housman. Can we look forward to a better day? I finish by quoting Housman in a more poetic mood:-

West and away the wheels of darkness roll
Day's beamy banner up the east is borne;
Spectres and fears, the nightmare and her foal,
Drown in the golden deluge of the morn.[38]

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[37] AE Housman, Notes on Phaedrus, The Classical Review, Volume XX 1906, at page 257
[38] AE Housman, Revolution, 1922

Appendix B

"Good faith: To be or not to be?
The Rt Hon Lord Justice Rix
BILA President's Lunch
19 December 2001

I am very honoured to have been asked to speak to BILA today. I have enjoyed BILA's hospitality on a number of occasions in the past, when others have had the pleasure or the burden of making this lunch-time address, and now, I quite understand, it is time for me to pay my debts. I am reminded yet again that "There is no such thing as a free lunch".

I have chosen as my topic or title "Good faith - To be or not to be".

Some of you may think that "To be or not to be" are the opening words of Hamlet's great soliloquy about the possibilities of suicide. But Hamlet's soliloquy also contains numerous reminders of the law, insurance and litigation, exactly what this Association is concerned with - I cite but a few of the references: "that is the question ... a sea of troubles ... the thousand natural shocks ... the law's delay ... the insolence of office ... conscience" - perhaps an early reference to the doctrine of good faith - "the pale cast of thought ... enterprises of great pith and moment" - and finally "the name of action".

Be that as it may, and you may or may not be convinced thus far, why really have I given my talk the title I have? Well, the basic reason is that it seems to me to express in a few words, usefully of one syllable, two divergent movements in the practice and law of insurance and reinsurance today.

On the one hand, ever since Banque Keyser[39] in the late 1980s, the courts have been asked to explore, almost for the first time since the duty of good faith was developed by Lord Mansfield in the eighteenth century, the question of that concept operating in the context not of the making of an insurance contract, but of the performance of it. So here is a field in which the boundaries of the concept of good faith are possibly being extended: or are they?

On the other hand, the courts are also being asked to come to grips in recent years with a number of insurance contracts where the parties have chosen to enter into exclusion clauses which, whatever their extent, and that is nearly always a matter of controversy sooner or later, are obviously designed to trespass a certain distance or further into the obligations involved in the concept of good faith, such as proper disclosure and the avoidance of misrepresentation. Not only that, but underwriters have shown themselves willing in recent years, it seems to me increasingly willing, to undertake in an insurance format business risks of a financial nature, such as mortgage indemnity insurance[40] and film finance insurance[41]

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[39] Banque Keyser Ullman SA v. Skandia (UK) Insurance Co Ltd [1990] 1 QB 665 (Steyn J and CA), Banque Financiere de la Citi SA (formerly Banque Keyser Ullman SA) v. Westgate Insurance Co Ltd (formerly Hodge General & Mercantile Co Ltd [1991] 2 AC 249 (HL).

[40] See eg Svenska Handelsbanken v. Sun Alliance and London Insurance plc [1996] I Lloyd's Rep 519.

[41] See eg HIH Casualty & General Insurance Ltd v. New Hampshire Ins Co [2001] 1 Lloyd's Rep 378 (David Steel J), [2001] 2 Lloyd's Rep 161 (CA) and HIH Casualty & General Insurance Ltd v. Chase Manhattan Bank [2001] 1 Lloyd's Rep 30 (Aikens J), [2001] 2 Lloyd's Rep 483 (CA).

which see the underwriter undertaking not so much the risk of a fortuitous intervention, but the essential business risk of the assured himself. Thus in mortgage indemnity insurance, the underwriter undertakes the lender's risk that both his borrower and his security will be unable to repay the loan, and in film finance insurance the underwriter undertakes the risk that the film will be insufficiently successful to repay the basic costs of making it. Such risks, it seems to me, are in a business sense distinct from the more traditional risks of loss and damage to property or personal injury and death, to be met for instance in marine, aviation, property, motor and life insurance. In between these two divisions lie more traditional types of financial risk, such as liability insurance and fidelity insurance and business interruption insurance and even political risk insurance, where the risk is incidental to the assured's business, but is not the same as the essential core of the assured's business. It is in just such new or newish types of business risk insurance as mortgage indemnity insurance and film finance insurance that one sees the good faith duty most under attack in the form of exclusion clauses of one kind or another. I do not think that that is a coincidence. As the underwriter steps closer to the essential business risk of his assured, so the assured seeks a contract in which the underwriter is asked to take that risk in purer form, without the protection of the duty of good faith. That in a sense is paradoxical, because it might be said that no assured knows more about his own risk, and no underwriter knows less about his assured's risk, than the parties to a business risk insurance of this kind. And yet it was just this consideration, that the insured knows much more about his own business than the underwriter can know, that led to the imposition of the duty of good faith and the need for disclosure in the first place. What is going on here? Do the lawyers know? Do the parties know? Are underwriters wise to undertake the basic business risk of their assured without knowing as much about it as their assured and without the protection of the duty of good faith? That is perhaps not a legal question, but it is a question.

So whither the duty of good faith?

There is another consideration within the context of my question. Insurance law is familiar with the operation of the duty of good faith in the making of an insurance contract. Insurance law is becoming more familiar than it used to be about the problems of the operation of the duty of good faith in the performance of the insurance contract. But what about the operation of the duty of good faith in the unmaking of the insurance contract? When a breach occurs, be it of warranty or condition or of the duty of good faith itself, and the insurer says that he is free of his contract, or elects to avoid it, does he owe any duty of good faith to the assured in the exercise of his rights? This is a question which is sometimes asked in a general way, outside the particular context of insurance contracts, where it is well known that in English law, unlike the civil law, there is no all pervasive doctrine of good faith. But why has it never been asked in the specific context of insurance law, where there is even in England a concept of good faith, and it is recognised that that concept is mutual and survives the making of the contract itself?

So whither the duty of good faith?

It is intriguing in this context to go back to Lord Mansfield and the famous case of Carter v. Boehm[42] decided in 1766. This is often cited as the origin of the doctrine. The risk there insured might be described as the archetypal political risk, for it was against the loss of so-called Fort Marlborough, a trading settlement in India, to any European enemy within the

[42] Carter v. Boehm (1766) 3 Burr 1905, 97 ER 1162

year. It fell to a French naval force. The underwriter, facing a huge loss, pleaded ... (what do you think?) yes, non-disclosure, to the effect that he was not informed of the insured's fears of a French attack and of the fort's inadequate protection, if attacked from the sea. The defence failed. Lord Mansfield regarded the insurer in London to be as well or better informed about the military situation as the governor of the fort, who was the assured. He regarded the insurer as waiving further enquiry. He said "The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question."[43]

Lord Mansfield regarded a defence of non-disclosure in such circumstances as itself capable of being an instrument of fraud, which it should never be allowed to be. Thus this leading case on the duty of good faith resulted in a great victory for the assured, and a warning to underwriters not to attempt to misuse the doctrine.

I do not suppose that the facts of the case are very well known, however. What Carter v. Boehm is famous for are Lord Mansfield's dicta on the nature of the duty. He considered that it was "applicable to all contracts and dealings"[44] but in this attempt to introduce into the English common law the civil law doctrine of good faith, he failed. It only took root in English law in the insurance setting. In that setting, Lord Mansfield was not very clear as to whether non-disclosure could be innocent or required, if not necessarily fraud, at any rate a notion of concealment. He said that fraud was not necessary: for the suppression, as he called it, could occur through mistake, ie without an intention to deceive. But he seems to have had in mind that concealment was necessary at least in the sense of a deliberate intention to keep quiet about that which it was to your advantage that those, who had an interest in knowing, should be ignorant of. As he said in the now forbidden Latin: "aliud est celare; aliud tacere"[45] - it is one thing to conceal, another to be silent.

Thus it was that for many years, as the doctrine was worked out, the law spoke not so much of non-disclosure, which is the modern word, but of concealment. It was only by stages that the inconsistency or ambiguity in Lord Mansfield's doctrine was refined into the doctrine which has come down to modern times, that a non-disclosure may be completely innocent and unintentional, and yet effective to permit the remedy of avoidance. The breach of the duty, in other words, depends not so much on the motive of the assured, as on the content of the non-disclosure.

As such, the doctrine is an effective instrument to protect the insurer against his ignorance of that which he needs to know, but it has strayed quite far from its origin in a doctrine of good faith. In this modem sense, good faith has become a somewhat conventional concept.

It is perhaps for this very reason that there has been in more recent times a swing of the pendulum towards incorporating exceptions to the operation of the duty of disclosure. This has occurred not only in the pure business risk context of which I was speaking earlier, but also, as I understand, in the context of consumer insurance contracts where either special terms or even statements of practice seek to render the duty of good faith relevant only if broken fraudulently or negligently.

[43] ibid, at page 1169.
[44] ibid, at page 1164.
[45] ibid, at page 1164.

Similarly, in Pan Atlantic Insurance v. Pine Top Insurance[46] in 1994 the House of Lords charted a new course in holding that, for a breach of the duty of good faith in making an insurance contract to be effective, it had to have induced the making of the contract. That decision required the need for inducement to be implied into the Marine Insurance Act. In coming to that conclusion, in one of the most important insurance judgments in recent years, Lord Mustill said this:[47]

> "The existing rules, coupled with a presumption of inducement, are already stern enough, and to enable an underwriter to escape liability when he has suffered no harm would be positively unjust, and contrary to the spirit of mutual good faith recognised by section 17, the more so since non-disclosure will in a substantial proportion of cases be the result of an innocent mistake."

I think there is a similar modern awakening to the underlying doctrine of good faith, and not to a merely conventional view of the duty. in the series of cases in recent times about the operation of the mutual duty of good faith after the making of an insurance contract and in the performance of it. Those cases have for the moment culminated in The Star Sea[48] in the House of Lords and even more recently in Merc-Scandia[49] in the court of appeal. In The Star Sea it was held that only fraud in the claims context will entitle the insurer to avoid the contract; and in Merc-Scandia it was held that even fraud in the claims context will not entitle avoidance unless the fraud was so material as to amount to a repudiation of the contract as a whole. The latter decision, like Pan Atlantic, appears to proceed on the basis of an implied limitation on the statutory right of avoidance.

What one sees here is, I think, the realisation that a proper doctrine of good faith requires remedies for breach to become more thoughtful, focused, proportionate and flexible. In one sense, this may all be a reaction to the Banque Keyser case which says in effect: good faith is a rule of law, not an implied term, and therefore does not sound in damages only in avoidance. That may have been all very well in the context of good faith in the making of a contract, but it does not work very well in the context of the performance of a contract. Since then, the following has occurred:

- it has been realised that the post-contractual situation is not the same as the pre-contractual situation

- it has been decided (in the Star Sea)[50] that, at any rate in the claims' context, post-contract, there is no breach which entitles avoidance unless there has been material fraud (two limitations)

- it has also been decided (ibid) that the post-contractual duty of good faith ends with litigation and is superseded by its rules; (a third limitation)

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[46] Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd [1995] 1 AC 501
[47] ibid, at page 549D
[48] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Europééne ("The Star Sea") [2001] 1 Lloyd's Rep 389
[49] K/s Merc-Scandia XXXXII v Certain Lloyd's Underwriters subscribing to Lloyd's Policy No. 25T 105487 and Ocean Marine Insurance Co Ltd and Others ("The Mercandian Continent") [2001] 2 Lloyd's Rep 563
[50] Manifest Shipping Co. Ltd. v Uni-Polaris Insurance Co. Ltd and La Réunion Europééne ("The Star Sea") [2001] 1 Lloyd's Rep 389, at page 413

- because the post-contractual duty of good faith in the claims context overlaps with either express or implied terms dealing with the prohibition and consequences of fraudulent claims, and also because the remedy of avoidance ab initio is such a draconian and disproportionate remedy, therefore it should be limited to a situation where the breach is repudiatory (Merc-Skandia, a fourth limitation)

- Lord Scott in The Star Sea has gone so far as to suggest that breach of the duty of good faith actually requires "bad faith". Where does that take you, unless he was speaking solely in the post-contractual context?

And so I go on to raise the question of what the mutual requirement of good faith may require in the context of the unmaking of a contract. To some extent, recent cases in the post-contractual context may be said to be already knocking, questioningly, at this door. I grant that breaches of the obligation of good faith in the pre-contractual and post-contractual periods raise different problems, for the former, unlike true examples of the latter, impeach the making of the contract itself. Nevertheless, perhaps we should not be afraid, in the name of good faith, to be thinking hard about the mighty remedy of avoidance ab initio and the circumstances in which it is fair and appropriate for it to be used. As we have seen, in the form of exclusions or statements of practice, the industry has to some extent been moulding its own solutions. Recent cases which I have highlighted, particularly in the context of post-contractual breaches, teach the lesson that considerations of remedies for breach are critical to the soundness of the doctrine, and that if we were starting all over again, we would not have at any rate a post-contractual duty of good faith which sounds in avoidance ab initio. The trouble with that remedy of course, is that not only does a breach of good faith in relation to one claim imperil not only that claim but the whole policy, but the danger to the whole policy raises the problem of unscrambling all that has happened under the policy ab initio: the cover itself from its inception and all payments, not only of premium but for instance of other claims, that may already have occurred under the policy.

Warranties and their effect, although not themselves founded in the doctrine of good faith, raise an analogous problem. Any breach of warranty, unless the insurer waives it, puts an end to the contract's existence, although in this case, the contract dies from the moment of breach rather than ab initio. The unsatisfactory nature of this rule in cases where the breach is causally irrelevant to a loss has long been recognised, and other jurisdictions have found a means to overcome this problem[51]. In English law it remains, although the Law Commission has I think recommended its reform. I quite understand the logic of the rule, which is that since a warranty is part of the definition of the risk, any breach of it renders the insurer entitled to say that "This is not the cover which I agreed to give" and so to stand aside[52]. But experience has shown that this logic can lead to unfairness. It is intriguing that, as far as I am aware but I have conducted no specific research into the question, the common law has not sought to marry up the competing logics of the insurance warranty and the concept of good faith. It might be said that the latter concept would place some limits on the exercise of the power to found the destruction of the policy on a causally irrelevant breach of warranty. If English law had followed Lord Mansfield's desire to introduce the civil law concept of good faith generally into our law of contract, it may be that this issue would have emerged in our jurisprudence. As it is, the warranty doctrine is now so well entrenched not only in our

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[51] See eg, in the US, Home Insurance Co v, Ciconett I79 F 2d 892 (I950), Coffey v. Indiana Lumberman's Mutual Insurance Co 372 F 2d 646 (I967).

[52] See Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) [I992] 1 AC 233 (HL).

common law but also in the Marine Insurance Act itself, that it is probably impervious to any assault that good faith could make on it.

Nevertheless, in my view the common law should not be afraid of moulding its own remedies, where at any rate statute gives it room to do so. The common law's ability to mould a proper, principled, response to individual circumstances is part of its genius. It should not be frightened of its strengths: Pan Atlantic, The Star Sea, Merc-Scandia are all examples where the common law has found room for improvement. Perhaps the most famous of all examples of this creativity in the field of remedies is Hongkong Fir[53] itself, albeit that lies outside the field of insurance law. Nevertheless it was concerned with the problem of a supposed doctrine which said that all remedies for breach of contract fell either into the camp of damages only (for breach of warranty) or into the camp of giving to the innocent party the option of terminating the contract (for breach of condition). Not so, of course, says Hongkong Fir: for most terms are innominate, and the remedies for any breach of them depends on all the circumstances.

So whither good faith? To be or not to be? Will the genius of the common law struggle to solve these problems? Or is history or statute too strong? Do we need to look again at some of these problems, as Australia is in the course of doing, with an Australian Law Reform Commission report followed by recommended drafting changes to their existing Marine Insurance Act 1909?

While you consider the prospect of those slings and arrows of outrageous fortune, let me leave you with my favourite legal anecdote about the delicious nature of a knotty legal problem. I am indebted to a book in my library called "The Jottings of an old Solicitor"[54], by Sir John Hollams, published in - 1906, a good vintage for insurance lawyers. Sir John tells this anecdote about Lord Bramwell at p 155 of his book:

> "Many years before he was a judge, I had sent him a case for his opinion. He said to me some time after he had the case: "You must think I take a long time sending you that opinion. The fact is, I have written two opinions, one in your favour and the other against you. I read them both every morning, and cannot make up my mind which to send you." I expressed regret that it gave him so much trouble; he replied that it was a real pleasure to him."

Well, this has been a real pleasure to me. Thank you very much.

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[53] Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 (CA).
[54] Sir John Hollams, Jottings of an old Solicitor (John Murray, 1906), at page 155

Appendix C

British
Insurance
Law
Association

The Secretary of the Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 213Q

1 September 2002

Dear Sir

In December 2000, BILA formed a Sub-Committee to examine areas of Insurance Contract Law that were creating problems in the market and in insurance disputes, with a view to suggesting possible reforms. The conclusions of the Sub-Committee are set out in the attached Report, which is sent for the consideration of the Commission.

We recommend strongly the implementation of reforms on the lines set out, and hope that the delays in the implementation of the Law Commission's 1980 recommendations will not be repeated. These recommendations have, we believe, assumed increased urgency with the passage of time since 1980. The tougher attitude of insurers, manifest through growing insurance litigation and growing pressures from consumer groups, call for good practice to be underpinned by an agreed statutory basis rather than Codes of Practice.

Reform is supported in principle by senior members of the Judiciary, particularly our president, Mance LJ, and Longmore and Rix LJJ, whose recent papers to BILA are attached to our Report.

The Sub-Committee comprised a selection of leading legal and insurance practitioners from different areas of the law and the market. Reform has already taken place in many European countries, and in other parts of the world, particularly in Australia. We consider that it is important that the UK keeps pace with these reforms.

The members of the Sub-Committee are available to assist the Commission, if the Commission wished further views on particular topics.

Yours faithfully

Adrian Hamilton QC
Chairman of the Sub-Committee

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The British Chapter of
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Association for
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Appendix D
Feedback Questionnaire

Feedback received on this report will be collated and published at a later date. **Responses will <u>not</u> be attributed other than by prior agreement.** Your details are requested so that we may contact you when the feedback is published, or if we have any queries regarding your responses.

Your name: ....

Firm (if any): ....

Category: ....
eg: insurer, intermediary, loss adjuster, trade body, regulator, complaints body, loss adjuster, barrister, solicitor, arbitrator, consumer organisation, academic

Tel no: ....

Email address: ....

1	Should the Law Commission Report of 25 July 1980 (Insurance Law : Non-disclosure and Breach of Warranty, Report No. 104, Cmnd. 8064) be implemented?	Yes/No
2	Do you consider that the Statements of Practice issued by the ABI should be replaced by legislation?	Yes/No
3	Should the law differentiate between fraud, negligence, and innocence in cases of misrepresentation or non-disclosure?	Yes/No
4	Should the courts have the power to apply principles of proportionality when deciding the consequences of a negligent or innocent misrepresentation or non-disclosure?	Yes/No
5	Should an insured be entitled in law to damages following an insurer's refusal to settle a claim, or its unreasonable delay in settling a claim?	Yes/No
6	Do you agree that the eight recommendations of the BILA report regarding claims and intermediaries (page 8, para 25) should be implemented by the Financial Services Authority in codes with statutory backing?	Yes/No
7	Do you agree with the BILA report (page 8, para 26) that there should be a duty placed upon underwriters to ask reasonable questions concerning a risk presented to them?	Yes/No
8	Should the duty of utmost good faith apply throughout the currency of the policy?	Yes/No

Continued overleaf...

9	Should insurable interest be re-defined as recommended in the BILA report (page 8, para 24), so that "economic advantage" is the test, not legal or equitable interest?	Yes/No
10	Do you accept the five recommendations in the BILA Report (page 9, para 29) concerning marine insurance?	Yes/No
11	As a general view, do you agree that insurance contract law requires a thorough review, and is in need of reform?	Yes/No
12	Are you a BILA member?	Yes/No

Additional Comments

Please use this space for any additional comments that you wish to make, continuing on a separate sheet if necessary.

Please return completed forms to:

Peter J Tyldesley
Centre for Financial Regulation Studies
Room 601a
London Guildhall University
84 Moorgate
London
EC2M 6SQ

Schedule 1

Members of BILA Sub-Committee on Insurance Law Reform

Chairman: Adrian Hamilton QC, 7 Kings Bench Walk, Temple
Secretary: Derrick G Cole ACII, MAE, MEWI, Chartered Insurance Broker

<u>Sub-Groups</u>

<u>Utmost Good Faith</u>

Chairman:	Alison Green LLM, Barrister	2 Temple Gardens, Temple
Members:	Adrian Hamilton QC	
	Derrick G Cole ACII, MAE, MEWI, Chartered Insurance Broker	Associated Insurance Experts
	Geoffrey H Lloyd FCII, MAE, MEWI, Chartered Insurance Practitioner	Associated Insurance Experts
	Richard Hanson-James LLB, FCII, FCILA Chartered Loss Adjuster	ClaimEx
	Anthony P Davies ACII	Deputy Claims Manager, Munich Re
	Angela Darling FCII (gave comments, but did not attend any meeting of the sub-group)	GISC Head of Policy
	Phillipa Rowe MA, FCII, MAE, QDR (gave comments, but did not attend any meeting of the sub-group)	Phillipa Ross & Co

<u>Reinsurance</u>

Chairman:	Tim Hardy, Solicitor	Partner, Barlow Lyde and Gilbert
Members	Kenneth Louw MSc, FCII	Reinsurance Evaluations Ltd
	Phillipa Rowe MA, FCII, MAE, QDR	Phillipa Ross & Co

<u>Marine</u>

Chairman:	David Taylor, Solicitor	IUA Special adviser
Members:	Christopher Jones	IUA Research Assistant
	Tim Taylor, Solicitor	Partner, Hill Taylor Dickinson

<u>Claims</u>

Chairman:	Richard Hanson-James LLB, FCII, FCILA Chartered Loss Adjuster	ClaimEx
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	Geoffrey H Lloyd FCII, MAE, MEWI, Chartered Insurance Practitioner (gave comments, but did not attend any meeting of the sub-group)	Associated Insurance Experts

Intermediaries

Chairman:	Derrick G Cole ACII, MAE, MEWI, Chartered Insurance Broker	Associated Insurance Experts
Members:	Angela Darling FCII	GISC Head of Policy
	Christopher Henley FCII, Solicitor, (Author of The Law of Insurance Broking)	Ashurst Morris Crisp
	Ken Louw MSc, FCII (did not attend any meeting of the sub-group, but did not disagree with findings)	Reinsurance Evaluations Ltd

Academic Advisers

Professor Malcolm Clarke	Professor of Commercial Contract Law St John's College, Cambridge (Author of "The Law of Insurance Contracts")
Professor John Birds	Professor of Commercial Law, Sheffield University. (Author of Modern Insurance Law, co-author of MacGillivray on Insurance Law, and Adviser to National Consumer Council in their 1997 Report)
Peter J Tyldesley	Senior Lecturer, Centre for Financial Regulation Studies, London Guildhall University

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Robert Viney	Partner, Davies Arnold Cooper, Solicitors
Rhicert J P Webb	BILA Vice Chairman, Solicitor, Senior Vice President and Chief Counsel of XL London Market Ltd
Richard Whatton	BILA Chairman, Managing Director, Omni Whittington Services Ltd

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Any communications concerning this report should be addressed to the Secretary to the Sub-Committee or to the BILA Secretariat.

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