

**Reform of 'non-disclosure' in UK Marine Insurance Law:
Exotic Approach or Original Understanding?**

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by

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ABSTRACT

“Reform of ‘non-disclosure’ in UK marine insurance law: Exotic Approach or Original Understanding?”

Mr.Poomintr Sooksripaisarnkit

A marine insurance contract is a contract of utmost good faith (*uberrimae fidei*), which requires the duty of disclosure prior to the conclusion of a contract. This is essentially stated in ss.17 and 18 of the Marine Insurance Act 1906. Despite the 100-year application of these provisions, the defects are shown and the injustice occurs. The voluminous case laws and their complexity suggest nothing else apart from that this area of law is highly problematic. The criticisms are essentially rested upon two grounds: (1) the material fact which rests upon the view of the ‘prudent insurer’ makes it difficult for the assured to determine for himself the fact to be disclosed (2) in case of non-disclosure, the remedy of avoidance applies regardless of culpability of the party in breach. As such, the reform to the law is inevitable and the purpose of this thesis is to suggest how reform can be achieved.

Two possible ways to bring the change to the law are considered. These are (1) to adopt the alternative solutions identified in other jurisdictions or (2) to re-consider whether the law on duty of disclosure as has been recognised since the seminal judgment of Lord Mansfield in *Carter v. Boehm* (1766) 3 Burr. 1905 has been correctly applied.

This thesis concludes that the judgment of Lord Mansfield has been misunderstood in the UK and that, to constitute non-disclosure, only the deliberate intention is required and that the remedy of avoidance is justifiable upon the public policy ground. Such duty should be based upon the broad notion of good faith (*bonae fidei*), a flexible concept of fairness and justice. In the end, the draft provisions are formulated to reflect these suggestions.

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Introduction

A marine insurance contract is a contract which governs the relationship between an assured, usually either a cargo-owner or a ship-owner, and the insurer. As explained in s.1 of the Marine Insurance Act 1906 ("MIA 1906"), it is a contract "whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses..." The insurance covering loss to the vessel is known as 'hull insurance', while that covering loss to the cargoes on board is known as 'cargo insurance'. Like most commercial contracts, there are some standard form contractual clauses which set out the basic terms of the contract which the parties can adopt without the need to negotiate. These are known as the 'Institute Clauses' which were drafted and published by the Institute of London Underwriters (ILU), now known as the International Underwriting Association (IUA).¹ The most common form is the 'Institute Cargo Clauses (1/1/82)'. Since November 2003, new standard contractual terms for hull insurance came in use. These are the 'Institute Hull Clauses (01/11/03)'. These forms must be used with the Lloyd's Marine Insurance Policy (MAR), which by itself is not the contract. It is just evidence that a contract has been made.² To procure a marine insurance contract, the parties must act towards each other with an 'utmost good faith'. This duty is clearly stipulated by a rule of law in the MIA 1906, a piece of legislation the success of which is marked by the entire history of non-amendment throughout its 100-year application and the virtually identical statutes which can be found in other countries.³

According to s.17 of the MIA 1906, marine insurance contracts are classified as contracts *uberrimae fidei* or contracts of the utmost good faith, which,

¹ In 1998, the Institute of London Underwriters (ILU) merged with the London Insurance and Reinsurance Market Association (LIRMA) and a new organisation was formed since then, namely the International Underwriting Association (IUA). See Maritime London, 'International Underwriting Association'

<http://www.maritimelondon.com/members/international_under.shtml> accessed 29 January 2006.

² See s.22 of the Marine Insurance Act 1906. The contract concludes as soon as the slip is initialled by the underwriter. *General Reinsurance Corporation and Others v. Forsakringsaktiebolaget Fennia Patria* [1982] 1 Lloyd's Rep. 87, 97.

³ For example The Marine Insurance Act 1908 (New Zealand), The Marine Insurance Act 1909 (Cth) (Australia), Chapter 329 Marine Insurance Ordinance (1964) (Hong Kong (SAR)).

among other things, mean that the parties are subject to a duty of disclosure as described in s.18 and a duty not to misrepresent in s.20. As will be explained later, these two duties in practice appear to be indistinguishable. Every misrepresentation seems to contain the elements of non-disclosure and the fulfilment of the duty of disclosure means the absence of misrepresentation. Nevertheless, the latter appears to be explained more in relation to the answering of questions. Suffice it to say for present purposes, by bearing such similarity in mind, that the parties are subject mostly to the so-called 'duty of disclosure'.

To explain broadly, the rationale of the duty of disclosure is that it requires the parties to a marine insurance contract to tell each other the known facts which are essential to the assessment of the risk. For example, X, a ship-owner, might want to insure his vessel against its loss with Y, an underwriter. In such a case, X needs to tell Y if there are some defects in his ship's engine. Such information is important for Y to assess the risk and calculate the premiums X needs to pay monthly. If the ship's engine is not in an appropriate condition, the ship might not be ready to confront perils of the sea. Y might decide to decline the risk or might accept it but charge higher premiums. If such fact has been concealed, Y may be gravely prejudiced.

As the law now stands, while the utmost good faith is said in s.17 to be reciprocal, s.18 only sets out the details of the duty of disclosure by the *assured*. It extends the duty of disclosure beyond the facts within the actual knowledge of the assured. In this sense, the assured needs also to disclose the facts which he should know 'in the ordinary course of business', in other words "constructive knowledge".⁴ Yet, it would be wrong to understand that the law requires the assured to disclose *everything*. It only imposes upon the assured the duty to disclose 'material facts'. Even so, this term is still broad.

⁴ Park, S., *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing Company, Hants 1996) 15.

‘Material facts’ means the facts which a prudent insurer, a hypothetical reasonably experienced insurer,⁵ would like to know in considering the risk.⁶ As can be envisaged, materiality is given a wide meaning while it is rather difficult for the assured to determine what a prudent insurer wants to know which then leads to the problem on considering what should be disclosed. Once the assured failed to disclose some facts, if the insurer can prove that these are what the prudent insurer would take into account and the insurer himself was *induced* to enter into the contract on the terms he did by such non-disclosure,⁷ then, the insurer has a right to avoid the contract from the beginning, known as avoidance *ab initio*.⁸ Although the requirement of inducement is not expressly stated in s.18, the House of Lords found it to be implied in this provision.⁹

The effect of the remedy of avoidance is draconian. Although non-disclosure may occur through different degrees of culpability, either complete innocence, negligence, or even fraudulence, this remedy is applied by not taking into account the state of mind. Thus, even the non-disclosure was *innocently* made by the assured, still the insurer can avoid the contract. Furthermore, it applies regardless of any causation between the non-disclosure and the loss. Thus, the insurer does not have to prove that the loss was due to the matter undisclosed. The effect of avoidance is as if the contract was never made. The assured must also return to the insurer the payments made by the insurer for the loss previously occurred under the same contract.¹⁰ Moreover, the insurer is discharged from paying any prospective claims.¹¹

The MIA 1906 provides for the same remedy of avoidance *ab initio* for breach of the broader duty of utmost good faith and for material

⁵ *Ibid*, at 77. *Associated Oil Carriers, Limited v. Union Society Insurance of Canton, Limited* [1917] 2 K.B. 184, 192.

⁶ *Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Insurance Co. Ltd* [1994] 2 Lloyd’s Rep. 427, 440.

⁷ *Assicurazioni Generali Spa v. Arab Insurance Group (B.S.C.)* [2002] EWCA Civ. 1642.

⁸ Park, n.4 above, 12.

⁹ *Pan Atlantic* [1994] 2 Lloyd’s Rep. 427, 452-453. See further Chapter 3 below, 93-98.

¹⁰ Although the premiums already paid by the assured to the insurer must be returned if non-disclosure was non-fraudulent. See s.84(3)(a) of the Marine Insurance Act 1906. See also Park, n.4 above, 12.

¹¹ *Ibid*.

misrepresentation.¹² Since the language of s.18 does not provide the consequence for non-disclosure by the *insurer* and as the duty of disclosure is perceived as a part of the broad notion of utmost good faith as set out in s.17, by the application of this particular provision, if the assured faced loss from the insurer's non-disclosure, the only remedy available for him is the right to avoid the contract.¹³ This is the case despite the fact that the loss of cover may be the most unwanted situation for the assured.

Such a duty of disclosure extends to the broker, who is the agent of the assured in placing the insurance with the insurer. Such agent needs to disclose the material facts within his knowledge or constructive knowledge, and those which the assured needs to disclose.¹⁴ Nevertheless, here the material facts are not understood differently from those concerning the assured's duty of disclosure.¹⁵ Moreover, non-disclosure by the broker entitles the insurer to avoid the assured's insurance contract although the assured may claim from the broker upon the ground of negligence.¹⁶ Thus, in this work, the duty of disclosure by the broker will not be separately discussed.

Although the duty of disclosure is extremely wide and the consequence of the failure to disclose is harsh, one must bear in mind the fact that the relationship between the assured and the insurer is *contractual*. Where the Act is silent upon a point, one may need to resort to general contract law principles. One of the traditional tenets of general contract law is 'freedom of contract', the essence of which is that "...persons of full capacity should in general be allowed to make

¹² See ss.17 and 20 of the Marine Insurance Act 1906 in Appendix 1 attached to this thesis.

¹³ See *La Banque Financiere de la Cite S.A.* (Formerly named *Banque Keyser Ullman En Suisse S.A.*) v. *Westgate Insurance Co.Ltd.* (Formerly named *Hodge General & Mercantile Insurance Co.Ltd.*) [1998] 2 Lloyd's Rep. 513 (Court of Appeal) affirmed by *La Banque Financiere de la Cite S.A.* (Formerly *Banque Keyser Ullman En Suisse S.A.*) v. *Skandia (UK) Insurance Co.Ltd* *Westgate Insurance Co.Ltd.* (Formerly *Hodge & Mercantile Insurance Co.Ltd.*) and *Others* [1990] 2 Lloyd's Rep. 377 (House of Lords).

¹⁴ See s.19 of the Marine Insurance Act 1906.

¹⁵ There is no definition of 'material circumstance' provided in s.19 and no judicial interpretation suggests this term to be any difference from that in s.18. "It is obvious that s.19 is intended to add to the duty of disclose imposed in s.18..." *PCW Syndicates v. PCW Reinsurers* [1996] 1 Lloyd's Rep. 241, 258.

¹⁶ *Blackburn Low & Co v. Vigors* (1887) L.R. 12 App.Cas. 531, 542-543.

what contracts they like[d]: the law only interfered on fairly specific grounds...”¹⁷
To what extent then can the parties contract out of the provisions of the MIA 1906 concerning the duty of disclosure?

With the exception of fraudulent non-disclosure, the courts have upheld agreements by the parties to exclude the remedy of avoidance.¹⁸ Thus, there appears to be no reason why the parties cannot expressly provide for an alternative remedy to avoidance. Similarly, it was once held that it is possible for the parties by their contract to limit or exclude the duty of disclosure.¹⁹ Nevertheless, the House of Lords has not yet come to affirm these legal positions and some doubts can be maintained.²⁰

In any event, a high volume of case law is continuously seen where the insurers attempt to avoid the contract and the insurers still rely on the law of disclosure as in s.18 of the Act without the contract expressing to the contrary. Thus, one cannot deny the fact that the prejudicial state of law still exists. Therefore, when Australia, a country that has an identical statute to the MIA 1906 (namely the Marine Insurance Act 1909 (Cth)),²¹ considered reforming its marine insurance statute, it was unsurprising that the duty of disclosure became one of the

¹⁷ Treitel, G.H., *The Law of Contract* (11th ed., Sweet & Maxwell, London 2003) 2.

¹⁸ “...conceptually it is also possible to draft a clause which excludes the other party’s right to rescind for non-disclosure, except in the cases of fraud, even though the clause excluding rescission forms part of a contract which upon rescission would be rendered retrospectively null and void. But that is only possible if the clause evinces a clear intention to exclude the right of avoidance.” *Pan Atlantic Insurance Co.Ltd and Another v. Pine Top Insurance Co.Ltd.* [1993] 1 Lloyd’s Rep. 496, 502 (per Lord Justice Steyn); *Toomey v. Eagle Star Insurance Co.Ltd. (No.2)* [1995] 2 Lloyd’s Rep. 88, 91-92; *HIH Casualty and General Insurance Ltd and Others v. Chase Manhattan Bank and Others* [2001] 1 Lloyd’s Rep. 30 at 42, [22]-[23].

¹⁹ “...the Courts have said that the insurer has ‘waived’ the duty of disclosure of the assured, usually by limiting the scope of questions that it asks in a proposal form. It can also waive the duty by the nature of the insurance itself. If the scope of disclosure can be limited by these means then... it is conceptually possible to draft a clause in a contract of insurance whereby the parties agree that the *duty of disclosure* of the assured...is excluded or waived, altogether.” *HIH* [2001] 1 Lloyd’s Rep. 30 at 42, [24] (per Aikens J.).

²⁰ See Birds, J., and Hird, N.J., *Birds’ Modern Insurance Law* (6th ed., Sweet & Maxwell, London 2004).

²¹ Salter, R., “Marine Insurance Reform in Australia-Start, Pause and Go Where?” in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume 2* (Intersentia, Antwerp 2000) 181.

issues.²² Similarly, in South Africa, although it has its own marine insurance regime developed from its distinctive legal origins, the influence of the UK law in this area is undeniable. The draft South African Marine Insurance Act seems to be based upon the MIA to a large extent, still the nature of the duty as perceived is different from that in the UK or other common law countries.²³

The objective of this work is to argue that, in light of the 100-year anniversary of the MIA 1906 in 2006, the year of the submission of this thesis, the time is ripe for reform of the UK marine insurance law, especially in respect of the duty of disclosure. It will seek to analyse, among other things, the problems occurring from the wide scope of the duty of disclosure and the inappropriateness of the remedy for breach of such duty. It will show how judges have recognised these problems and thus tried to correct the defects in the law which then lead further to the uncertainty of the precedents. Ultimately, it will propose how the provisions concerning the duty of disclosure in the MIA may be re-formulated.

However, there appear to be several ways the UK may opt for the reform of the duty of disclosure. One possible way is perhaps to adapt from the alternatives identified in other common law countries, especially in Australia and South Africa, and this will be the subject of the comparison in this work.²⁴ The reasons why these jurisdictions are chosen for such purpose is that, in the former, some recommendations to reform the law based upon the MIA came out in 2001 and, certain changes are suggested for both the scope of the duty of disclosure and the remedy for non-disclosure. In the latter, although inherited legal thought from

²² See the Australian Law Reform Commission, 'Review of the *Marine Insurance Act 1909*' (Report No.91, 2001)

<<http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch10.html#Heading1>> accessed 1 February 2006. The excerpt of the relevant clauses from the "Draft Marine Insurance Amendment Bill" can be found in Appendix 2 attached to this thesis.

²³ This draft mentions in clause 17 that marine insurance contract is based on good faith or *bonae fidei*. The Maritime Law Association of South Africa, 'Draft Proposal for a Marine Insurance Act: Redraft 1997' <<http://www.uctshiplaw.com/marins.htm>> accessed 6 July 2005.

²⁴ South Africa used to be governed by both the Netherlands and the UK. Its legal system has been influenced by the laws of both countries. It might be broadly categorised as a country in the common law legal system due to the use of case laws, although one might prefer viewing it as a country with the 'mixed legal system': see Tetley, W., 'Mixed Jurisdiction: Common Law vs. Civil Law (Codified and Uncodified)' <<http://upload.mcgill.ca/maritimelaw/mixedjur.pdf>> accessed 21 August 2005.

the UK, some conceptual differences can still be seen, such as the understanding of 'material facts'.²⁵ Thus, the question is whether the law as applied in South Africa or the recommendations in Australia maybe more suitable than the current MIA regime in the UK. Thus, by this means, the law may be reformed by the analysis for the best alternatives.

One may question why marine insurance law in the USA is omitted from the scope of consideration here despite the fact that this is an influential common law country. There, the arguments are more on the jurisdictional question, i.e. whether marine insurance is subject to federal law or state law.²⁶ So far as the federal law on disclosure can be traced, despite its similarity to the law in the UK, the understanding on 'material facts' is not at all clear.²⁷ As such, it will not be considered in this work.

But, as mentioned above, the comparative method may not be the sole route which can lead to the answer to the question how the UK law on duty of disclosure may be reformed. Another possible way, which seems to be unacknowledged by any academic commentators in the UK, and which is not mentioned by judges or legal literature, but might present the solution towards reform is to ask whether the law on duty of disclosure that has been applied was derived from the understanding of what Lord Mansfield had intended and did mention in *Carter v. Boehm* (1766),²⁸ a case which is understood to establish such duty.²⁹

²⁵ The duty of disclosure is also based upon the standard of the 'reasonable man'. See s.53(1)(b) of the Short-Terms Insurance Act 1998 in Chapter 1 below, 32-33.

²⁶ This resulted from the judgment of the United States Supreme Court which suggested that marine insurance is subject to the state law. *Wilburn Boat Company et al v. Fireman's Fund Insurance Company* (1954) 348 U.S. 310. See also Sturley, M.F., "Marine Insurance in the United States: The U.S. Supreme Court's *Wilburn Boat* decision and its impact on marine insurance" in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume 1* (Intersentia, Antwerp 1999) 145.

²⁷ Compare the apparent conflicting explanations in Staring, G.S., and Waddell, G.L., "Marine Insurance" (1999) 73 *Tulane Law Review* 1619, 1654 and 1657; Schoenbaum, T.J., "The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law" (1998) 29 *Journal of Maritime Law and Commerce* 1, 25 and 27.

²⁸ *Carter v. Boehm* (1766) 3 Burr. 1905.

²⁹ See e.g. Park, n.4 above, 8.

As will be shown throughout this work, there appear to be some grounds which may lead one to suspect that the original understanding of Lord Mansfield has been greatly distorted and, as a result, the duty of disclosure has been misapplied. One may ask whether Lord Mansfield did intend for such a boundless duty of disclosure coupled with the draconian remedy of avoidance. One even can perhaps enquire further into what inspired his Lordship to establish the rule on disclosure. Thus, the deeper interpretation into the judgment of Lord Mansfield and the reasons behind his decision may provide us with new insight into the law on duty of disclosure which may then lead to the re-formulation of the law on this area.

Considering the two possible approaches above, as the title of this work reflects, the question is thus which basis the UK should adopt in undertaking the reform of the law on duty of disclosure which will yield the effective result that leads to the appropriateness of the law. In pondering upon the first alternative, despite the focus on the law in Australia and South Africa, the comparative perspective will be extended to the related provisions in the Norwegian Marine Insurance Plan (NMIP),³⁰ given the fact that the recent proposals on marine insurance law in Australia, especially in relation to the remedy for non-disclosure, are somewhat similar to the Plan.³¹ Indeed, the remedy provisions as set out in the Plan seem to offer more flexibility as different results apply to different states of mind. Thus, some analysis of this regime is also needed.

While every attempt is made to ensure that, in comparative analysis, the latest legal thought from the selected jurisdictions is included in this examination, certain limitations must be borne in mind. Not all legal materials in South Africa are written in the English language, while many of the sources in Norway are Norwegian. Unfortunately, material in languages other than English has not been accessible to the author.

³⁰ The Central Union for Marine Underwriters (CEFOR), 'The Norwegian Marine Insurance Plan of 1996, version 2003' <<http://www.norwegianplan.no/eng/index.htm>> accessed 21 August 2005.

³¹ Derrington, S.C., "Marine Insurance Law in Australia: Australian Law Reform Commission Proposals" [2002] LMCLQ 214, 233.

To attain the main objective set out above while also to ensure that an analysis of all the significant angles of the law on duty of disclosure is undertaken, this work will be divided into six chapters. In Chapter 1, the historical background and recent development of marine insurance law and legislation on the duty of disclosure in the UK, Australia, South Africa, and Norway will be outlined and explored in order to gain an understanding of the origin of the ideas behind the reform project and legal thought in each country.

In Chapter 2, the perspective will move from a historical one to a more technical and theoretical one. The potential overlap and inter-relationship between the duty of utmost good faith, duty of disclosure and duty not to misrepresent will be explored. The understanding gained in this chapter will underpin the rest of this work and introduce the background to the suspicion that the original intention of Lord Mansfield has been misunderstood.

The scope of the duty of disclosure as set out in s.18 of the MIA 1906, especially in sub-sections (1) and (2) will then be discussed in Chapter 3. Conceptually, the duty of disclosure is reciprocal; practically however, the assured possesses most of the information concerning the risk. Thus, it is the duty of disclosure by the assured which deserves particular focus. It will point out the problems arising from the current language of s.18 and further analysis will be made to see whether such problems may be solved by adopting the exotic approach or returning to the original understanding of Lord Mansfield.

Afterwards, the consequences of non-disclosure will be examined in Chapter 4. This includes an analysis of the rights and liabilities of the parties to a marine insurance contract, as well as the effect on the contract itself. Again, the focus will be on the problems concerning the remedy caused by the stipulation of the sole remedy of avoidance in the language of the Act and the questions whether the alternatives identified by other jurisdictions can help reducing such problems and whether they might be better than what Lord Mansfield had intended.

At this point, one should be able to form the view of what each method of reform is likely to achieve. In Chapter 5, both methods will be tested against an emerging area in marine insurance law, particular to the UK, namely the post-contractual duty of utmost good faith, i.e. the possibility of the duty of disclosure extending to the period *after* the marine insurance contract is concluded. While the language of s.18 might not suggest so, the language of s.17 does not seem to be so restricted and the judicial authorities seem to suggest such extension.³² Should there be a duty of utmost good faith post-contractually? Which method of reform can clarify the state of the law and present the precise scope of the duty?

Ultimately, Chapter 6 will highlight the justification for reform of the law on duty of disclosure in the MIA 1906 and which method the UK should pursue—exotic approach or original understanding. It will also sketch the shape of the law as will stand in light of the changes proposed. Any amendment to be made will resolve the existing problems in the law and bring fairness to the parties to a marine insurance contract.

³² See *Black King Shipping Corporation and Wayang (Panama) S.A. v. Mark Randal Massie (The "Litsion Pride")* [1985] 1 Lloyd's Rep. 437; *Manifest Shipping Co.Ltd v. Uni-Polaris Insurance Co.Ltd and La Reunion Europeene (The "Star Sea")* [2001] UKHL/1; [2001] 1 Lloyd's Rep. 389.

Chapter 1: Historical background and recent development of the law on “non-disclosure” in selected jurisdictions

In this chapter, the historical background and recent development of marine insurance law in the UK, Australia, South Africa, and Norway will be explored as far as it relates to the duty of disclosure so the idea of law reform in each country can be seen. Some observations will be provided in the last part. These are the points which should be taken into account if the reform of the Marine Insurance Act 1906 (“MIA”) will be undertaken.

1.1. UK

The MIA was drafted by Sir McKenzie Chalmers. Despite its name seems to indicate its application, in reality, it also governs non-marine insurance law.¹ This piece of legislation is the product of the codification of some case laws which had been decided some 200 years prior to its enactment.²

It has been suggested that the duty of utmost good faith is derived from the judgment of Lord Mansfield in *Carter v. Boehm* (1766).³ Similarly, the origin of the duty of disclosure can be traced back to the same source, as it is perceived as a part of the duty of utmost good faith.⁴ Here, Lord Mansfield proclaimed,

“First. Insurance is a contract upon speculation.
The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the *insured* only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.

¹ “Although the issues arise under a policy of non-marine insurance it is convenient to state them by reference to the Marine Insurance Act...in relevant respects the common law relating to the two types of insurance is the same....” *Pan Atlantic Insurance Co.Ltd and Another v. Pine Top Insurance Co.Ltd.* [1994] 2 Lloyd’s Rep. 427, 432 (per Lord Mustill).

² Merkin, R., *Marine Insurance Legislation* (2nd ed., LLP, London 2000) 1.

³ See e.g. Park, S., *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing Company, Hants 1996) 8. *Carter v. Boehm* (1766) 3 Burr. 1905.

⁴ *Ibid.*

The keeping back such circumstance is a *fraud*, and therefore the policy is *void*. Although the *suppression* should happen through *mistake*, without any fraudulent intention; yet still the underwriter is *deceived*, and the policy is *void*; because the risk run is really different from the risk understood and intended to be run, at the time of the agreement.

The policy would equally be void, against the underwriter, if *he* concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

The governing principle is applicable to *all* contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.”⁵

The above passage of Lord Mansfield is so widely accepted that it became “a fundamental principle in insurance contracts”.⁶ Thus, it was later enshrined in the MIA 1906, in the broad provision of s.17.⁷

As will be argued in Chapter 2,⁸ it is submitted that the passage of Lord Mansfield established *only* the relatively narrow duty of disclosure. The above passage did not mention ‘utmost good faith’ and this is rather derived from a misunderstanding and s.17 can be said to be the product of such misconception. His Lordship mentioned the term ‘good faith’, synonymous to concept of good faith (*bonae fidei*) as applied in the continental legal system.⁹

Since such misunderstanding has been unacknowledged to date, the Act reflects how the law has been understood. Immediately below the general duty in s.17, the Act sets out the scope of the duty of disclosure in s.18, especially in subsections (1) and (2). No one seems to argue that the pre-contractual duty of disclosure should not exist. However, the *scope* of the duty as stipulated in the Act has been doubted. The attempts to bring the reform to such duty in non-

⁵ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909-1910 (italics following the original text).

⁶ Park, n.3 above, 20.

⁷ For s.17 and the relevant provisions, see Appendix 1.

⁸ Below, 66-72.

⁹ See Chapters 2 below, 66-72.

marine insurance context can be seen from time to time but no fundamental change has been done. As far as marine insurance is concerned, what can be gleaned from the attitude of the relevant sectors appears to be that the reform of such duty has been *gravely* neglected.

A formal call for reform first appeared in 1954 when Viscount Simonds raised for the consideration of the Law Reform Committee “the effect on the liability of insurance companies of special conditions and exceptions in insurance policies and *of non-disclosure of facts by person effecting such policies*”.¹⁰ Following the consideration, the report was published. As shown in the report, marine insurance had ultimately been excluded from the scope of its consideration. The reason was:

“The general public is not interested in marine insurance and we have no reason to believe that business circles... are in anyway dissatisfied with the law as it stands.”¹¹

The first reason put at the forefront, namely the interest of the public is, with respect, unsustainable. What should be taken into account in considering whether law reform should be undertaken is the effectiveness of the law to respond to legal problems. The interest of the general public should not be the factor. Otherwise, the reform of some branches of law such as marine insurance or international trade cannot be undertaken. Although general public may not realise, the effectiveness of this law is, in fact, within their broad interest. True, by nature, such law may receive close attention of limited group of people, such as underwriters, shipowners, or cargo-owners, but it is implicitly influential on the economy of the country. In referring to the interest of the public, the Committee might be envisaging the difficulty at the parliamentary process. Members of Parliament may only be interested in legal reforms which can attract the attention of the public since they are the majority of the electorate.¹² The Law Reform

¹⁰ *The Fifth Report of the Law Reform Committee on Conditions and Exceptions in Insurance Policies*, Cmnd. 62 (1957), 3, [3] (emphasis added) (hereinafter *The Fifth Report*).

¹¹ *Ibid.*

¹² Clarke, M., “Doubts from the Dark Side-The Case Against Code” [2001] JBL 605, 613.

Committee's assertion is further dubious to the extent that they mentioned they had no reasons to believe that the law was in an unsatisfactory state. With respect, the whole marine insurance business did not seem to be consulted.¹³ By taking *only* non-marine insurance into account, the Law Reform Committee suggested how the legal provisions may be re-formulated, among other things, the change to the test of materiality was suggested to be 'reasonable insured', instead of prudent insurer.¹⁴ Nevertheless, the recommendations were not pursued further.

Non-disclosure became the subject of scrutiny again when the Lord Chancellor raised it with the Law Commission in 1978 following the introduction of the 'draft E.E.C. Directive on the co-ordination of laws, regulations and administrative provisions relating to insurance contracts'.¹⁵ The Commission grouped three kinds of insurance together: marine, aviation, and transport insurance, collectively known as MAT. Again, these were excluded from its consideration on the basis that:

"...MAT policy holders are...professionals who carry on business in a market governed by long-standing and well-known rules...the necessity to protect the insured...is...less relevant... This...would not have prevented us from making provisional recommendations for reform...if there were grounds for believing that it was unsatisfactory...The Marine Insurance Act 1906...contains comprehensive provisions which provide a context of certainty of law and practice in this country...This basis of legal certainty has helped to establish London as the leading international market for MAT...we have decided not to deal with MAT in this working paper..."¹⁶

¹³ The Committee received the opinions in a form of the memorandum from various sectors but it did not appear to get the opinions from marine insurance business circles. See *The Fifth Report*, n.10 above, 3, [3].

¹⁴ See *The Fifth Report*, n.10 above, 7, [14]. For the analysis of the 'reasonable assured test' in marine insurance context, see Chapter 3 below, 99-103.

¹⁵ *The Law Commission working paper no.73 on Insurance Law: non-disclosure and breach of warranty* (1979), 1, [1] (hereinafter *working paper no.73*). The draft directive has never been implemented. See Longmore, A. (Sir), "An Insurance Contracts Act for a new century?" [2001] LMCLQ 356, 357.

¹⁶ *Working paper no.73*, 9-10, [15]-[17].

Essentially, the Law Reform Committee insisted on the same attitude with some support drawing from an article by Hasson,¹⁷ in which he maintains:

“It is submitted that any reforming provisions...*should not cover the law relating to marine insurance*. Both the law and practice in this area...appear to work satisfactorily and there would appear to be every argument for leaving well alone in this area.”¹⁸

The above statement appears to be the personal opinion of Hasson as he did not cite any evidence to support his assertion. Moreover, this article had been written almost a decade earlier. How was the situation in 1978? One might ask further whether the Law Commission was aware of the initiative from the United Nations Conference on Trade and Development (UNCTAD), which conducted an examination into marine insurance law in the UK, more or less at the same time as the Law Commission working paper was produced.¹⁹ As shall be seen, UNCTAD reached completely different conclusion from that of the Law Commission.

A report which took the same attitude was then published following the Law Commission working paper.²⁰ However, the Commission tried to separate marine insurance into two kinds: where the policy holders are business organisations and where the policy holders are consumers.²¹ It suggested that the latter type of marine insurance should come under the scope of consideration and

¹⁷ *Ibid*, at 10, [16] see in particular footnote 22. Hasson, R., “The Doctrine of *Uberrima Fides* in Insurance Law-A Critical Evaluation” (1969) 32 MLR 615.

¹⁸ *Ibid*, 635 (emphasis added).

¹⁹ The report published in 1982 but the draft had been issued since 1978. The United Nations Conference on Trade and Development (UNCTAD), ‘Legal and Documentary aspects of the marine insurance contract’, United Nations Publication, New York, 1982, TD/B/C.4/ISL/27/Rev.1, <<http://r0.unctad.org/ttl/docs-legal/rep-doc/Legal%20and%20Documentary%20Aspects%20of%20the%20Marine%20Insurance%20Contract.pdf>> accessed 9 July 2005

²⁰ *The Law Commission Report on Insurance Law: non-disclosure and breach of warranty*, LAW COM No.104, Cmnd. 8064 (1980).

²¹ The latter type such as the persons who are the owners of the sailing boats or pleasure crafts. *Ibid.*, 15, [2.9].

this should fall within the 'Draft Insurance Reform Bill' attached to the report.²² The Bill, however, has never been implemented.²³

While the Law Commission consistently insisted that there were no problems concerning the duty of disclosure in a commercial marine insurance context, in the international arena the weaknesses of the UK marine insurance law were analysed and pointed out in the work of UNCTAD mentioned above. While its primary aim was to consider the possibility of unifying the contractual clauses used in international marine insurance business, the possibility of harmonising the law in this area was not wholly discarded.²⁴ Due to its influence in international marine insurance business, the UK marine insurance industry was investigated.²⁵ As far as the law on the duty of disclosure is concerned, the conclusions were that two features of UK law were unsatisfactory. First, it imposed too many burdens on the assured. This could cause some difficulties for the assured, especially the cargo-owner, who might not be particularly familiar with evaluating the significance of information. Secondly, the failure to disclose could lead to the avoidance of the contract from the beginning regardless of the causation between the non-disclosure and the loss, and regardless of the assured's state of mind.²⁶ It further suggested how UK law on this matter might be improved:

“The statutory rule stipulating that all non-disclosure or misrepresentation...of material information at the time of making the insurance contract enables the insurer to avoid liability even as to damage caused by an event completely unconnected with the non-disclosure or misrepresentation,

²² *Ibid.*, see particularly Appendix A “Draft Insurance Law Reform with Explanatory Notes”.

²³ “The suspicious observer might conclude that the insurance industry lobby has been active behind closed doors and has in fact won.” North, P.M., “Law Reform: Process and Problems” (1985) 101 LQR 338, 350.

²⁴ See The United Nations Conference on Trade and Development, n.19 above, at 3, [4]. This project of the UNCTAD finally led to the production of the model clauses. See The United Nations Conference on Trade and Development (UNCTAD), ‘UNCTAD Model Clauses on Marine Hull and Cargo Insurance’, United Nations Publication, New York, 1989, TD/B/C.4/ISL/50/Rev.1, <<http://ro.unctad.org/ttl/docs-legal/nm-rules/UNCTAD%20Model%20Clauses%20on%20Marine%20Hull%20and%20Cargo%20Insurance.pdf>> accessed 9 July 2005.

²⁵ The United Nations Conference on Trade and Development, n.19 above, 6.

²⁶ *Ibid.*, 20, [105]-[106].

should be amended to eliminate the *obviously inequitable* situation.”²⁷

As shall be seen in subsequent chapters, academic commentators and, indeed, judges have reached exactly the same two criticisms made by UNCTAD. What has been done in light of these criticisms? With respect, the author is of the impression that the Law Commission here rather overlooked the need for reform of marine insurance.

After the Law Commission’s report in 1980, the calls for reform in the UK can still be seen but these calls all excluded marine insurance. In 1997, a report by the National Consumer Council was published suggesting, among other things, the change to the duty of disclosure so the assured needs to disclose only the facts which he or the ‘reasonable person in the circumstance’ knows to be relevant to the insurer and the unavailability of the remedy of avoidance in case of non-fraudulent non-disclosure.²⁸ In 2002, the suggestions from a Sub-Committee on Insurance Law Reform of the British Insurance Law Association (BILA) to the Law Commission were made showing that reform of the law on the duty of utmost good faith and disclosure in marine insurance might not be needed:

“...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

No details of these arguments were mentioned and what the Sub-Committee did discuss is not open to us. It suggested the alternative to statutory reform, namely the reform of the Institute Clauses. As seen earlier, the nature of these clauses are standard form contracts and they are prepared and drafted by the International

²⁷ *Ibid.*, 35, [191] (emphasis added).

²⁸ See National Consumer Council, “Insurance Law Reform: The consumer case for a review of insurance law”, May 1997, PD13/F/97, 8-10, recommendations 4-6.

²⁹ The 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, 9, [29.1].

Underwriters Association (IUA).³⁰ As the name of this organisation indicates, it leads to some doubts whether the clauses that truly balance the rights of both parties can *ever* be drafted by a body representing one interest.

It might be that both the Law Commission and the BILA envisaged marine assureds as big ship-owning companies or large exporters of goods who tend to insure large risks. As such, from them, the insurers can obtain high rate of premiums and thus, taken together, they form a fairly powerful group which contributes to their negotiating power with the IUA regarding the drafting of the Institute Clauses. How far this statement is true? The harshness and injustice of the law on duty of disclosure has been complained of for a long time but the Institute Clauses still exist in the same form with no amendment to reflect an intention to correct the flaws. Does it imply that the IUA ignores the problems?

Nevertheless, the recommendations of the BILA ultimately attracted the attention of the Law Commission and the Scottish Law Commission through the insurance law reform project, which is currently in its very initial stage. The scoping paper was published on 18 January 2006.³¹ Both Law Commissions decided to advance one step further from the BILA by taking non-disclosure in marine insurance into account. They said,

“In 1980, the English Law Commission excluded marine, aviation and transport risks (“MAT”) from the scope of its report. The reasons...were that the law was operating satisfactorily...

...The current review will include MAT. Criticism of some areas of the law - notably non-disclosure and breach of warranty - seems to us to be sufficiently fundamental to warrant review *regardless of the type of risk*. Furthermore, there is significant uncertainty...as witnessed by the costly litigation that has occurred since 1980.”³²

³⁰ Introduction above, 3

³¹ The Law Commission and The Scottish Law Commission, ‘Insurance Contract Law A Joint Scoping Paper’ <http://www.lawcom.gov.uk/docs/ins_scoping.pdf> accessed 18 January 2006.

³² *Ibid.*, 40, [A.30]-[A.31] (emphasis added).

Although the general statement of intention is clearly declared, the scenarios used in the paper to show the unfair state of law imply that both Law Commissions heavily bear consumer insurance in mind.³³ With greatest respect, the present author doubts how far they are prepared to pursue marine insurance contract law reform.

1.2. Australia

Unlike the UK, Australia is governed by a federal system. It has a central or federal government known as 'the Commonwealth', six state governments and ten territories. The territories are different from the states in the sense that they do not have their own legislative powers but are subject to the legislative power of the Commonwealth. The relationship between federal law and state law in Australia is that "...if a valid Commonwealth law is inconsistent with a law of a State Parliament, the Commonwealth law operates and the State law is invalid to the extent of the inconsistency."³⁴ Australia used to be a British colony and is now one of the Commonwealth countries. It acquired the right to enact its own law independently from the UK in 1901 and the Australian 'Marine Insurance Act 1909 (Cth)', which basically has the same contents as the MIA 1906, came out on 1 July 1910.³⁵ The major difference between these two pieces of legislation, however, lies in the fact that the MIA 1909 (Cth) only applies to marine insurance due to the enactment of the 'Insurance Contracts Act 1984 (Cth)', which deals with general insurance.³⁶

³³ So far as non-disclosure is concerned, they drew an example from non-marine insurance case in *Lambert v. Co-operative Insurance Society Limited* [1975] 2 Lloyd's Rep. 485. See *ibid.*, 34-35, [A.13].

³⁴ Attorney-General's Department, 'Australia's Legal System' <<http://www.law.gov.au/www/agdHome.nsf/AllDocs/RWPA5C949DB88E95857CA256BB300154E38?OpenDocument>> accessed 31 March 2003.

³⁵ Attorney-General's Department, 'Australian Law Reform Commission Review of the Marine Insurance Act' <<http://www.law.gov.au/www/attorneygeneralHome.nsf/Web+Pages/DCC5EFE7A4925B72CA256B59007QACAE7?OpenDocument>> accessed 31 March 2003. "The Marine Insurance Act 1909 (Cth)" hereinafter referred to as "MIA 1909 (Cth)".

³⁶ Derrington, S.C., *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance A Case for Reform*, Thesis submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy in The University of Queensland, T.C. Beirne School of Law, St.Lucia, 1998, 18.

Unlike the attitude which had been maintained by the Law Commission in the UK, in Australia, marine insurance has not been overlooked. This can be seen since the drawing up of the Terms of Reference by the Commonwealth Attorney-General of Australia to the Australian Law Reform Commission (ALRC) back in 1976, the Terms which triggered the separation of the marine and non-marine insurance legal regimes in Australia.³⁷ As noted by the ALRC in 1979:

“On 9th September 1976, the Commonwealth Attorney-General referred to the Law Commission a number of questions relating to the reform...to insurance contracts. Excluded from the Terms of Reference were marine, worker’s compensation and compulsory third party insurance. *Marine Insurance is a discrete area of insurance with special significance for international trade and commerce...*”³⁸

The Terms of Reference indicated that the Attorney-General did not overlook marine insurance. He did not suggest that the marine insurance system worked perfectly well. He just found that marine insurance law is too complex an area to be included in a general insurance review and that it requires special treatment.

Although marine insurance was not totally disregarded, the possibility for reform of it was not considered again until 1983 when the New South Wales Law Reform Commission touched upon insurance contract law.³⁹ However, marine insurance was ultimately excluded from consideration on the basis that the MIA 1909 (Cth) is subject to the power of the Commonwealth Parliament, not the power of the local authority.⁴⁰ Nevertheless, its true view on marine insurance could rather be seen from a subsequent statement:

³⁷ See the Australian Law Reform Commission, ‘Insurance Contracts, 1982’ (Report No.20, 1982) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/20/chap4.pdf>> accessed 31 March 2003.

³⁸ The Australian Law Reform Commission, Discussion Paper No.7, *Insurance Contracts* (1979), [1] (emphasis added).

³⁹ New South Wales Law Reform Commission, *First-Report-Insurance Contracts-Non-Disclosure and Misrepresentation* (1983).

⁴⁰ *Ibid.*, Appendix II, 59, [1].

“...the Marine Insurance Act 1909 (Cth) enshrines...the traditional principles of common law that we consider to be overdue for reform.”⁴¹

What the above statement indicated is that the principles stated in the MIA 1909 (Cth) were considered to be outdated and any reform would be welcomed. But, since this view was considered by the local authority which has no power over a Commonwealth statute, the problems arising out of the Act were not examined further.

In line with the above view, in Australia there have been some signs of dissatisfaction with the 1909 Act. The first sign is the paper presented by Sir Anthony Mason, the then Chief Justice of High Court of Australia, in the Ebsworth Lecture in 1995.⁴² Mason pointed out the potential areas for reform including the duty of disclosure, insurable interests, causation, and warranty. Regarding the duty of disclosure, his concern was related to its unpredictability, especially the interpretation of the scope of the duty of disclosure, as the issue seldom came before the courts in Australia.⁴³ To add to this point, as shall be seen, the scope of the duty of disclosure in Australian marine insurance law has been interpreted by some state courts but the interpretations do not necessarily accord with each other.⁴⁴ This mounted to the uncertainty of the law in Australia, which led Mason to conclude “...it may be appropriate for the legislature to take the matter up...”⁴⁵

Apart from the scope of the duty, Mason also identified the issue of remedy as another area which deserved attention. Mentioning the fact that damages are not available in appropriate circumstances, he continued:

⁴¹ *Ibid.*, [2].

⁴² Mason, A., “The Future of Marine Insurance Law”, The 1995 Ebsworth & Ebsworth Maritime Law Lecture (a document in html format kindly supplied by the IT Unit, Faculty of Law, Australian National University, 22 February 2005). “The Ebsworth Lecture resulted in a paper by the Attorney-General of Australia...” Huybrechts, M.A., “Marine Insurance Law: A San Andreas Fault Between the Common Law and the Civil Law” in Thomas, R.D. (ed.), *Modern Law of Marine Insurance Volume 2* (LLP, London 2002) 335, 337, [10.6].

⁴³ *Ibid.*

⁴⁴ See Chapter 3 below, 86-92.

⁴⁵ Mason, n.42 above.

“... [a] more plausible alternative is to make common law damages available as an additional remedy...”⁴⁶

Finally, as we will see, the consideration along the line with Mason’s suggestion was adopted by ALRC.⁴⁷

The combination of Mason’s paper, and a request for reform from the Queensland Commercial Fishermen’s Organisation (QCFO) arising from concern over warranty provisions,⁴⁸ led the Attorney-General to assign a task to the International Trade Law Branch of the Attorney-General’s Department to draft an ‘issue paper’, which was then published in 1997.⁴⁹ It appears from the issue paper that not only warranty and duty of disclosure were to be the subjects of review. Other issues, such as the application of the MIA 1909 (Cth) to pleasure craft, were also included. So far as the duty of disclosure is concerned, the following points were raised in the paper:

⁴⁶ *Ibid.*

⁴⁷ Apart from the comparative approach with the Norwegian Marine Insurance Plan of 1996, the ALRC also looked into the remedy regime as in s.28 of the Insurance Contracts Act, an approach which was suggested by Mason. See the Australian Law Reform Commission, ‘Review of the *Marine Insurance Act 1909*’ (Report No.91, 2001) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch10.html#Heading1>> accessed 1 February 2006, see especially [10.104]. See also Chapter 4 below, 142-146.

⁴⁸ The copy of the letter from the Queensland Commercial Fishermen’s Organisation to Hon. Michael Lavarch, the Attorney-General, “Request for Meeting to Discuss Reform of the Commonwealth Marine Insurance Act” and the copy of the document titled “Reform of the Marine Insurance Act 1909” submitted by the QCFO to the Attorney-General (both copies were kindly supplied by Sharon Kimmers of the Queensland Seafood Industry Association (QSIA) 3 March 2003). Queensland Commercial Fishermen’s Organisation was changed to Queensland Seafood Industry Association in July 2000. (See ‘New Structure for Peak Fishing Industry Body’ <<http://www.seafoodsite.com.au/stats/mediareleases/24June00.htm>> published 24 June 2000). Dr. Derrington maintains that the request of the QCFO triggered the reform project. Personal e-mail communication with Dr. Sarah C. Derrington, T.C. Beirne School of Law, University of Queensland, Australia, 3 February 2003. Indeed, the paper given by Mason was also attached with the document prepared by the QCFO.

⁴⁹ See Attorney-General’s Department, “*The Marine Insurance Act 1909: Issue Paper*” prepared by the International Trade and Environmental Law Branch, Commonwealth Attorney-General’s Department, in Appendix A attached to Salter, R., “Marine Insurance Reform in Australia-Start, Pause, and Go Where?” in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume 2* (Intersentia, Antwerp 2000) 181, 188-208. See also Davis, I., ‘Reform of the Marine Insurance Act Options and Constraints’ (Paper presented at the Maritime Law Association of Australia and New Zealand Annual Conference, August 2000) <<http://www.alrc.gov.au/events/speeches/ID/MLAANZ%20Paper.rtf>> accessed 13 April 2005.

- “(a) Should the definition for materiality of a fact...be modified to expressly require that it would *reasonably* influence the judgment of a prudent insurer?
- (b) Should the MIA [1909] be amended to expressly require that an insurer seeking a remedy...be required to show actual inducement...?
- (c) Should an insurer’s remedy in the event that the disclosure provisions are breached be limited to damages unless there has been fraud...?
- (d) Should the MIA [1909] be amended to impose a duty on the insurer to inform the insured of the general nature and effect of the duty to disclose...?”⁵⁰

As can be seen, the issue paper captured virtually all major problems concerning non-disclosure in marine insurance law. This perhaps reflected the amounts of information on the defects of the law on this area received by the Attorney-General’s Department and also showed its active part in the law reform process. The Attorney-General then established the Terms of Reference for the ALRC at the beginning of 2000.⁵¹

Prior to the publication of the ALRC’s discussion paper,⁵² Sarah Derrington, now of the T.C. Beirne School of Law, University of Queensland, completed her PhD thesis which sought to examine the potential areas of marine insurance law reform and also how the reform should be done.⁵³ This thesis made a great contribution to the work of the ALRC as it was cited extensively throughout the discussion paper and the final report which came out in 2001.⁵⁴

In Australia, the situation from now on depends on the Commonwealth Parliament although it has been nearly five years since the final report of the ALRC was published. Thus, it needs to be closely followed up as it comes to the

⁵⁰ *Ibid.*, 205-206 (italics following the original text).

⁵¹ The Terms of Reference dated 21 January 2000. See the Australian Law Reform Commission, ‘Review of the Marine Insurance Act 1909’ (Discussion Paper No.63, 2001) <<http://www.austlii.edu.au/au/other/alrc/publications/dp/63/>> accessed 9 July 2005.

⁵² *Ibid.*

⁵³ Derrington, n.36 above.

⁵⁴ See the Australian Law Reform Commission, n.47 and 51 above.

last stage where political will is necessary although one may doubt politicians' level of interest on the matter.

Overall, while marine insurance statutes in the UK and Australia are essentially the same, the situations in both countries are quite different. While in Australia the Attorney-General (and later the ALRC) was formally presented with the problems and requests for statutory reform, the UK Law Commission, in contrast, does not seem to be so well-informed on the matter. This might be due to the attitude of some UK lawyers that non-statutory reform can sufficiently respond to the problems. This is at least the view of the BILA Sub-Committee.⁵⁵ Even though in the latest attempt to reform insurance law in the UK, the possibility of marine insurance law reform has not been denied, the flavour of consumer insurance is much stronger.

1.3. South Africa

Like Australia, South Africa is governed by a federal system. It consists of a central government and nine provinces. These provinces have limited powers to enact their own law and such law cannot be used if it is contrary to the legislation from the national parliament.⁵⁶ This has been the position in South Africa since 1994. Prior to that, it was separated into only four provinces.⁵⁷ For present purposes, the previous system of provincial division will be referred to as further analysis will largely involve historical evidence.

South Africa does not have its own marine insurance statute and, as De Jager suggests, an examination of South African legal history is needed in order to understand marine insurance law in that country.⁵⁸ However, the exploration of

⁵⁵ Above, 19.

⁵⁶ Barratt, M., and Snyman, P., 'Researching South African Law' <<http://www.llrx.com/features/southafrica.htm#@structure20%of%20the%20State>> accessed 31 March 2003.

⁵⁷ See 'South Africa, Population, Political Divisions' <<http://www.angelfire.com/southernafrika/population.html>> accessed 31 March 2003.

⁵⁸ De Jager, T., "The Roots and Future of South African Law of Marine Insurance" (1996) 113 SALJ 152, 154.

such history is not without difficulty since South Africa used to be governed by both the Netherlands and the UK. Thus, its legal system is influenced by both.⁵⁹

The Netherlands came to be involved in South Africa through the activities of the 'Dutch East India Company' (VOC=Vereenigde Geoctroyeerde Oost-Indische Compagnie) which used South Africa as a transit port for trade with Asia in the seventeenth century.⁶⁰ It brought with it European people who started settling in this new territory. With them, they introduced their legal tradition. At that time, the Netherlands were known as the 'Republic of the United Provinces', consisting of seven provinces, of which the Province of Holland was the largest.⁶¹ The populations from this province formed the majority of Europeans in South Africa and therefore the law of this province came to be applied here. More influential, however, were the thoughts of the legal writers and jurists from the Province of Holland.⁶² Such legal thinking came to be known as "Roman-Dutch law".⁶³ Nevertheless, the confusion exists. In one sense, such law may have wider meaning which encompasses *ius commune*,⁶⁴ i.e. the Roman-law as interpreted and used in European countries during the medieval periods.⁶⁵ Whatever is the true meaning, the influence of the legal system in the Netherlands during the colonial period brought with it *lex mercatoria*, of which insurance law is a part.⁶⁶ The understanding of so-called Roman-Dutch law is important to the extent that, as shall be seen below, until today, it is uncertain whether marine insurance law in South Africa is still governed by this body of law.

⁵⁹ See Tetley, W., 'Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)' <<http://upload.mcgill.ca/maritimelaw/mixedjur.pdf>> accessed 21 August 2005.

⁶⁰ Fagan, E., "Roman-Dutch Law in its South African Historical Context" in Zimmermann, R., and Visser, D. (eds), *Southern Cross Civil Law and Common Law in South Africa* (Clarendon Press, Oxford 1996) 33, 35.

⁶¹ *Ibid.*, 35-36. See also 'Map of the republic of seven united provinces' <<http://library.wur.nl/speccol/kaart.html>> accessed 13 April 2005.

⁶² *Ibid.*, 40.

⁶³ *Ibid.*, 41.

⁶⁴ *Ibid.*, 42.

⁶⁵ 'Roman Law: Homepage'

<<http://www.jura.uni.sbg.ac.at/Rechtsgeschichte/Ius.Romanum/English.html>> accessed 13 April 2005.

⁶⁶ Tetley, W., *International Maritime and Admiralty Law* (Yvon Blais, Quebec 2002) 587 see in particular footnote 48. "Lex Mercatoria" is "... [a] body of oral, customary mercantile law...developed in medieval Europe and was administered...by merchant judges..." Tetley, W., 'Glossary of Maritime Law Terms, 2nd ed., 2004'

<http://www.mcgill.ca/maritimelaw/glossaries/maritimelaw/#law_merchant> accessed 9 July 2005.

Having been the colony of the Netherlands, South Africa was gradually occupied by the UK in the eighteenth century.⁶⁷ In 1806, the Cape Province was fully controlled.⁶⁸ The UK government did not forbid the application of Roman-Dutch law in the Cape.⁶⁹ However, there was a suggestion that such system of law as applied to maritime and commercial law was outdated.⁷⁰ Following this, "The General Law Amendment Act 8 of 1879" was enacted.⁷¹ It provided:

"In every suit, action and cause having reference to fire, life, and marine insurance...which shall henceforth be brought in the Supreme Court or in any other competent court of this colony, the law administered by the High Court of Justice of England, for the time being, so far as the same shall not be repugnant to, or in conflict with, any Ordinance, Act of Parliament or other statute having the force of law in this Colony, shall be the law to be administered by the said Supreme Court and other competent court."⁷²

Thus, marine insurance law which had been derived from the Netherlands was superseded by the then English law on the subject. A similar course of events occurred in 1902 in the Province of Orange Free State.⁷³ Only the Provinces of Natal and Transvaal insisted on Roman-Dutch law, yet the influence of English law was undeniable. As Van Niekerk describes,

"Although insurance law in Natal and Transvaal escaped from the formal introduction of English law, the informal influence of English law in practice was...prevalent...the Natal and Transvaal courts never seriously considered...the governing Roman-Dutch insurance cases..."⁷⁴

⁶⁷ It became the colony of the UK until 1910. Hahlo, H.R., and Kahn, E., *The South African Legal System and its background* (Juta & Co, Capetown 1968) 569 and 575.

⁶⁸ Van Niekerk, J.P., *The Decline, Revival and Future of the Roman-Dutch law of Insurance in South Africa*, No.3 in the Tax and Business Law Centre Monograph Series, Department of Mercantile Law, University of South Africa, March 1986, 2.

⁶⁹ *Ibid.*, 3.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Hare, J., *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta & Co, Kenwyn 1999) 654.

⁷³ Van Niekerk, n.68 above, 21.

⁷⁴ *Ibid.*, 44.

Although the statutes in the Cape Province and the Orange Free State which sought to introduce English law into the realm of marine insurance were repealed in 1977, both provinces still apply English law while Natal and Transvaal ostensibly use Roman-Dutch law.⁷⁵ Thus, the dichotomy was created.

The existence of two legal regimes without a precise division is clearly unsatisfactory. Which regime should then govern marine insurance contracts? The answer lies in s.6(1) of the 'Admiralty Jurisdiction Regulation Act 105 of 1983', the language of which indicates its fairly complex application. It reads:

"6. Law to be applied and rules of evidence

1. Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-
 - (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter as such commencement, in so far as the law can be applied;
 - (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."⁷⁶

As can be seen, the Act does not successfully abolish the dichotomy and the language of it is complicated. Indeed, it creates further problems in its application. As Hare explains,

"...s.6 of the 1983 Admiralty Jurisdiction Regulation Act enjoins the South African marine lawyer to apply English law as it was in 1983 to all maritime claims over which the English colonial courts would have had jurisdiction in 1891 and the Roman-Dutch law 'as

⁷⁵ Hare, n.72 above, 654.

⁷⁶ University of Cape Town, 'Admiralty Jurisdiction Act 105 of 1983' <<http://www.uctshiplaw.com/ajra.htm>> accessed 13 April 2005.

applicable to South Africa' to *all novel heads of jurisdiction*."⁷⁷

Thus, the brief historical account above is involved in the understanding of how the Act applies here which will in turn pinpoint the law to be applied to the duty of disclosure. The key question is whether marine insurance matters can be viewed as falling under 'novel heads of jurisdiction'. To answer this, it is necessary to investigate back to see whether the English Admiralty Court in 1890 had a jurisdiction over marine insurance claims.⁷⁸ After thorough examination, Van Niekerk concluded that the English Admiralty Court had exercised its jurisdiction over marine insurance matters during the mid-sixteenth to mid-seventeenth centuries only.⁷⁹ Consequently, English law does not apply to marine insurance law in South Africa.⁸⁰ However, this might not be the only way to interpret s.6(1).

Staniland pointed out that the Supreme Court Judicature Act 1873 of the UK set up the High Court of Justice with the result that several courts were merged together.⁸¹ He further developed his argument by maintaining that the Admiralty Court used to have a power over marine insurance cases.⁸² Later on, such power was forbidden. The justification for such order was, however, questionable since it was the result of the competition between courts to exercise their jurisdictions over marine insurance. Despite some doubts, the Admiralty Court was merged into the High Court of Justice.⁸³

Staniland indeed tries to argue that the Admiralty Court lost its jurisdiction over marine insurance due to technical matters rather than its own consent.

⁷⁷ Hare, n.72 above, 655 (emphasis added).

⁷⁸ Van Niekerk, J.P., "Marine Insurance Claims in the Admiralty Court: An Historical Conspectus" (1994) 6 SA Merc LJ 26, 30.

⁷⁹ *Ibid.*, 57.

⁸⁰ *Ibid.*, 61.

⁸¹ Staniland, H., "What is the Law to be Applied to a Contract of Marine Insurance in Terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?" (1994) 6 SA Merc LJ 16, 24.

⁸² *Ibid.*

⁸³ *Ibid.*, 25.

Therefore, it would be wrong to assume that the Admiralty Court officially stopped deciding marine insurance cases. Additionally, once it was merged into the High Court of Justice, the jurisdiction over marine insurance cases was moved to the latter. Hence, the continuation of power can be seen. Therefore, marine insurance cases should fall under s.6(1)(a) of the Act.

However, Staniland is prepared to admit that his argument might not be accepted. As he acknowledges, “there is much authority that Roman-Dutch law applies...”⁸⁴ Thus, it is possible to conclude that his argument becomes academic and that Roman-Dutch law applies to marine insurance in South Africa. Nevertheless, this is not the end of the matter.

Hare proposes that the term ‘Roman-Dutch law’ is wide enough to subsume English law which had been used in South Africa for over a century and, as such, had become absorbed and mixed with South African common law.⁸⁵ However, it may be possible to extract *pure* Roman-Dutch law by tracing back to the law and legal thinking from the Province of Holland that had been applied prior to the time when the UK came to occupy South Africa. The only question is whether such return would lead to an outdated law which fails to respond to modern commerce. Indeed, it is submitted that both English law that stood in 1890 and the *pure* Roman-Dutch law are all outdated. Nevertheless, it does not mean that the courts cannot develop the law based on historical roots.

Thus, when one wants to understand the duty of disclosure in the marine insurance law of South Africa, it is perhaps not wrong to resort to the judgment of Joubert J.A. in *Mutual and Federal Ins v. Oudtshoorn Municipality* (1985),⁸⁶ where the duty was recognised in the context of Roman-Dutch law and the wider notion of utmost good faith was rejected. As his Lordship proclaimed,

⁸⁴ *Ibid.*, 16.

⁸⁵ Hare, n.72 above, 657.

⁸⁶ *Mutual and Federal Ins v. Oudtshoorn Municipality* 1985 (1) S.A. 419

“...there is no magic in the expression of *uberrimae fidei*. There are no degrees of good faith. It is entirely inconceivable that there should be little, more or most (utmost) good faith...There is no room for *uberrimae fidei* as a third category of faith in our law.”⁸⁷

This statement does appear to be correct in the context of South African law. Indeed, it is submitted by the present author that the same should be true for marine insurance law in the UK. Utmost good faith is a vague concept which Lord Mansfield was unlikely to have envisaged. Joubert J.A. was also correct in stating that the only distinction is between good faith and bad faith. This will be analysed further in Chapter 2.⁸⁸

Before this section ends, it must be noted that not only s.6 of the Admiralty Jurisdiction Regulation Act governs marine insurance. Another statute to be taken into account is the ‘Short-Term Insurance Act, 53 of 1998’. This piece of legislation governs some “technicalities, formalities and insurance practice”.⁸⁹ It relates to marine insurance because the term ‘short-term policy’ as defined in s.1 encompasses transportation insurance and, by the same provision, the term ‘transport policy’ includes risk relating to the use of a vessel or the goods conveyed by such means. So far as the duty of disclosure is concerned, one must look at s.53(1). Previously, this provision governed only misrepresentation.⁹⁰ However, in 2003, this provision and its sub-section (b) was substituted by and added to by s.35 of the Act No.17 of 2003. The current text of s.53(1)(b), so far as the duty of disclosure is concerned, reads:

“(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term

⁸⁷ *Oudtshoorn Municipality* 1985 (1) S.A. 419, 433, column C.

⁸⁸ Below, 66-72.

⁸⁹ Hare, n.72 above, 658.

⁹⁰ The original version of this provision can be seen at the Shipping Law Unit, University of Cape Town, ‘Marine Insurance Misrepresentation Extract from the Short-Term Insurance Act, 53 of 1998’ <<http://www.uctshiplaw.com/stia1998.htm>> accessed 14 April 2005.

insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.”

As shall be seen, the law as stated in s.53(1)(b) in fact endorses the standard of materiality in relation to the duty of disclosure as found by Joubert J.A. in *Oudtshoorn Municipality* (1985).⁹¹ Such approval might be questioned on the basis that the judgment of Joubert J.A. on the materiality point has been surrounded by criticisms from South African legal commentators.⁹² Moreover, as mentioned earlier, in South Africa, the draft Marine Insurance Act was produced.⁹³ The question is thus whether South Africa still continues with this. There, the duty of disclosure is different from that found in the Short-Term Insurance Act.⁹⁴

It appears from the Draft Marine Insurance Act that South Africa indeed tries to follow the MIA 1906.⁹⁵ The draft has been prepared over many years. It is the fruit of co-operation between the Association of Marine Underwriters of South Africa (AMUSA) and the South African Maritime Law Association under the recommendations of Douglas Shaw QC.⁹⁶ The reason why the Act is needed is mainly due to the dichotomy created by the presence of two legal regimes. As mentioned by the press, “... [Courts] have often been guided by the judgments based on English law, the Courts have also referred to Roman-Dutch law from time to time to reach a verdict.”⁹⁷ Van Niekerk warns however that the draft is not an official one and if South Africa wants to have its own Act, it is likely that it

⁹¹ See Chapter 3 below, 101.

⁹² See e.g. Kerr, A.J., “The Duty to Disclose in a Pre-Contractual Context-Good Faith and the Role of the Reasonable Man” (1985) 102 SALJ 611.

⁹³ See Introduction, 8.

⁹⁴ Claus 18(2) of the draft bases the duty of disclosure upon the standard of reasonable insurer. See The Maritime Law Association of South Africa, ‘Draft Proposal for a Marine Insurance Act: Redraft 1997’ <<http://www.uctshiplaw.com/marins.htm>> accessed 6 July 2005.

⁹⁵ Staniland, n.81 above, 25.

⁹⁶ South African Insurance Times and Investments, ‘Marine Insurance New Legislation being drafted’ (Volume 15.3, June/July 2002) <http://www.insurance.times.net/Editorials/2002/June2002/marine_insurance.htm> accessed 11 July 2003.

⁹⁷ *Ibid.*

will – like Australia – not follow the MIA 1906 so closely.⁹⁸ The full text of the draft was released in 1997 but no further progress has been made since then. With the reform in Australia and the call for doing the same in the UK, which suggest the unsuitability of the MIA 1906, it is likely that South Africa may have to recast its plan rather than follow the same draft.

1.4. Norway

For the purposes of this work, as far as Norway is concerned, it is only necessary to focus on the Norwegian Marine Insurance Plan of 1996 (NMIP), especially its remedy provisions. The history and development of these can be dealt with rather shortly.

The NMIP is *not* a marine insurance law. Its status is simply that of a set of standard marine insurance contractual terms. In this sense, it is similar to the Institute Clauses used in the London Market. As Derrington explains, "...the Plan constitutes a standard contract which must be incorporated in the individual agreement by way of reference made in the policy."⁹⁹ However, it is submitted that the Plan is nevertheless influential. As Stang Lund describes, "[t]he Plan is a comprehensive piece of legislation more than standard insurance conditions..."¹⁰⁰ The reason why the Plan is so significant might be because while Norway has its insurance statute, the 'Norwegian Insurance Contracts Act dated 16 June 1989',¹⁰¹ its underlying policy is to respect freedom of contract and thus it is very easy to contract out of the statute.¹⁰² As Bull points out, "[t]he Insurance Contracts Act (ICA) 1989 is formulated in such a way that the shipowner's insurances can in

⁹⁸ Personal e-mail communication with Professor J.P. Van Niekerk, Department of Mercantile Law, Faculty of Law, University of South Africa, 14 February 2003.

⁹⁹ Derrington, n.36 above, 68.

¹⁰⁰ Stang Lund, H., "Comparative Lessons derivable from The Norwegian Marine Insurance Plan 1996" (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 1 July 2005).

¹⁰¹ Wilhemsen, T-L, 'Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis to the replies to the CMI Questionnaire' (CMI Yearbook 2000)

<<http://www.comitemaritime.org/singapore/marinsurance/wilhemsen.pdf>> accessed 9 July 2005.

¹⁰² Stang Lund, n.100 above.

principle be kept outside the mandatory law regulation.”¹⁰³ The mandatory rule Bull refers to is in s.1-3 of the ICA, especially in sub-section (c) which provides:

“...the provisions may nevertheless be contracted out of for insurance relating to commercial business:

(c) when insurance relates to a ship under duty to register...”¹⁰⁴

The NMIP only deals with hull insurance and, as can be seen, s.1-3(c) fully opens for the NMIP to be adopted among the parties. The cargo insurance is under another set of standard form contractual terms, namely “Conditions relating to Insurance for the Carriage of Goods 1995”.¹⁰⁵ Again, the Act opens a chance for this set of terms to be fully enforced by sub-section (e) of the same provision. While it is true that freedom of contract is also respected by the law of other countries, including the UK’s MIA 1906, the extent to which the parties can contract out of the 1906 Act, as far as the duty of disclosure is concerned, is unclear.¹⁰⁶

The Plan was drafted by the Central Union for Marine Underwriters (CEFOR) in co-operation with the Norwegian Shipowner’s Association.¹⁰⁷ Due to the appropriate balance of interests and negotiating power, the Plan is usually adopted and the update to it can be easily done. The current Plan (1996) is the seventh while the first one came out in 1871.¹⁰⁸ The Norwegian culture seems to play pivotal role in the success of the Plan as Stang Lund mentions “the tradition of consensus and compromise in Scandinavia”.¹⁰⁹

¹⁰³ Bull, H.J., “Norwegian Marine Insurance Plan of 1996” in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume 1* (Intersentia, Antwerp 1999) 109.

¹⁰⁴ ‘Act of 16 June 1989: Act relating to Insurance Contracts’

<http://www.kredittilsynet.no/archive/stab_word/01/02/20010028.doc> accessed 9 July 2005 (not an official translation).

¹⁰⁵ Bull, n.103 above, 109.

¹⁰⁶ See Introduction above, 7.

¹⁰⁷ Stang Lund, n.100 above.

¹⁰⁸ Bull, n.103 above, 109.

¹⁰⁹ Stang Lund, n.100 above.

The unique characteristic of marine insurance in Norway is that it is subject to neither the duty of utmost good faith (*uberrimae fidei*) nor the duty of good faith (*bonae fidei*). As Wilhemsen maintains,

“The Scandinavian insurance legislation does not include a regulation of this concept except what already follows from the regulation of duty of disclosure.”¹¹⁰

Is this enough to regulate the conduct of the parties to a marine insurance contract? This question is easy to formulate but the answer to it is not easy as it involves theoretical questions of how one perceives ‘utmost good faith’. If it is to be understood as nothing more than the duty of disclosure and the duty not to misrepresent, then, it is submitted, the NMIP has sufficient regulations to deal with the matter. So far as the question of degree is concerned, i.e. whether non-disclosure is innocently or negligently made, the NMIP delineates the sanctions for all types of breach.

The Plan provides, in § 3-4, for the insurer to be liable in full as if no non-disclosure was made if the assured was innocent. But, it still allows the insurer to cancel the policy by giving the advanced fourteen days notice. If non-disclosure was negligently made, by § 3-3, one must enquire further into what the insurer would have done if he had known of such non-disclosure by the time of making the contract as the NMIP gives different consequences to the case where the insurer would not enter into the contract at all and where the insurer would enter into it but on different terms. In the former case, the insurer will not be bound by the contract. In the latter case, the insurer will only be liable to the extent that there is no causation between non-disclosure and the loss, i.e. the loss was not caused by the matter undisclosed. In any event, the insurer can still cancel the contract by giving prior 14-day notice. If non-disclosure was fraudulently made, § 3-2 indicates that the insurer will not be bound by the contract at all. He may even cancel other contracts he entered with the assured, albeit such contracts may not be affected by such non-disclosure, provided that the prior 14-day notice is

¹¹⁰ Wilhemsen, n.101 above.

given.¹¹¹ In this sense, the remedy provisions in the Plan seem to be more balanced than in the UK's 1906 Act.

But, if utmost good faith is perceived as something broader than the two specific duties, then, what are the other facets of this utmost good faith concept? One may even doubt whether the remedies for breaches of other facets of utmost good faith do not seem to be provided in the Plan. The term 'utmost good faith' is extremely vague. If this concept is just a mere misunderstanding, is it the same as good faith (*bonae fidei*)? In his comparative study, Von Ziegler seems to be of the opinion that utmost good faith and good faith are not greatly different.¹¹² But, as correctly argued by Huybrechts, Von Ziegler rather deals with the narrower features of non-disclosure and misrepresentation. He looks into neither the broader notion of utmost good faith, nor good faith.¹¹³ It is submitted that the NMIP is unlikely to be sufficient to govern all aspects of the duty of good faith (*bonae fidei*), the concept of which is non-exhaustive in scope.

1.5. Conclusion

The lengthy exploration of the historical and recent development of 'non-disclosure' in marine insurance law from the selected jurisdictions above will not yield any benefits to us if some observations are not raised for further consideration. Five points are challenging us to probe further. These are either those concerning methodology, i.e. *how* the reform to marine insurance law on 'non-disclosure' in the UK should be undertaken, or those relating to substantive matters, i.e. *what* the contents of the law should be.

In the UK, the tendency to reform non-marine insurance law is greater than marine insurance. So far as the latter is concerned, the best way of reforming the

¹¹¹ See The Central Union for Marine Underwriters (CEFOR), 'The Norwegian Marine Insurance Plan of 1996, version 2003' <<http://www.norwegianplan.no/eng/index.htm>> accessed 21 August 2005.

¹¹² Von Ziegler, A., "The "Utmost Good Faith" in Marine Insurance Law on the Continent" in Huybrechts, M., et al (eds), n.49 above, 21, 28.

¹¹³ Huybrechts, n.42 above, 345, [10.31].

law on non-disclosure has not yet been identified. The propensity for separating marine and non-marine insurance is rather strong. If marine insurance law reform is to be undertaken, an important question relating to the substantive matter is whether the proposals to reform the Australian MIA 1909 (Cth) can serve as good model. One of the purposes of this work is to evaluate the Australian recommendations and such analysis will be seen throughout.

The marine insurance law reform process in Australia seems to come to a halt after reaching the stage where political will is required. It has been five years since the publication of the final report and the draft Marine Insurance Bill. From this, the further question is posed as far as the UK is concerned in that whether *statutory* reform is really needed, especially since the courts in the UK pave the way for the parties to agree the scope of the duty of disclosure and the remedies for breach of such duty to be otherwise.¹¹⁴ Moreover, the effective use of the standard form contractual clauses to govern marine insurance can be seen by the use of the Norwegian Marine Insurance Plan. Is it better to circumvent the uncertainty of political mood by contractual means? This is a question concerning methodology. The advantages and disadvantages of the use of such clauses and the justification for the reform of the UK's 1906 Act will be the subject of further discussion in Chapter 6.

As far as the Plan in Norway is concerned, two unique features of it should be mentioned here. First, while it stipulates the contents of the duty of disclosure, it does not base the duty upon the broad notion of utmost good faith. This seems to raise the substantive question of what utmost good faith is. In South Africa, this concept was rejected and the notion of good faith (*bonae fidei*) is recognised instead. Similarly, in the UK, the term 'utmost good faith' is nowhere in the judgment of Lord Mansfield, instead his Lordship spoke of 'good faith'. The question is thus whether he meant the same concept as understood in South Africa. This is the subject of discussion in Chapter 2 below.

¹¹⁴ See Introduction above, 7.

Then, the Plan delineates the remedies for breach of the duty of disclosure according to culpability. Thus, innocent non-disclosure will not lead to the same consequence as fraudulent one. As mentioned in the introduction to this work, this is considered in Australia.¹¹⁵ The question is not only whether the same or similar approach to remedies for non-disclosure should be adopted in the UK, but also whether only this and other miscellaneous issues should be taken into account in the statutory reform of the MIA 1906 or whether such reform should encompass the whole regime of marine insurance law as may happen in South Africa. One should not forget that the dichotomy caused by the existence of both Roman-Dutch law and English law in South Africa may drive this country to proceed with the drafting of its own marine insurance statute. Thus, in the UK, after 100 years have passed, should an entirely new Act for marine insurance be introduced? The issue of remedy will be the subject of consideration in Chapter 4 while the question of the wholesale reform of the Act will be discussed in Chapter 6.

Thus, the presentation of the historical account is obviously not just to review the background. It also provides us with some questions on how the UK can go forward from this and how the fate of the MIA 1906 will be after its 100-year application has passed. Nevertheless, it is quite certain that some of the issues raised above and considered further in this work will contribute to its future.

¹¹⁵ See Introduction above, 10.

Chapter 2: Some important technical and theoretical questions

The title of this chapter indicates that it will deal with both *technical* and *theoretical* questions. The former involves the question of what ss.18 and 20 of the MIA 1906 are all about. As mentioned in the Introduction,¹ the duty of disclosure is set out in s.18 while the duty not to misrepresent is stipulated in s.20, however, these two duties are not readily distinguishable. From reading these provisions, one may observe, first, the MIA 1906 fails to state the relationship between them. Secondly, what must be disclosed and what must be represented are set out in s.18(2) and s.20(2) in similar terms and the courts treat them as being the same.² Third, both duties operate *before* a marine insurance contract is concluded.³ Considering such similarity, in the first part of this chapter, the relationship between the duty of disclosure and the duty not to misrepresent will be analysed. Then, in the second part, the theoretical issue will be addressed. This involves the question of what 'utmost good faith' in s.17 is. As pointed out in Chapter 1,⁴ there appear to be grounds to suspect that the doctrine of utmost good faith itself might be derived from either misunderstanding or misinterpretation which occurred some time after the seminal judgment of Lord Mansfield in *Carter v. Boehm* (1766).⁵ Albeit not mentioned in the Act, the duty of disclosure in s.18 and the duty not to misrepresent in s.20 are understood to be aspects of the general duty of utmost good faith in s.17.⁶ So, one may ask what the other facets of this duty of utmost good faith are. Thus, this second part will discuss the scope of the application of s.17, as it appears to be understood in the UK. While the construction of the MIA 1906 may suggest that this issue should be dealt with first before proceeding to consider ss.18 and 20, logic seems to suggest that one should move from specific issues to a general one and that is why this chapter is constructed as it is.

¹ Above, 3-4.

² See *Pan Atlantic Insurance Co.Ltd. and Another v. Pine Top Insurance Co.Ltd.* [1994] 2 Lloyd's Rep. 427. See generally Chapter 3.

³ See s.21 of the Marine Insurance Act 1906.

⁴ Above, 14.

⁵ *Carter v. Boehm* (1766) 3 Burr. 1905.

⁶ Baatz, Y., "Utmost Good Faith in Marine Insurance Contracts" in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume I* (Intersentia, Antwerp 1999) 15, 16.

After exploring the scope of utmost good faith in s.17, in the third part, a doctrinal analysis of the duty of utmost good faith (*uberrimae fidei*) and the duty of good faith (*bonae fidei*) will be made. Although in South Africa the latter doctrine is adopted,⁷ in reality its scope has never been explored by the jurists there.⁸ To properly understand both concepts, it is submitted that a theoretical examination is inevitable. From this, one will see the need to re-interpret the judgment of Lord Mansfield and the reasons why the present author strongly believes that the notion of utmost good faith is incorrect. Ultimately, this chapter will be concluded by pointing out the potential reform of the MIA 1906 to solve these theoretical complexities and perhaps to bring the Act more in line with the original intention of Lord Mansfield.

2.1. Justification for the distinction between the duty of disclosure and the duty not to misrepresent

The first question to be put is: what is a representation? In the law of contract, a *representation* is understood as a “statement”.⁹ A statement is something that people communicate or spell out to the public or let others know about.¹⁰ What then is about the difference between disclosure and representation? Suppose X, a shipowner, reveals facts concerning a broken engine to Y, an underwriter. Can the action of X in revealing these facts to Y be regarded as making a *statement*? In other words, can this action be seen as representation? What is the line between disclosure and representation? Indeed, is there any need for such a line to be identified?

⁷ See *Mutual and Federal Ins v. Oudtshoorn Municipality* 1985 (1) S.A. 419, 432 column B.

⁸ Havenga, P., “Good Faith in Insurance Contracts-Some Lessons from Australia” (1996) 8 SA Merc LJ 75, 78.

⁹ Martin, E.A. (ed.), *A Dictionary of Law* (4th ed., Oxford University Press, Oxford 1997) 399. See also Beale, H.G., et al (eds), *Chitty on Contracts Volume 1 General Principles* (29th ed., Sweet & Maxwell, London 2004) 431-434, [6-004]-[6-011].

¹⁰ “If you **make** a statement you express...an explanation of something which was happened, or you do something which makes it clear what your opinion is. What you express is a statement.” Proctor, P. (ed.), *Cambridge International Dictionary of English* (Cambridge University Press, Cambridge 1996) 1415.

The MIA 1906 completely fails to give any hints to distinguish between a disclosure and a representation in ss.18 and 20. Due to this failure, some commentators deal with these two issues with some uncomfortable feeling. As noted by Mustill and Gilman in their authoritative text,

“Although disclosure and representation are separately dealt with both in the Marine Insurance Act 1906 and in this work, there is no hard-and-fast division between them.”¹¹

Although, Mustill and Gilman were not able to identify such hard-and-fast division, as the present author will propose, there appears to be no need for such a division as such distinction is simply impossible. The aim of this section is to show such impossibility by trying to examine the justification for such a conceptual distinction. In doing so, it will be separated into two sub-sections. First, the positive duty of disclosure and representation will be explored, i.e. what parties need to do to comply with the duty of disclosure and the duty not to misrepresent. Then, in the next sub-section, the focus will turn on the negative side, i.e. how breach of these duties can occur. The author hopes that by the end, the illogicality of such conceptual separation will be fully illustrated.

2.1.1. An examination of the positive duty of disclosure and representation

While Mustill and Gilman apparently admit the likely unsuccessful attempt to distinguish between a disclosure and a representation, they do seek to explain what a representation is. According to them,

“A representation, in the technical sense which the word bears in the law of insurance, may be stated to be:
A verbal or written statement made by the assured to the underwriter, at or before the time of the making of the contract, as to the existence of some fact or state of facts which is likely to induce the underwriter more readily to

¹¹ Mustill, M.J., and Gilman, J.C.B., *Arnould's Law of Marine Insurance and Average Volume 2* (16th ed., Stevens & Sons, London 1981) 437, footnote 1.

assume the risk, by diminishing the estimate he would otherwise have formed of it.”¹²

The above explanation suggests that once the fact renders the insurer to *reduce* the risk he might calculate in his mind, such fact is made known to the insurer by way of representation rather than disclosure. Consequently, once the assured expresses some facts to the insurer, such facts might constitute *both* a disclosure and a representation. Suppose that X told Y that his ship is new with an experienced captain and crew on board. His ship will carry some dangerous goods from the UK to Iraq. The facts of the new ship that will be sailed by veteran crew are likely to diminish the risk in the insurer’s mind. This is because such ship is supposed to be strong and not rusty. The experienced captain should be competent in controlling the ship to evade marine perils. These facts are made known to the insurer by way of representation. However, the fact that dangerous goods are on board will make the risk in the mind of the insurer becomes *greater*. This fact is made known to the insurer by way of disclosure. Several facts told by the assured at once have to be distinguished and classified whether each fact is likely to aggravate or diminish the risk in the insurer’s mind in order to answer whether disclosure or representation or both has been done by the assured. At that point, appropriate section of the Act can be assigned to each fact.

Long before Mustill and Gilman, Duer similarly opined:

“...The assured is under no obligation to disclose facts tending not to increase but to diminish the risks; *it is to such facts that most representations related.*”¹³

The above view was expressed by Duer long before the enactment of the MIA 1906. The construction of the Act does not make his view unjustifiable. From s.18(3)(a), the assured does not have a duty to disclose a fact that *diminishes* the

¹² *Ibid.*, 444, [588].

¹³ Duer, J., *A Lecture on the Law of Representations in Marine Insurance with Notes and Illustrations and A Preliminary Lecture on the Question whether Marine Insurance was known to the Ancients* (J.S.Voorhies, New York 1844) 51 (emphasis added).

risk.¹⁴ However, both Duer and the Act are illogical on this point. While the Act mentions that such circumstances need not be disclosed, it subsequently imposes the duty not to misrepresent on the assured, which essentially suggests that the assured needs to make a *representation*. In such a case, it cannot be understandable why both s.18(3)(a) and s.20 that seem to be conflicting stay together in the same piece of legislation. Thus, this ground of distinction, with respect, can be discounted straightaway.

There is yet another line of opinion which seems to suggest how these duties can be distinguished. Bennett provides the following explanation:

“...the duty of utmost good faith not only reaffirms the law of misrepresentation but also imposes the duty to *volunteer certain information*.”¹⁵

This view suggests that the assured plays an *active* role in giving or offering information to the insurer in case of disclosure as the term *volunteer* is employed. In other words, in case of disclosure, the insurer uses no right and stays silent. Taking this view, representation would be very limited. It can only happen when the insurer asks for the information from the assured and the assured answers to that question. The circumstance where the assured might perform the representation is most likely when he needs to fill in the proposal form. In this regard, the role of the proposal form should be understood.

When the assured wishes to make an insurance contract with the insurer, on some occasions (mostly in non-marine insurance), the assured will be presented with a form containing some questions to him by the insurer which he needs to answer. The rationale behind the use of such form is:

“...to ensure that all reasonable persons in the position of the assured, who may be unacquainted with insurance,

¹⁴ See s.18(3)(a) of the Marine Insurance Act 1906 in Appendix 1 attached to this thesis.

¹⁵ Bennett, H.N., *The Law of Marine Insurance* (Clarendon Press, Oxford 1996) 44 (emphasis added).

understand what information is desired by the insurer in order to assess the risk”.¹⁶

In such a case, the assured just has a duty to respond to a question. He does not perform his active duty in volunteering the information. Thus, he tends to perform representation rather than disclosure.

The above analysis gains some supports from Hodges who explains that:

“Representations...are generally *made spontaneously in answers to questions put to the assured by the insurer...*”¹⁷

Is it safe to assume that the borderline between disclosure and representation is the *active* or *passive* part of the assured in providing the information? By using the term ‘generally’, Hodges seems to imply that *representation* means more than just answering the questions. What else can amount to a representation?

Since by way of statutory interpretation,¹⁸ the interaction between ss.18 and 20 is not clearly revealed, thus if any views need to be explored, one of them should be what the draftsman of the Act had to say about this, albeit this is not a conventional approach to statutory interpretation. Prior to the enactment of the Act, Chalmers wrote a book *A Digest of Law Relating to Marine Insurance* (1901)¹⁹ to explain the then draft bill. His book did not provide a clue on this matter. However, in discussing whether it is necessary for the insurer to establish fraud in case he wants to avoid the contract on ground of misrepresentation,

¹⁶ Eggers, P.M., and Foss, P., *Good Faith and Insurance Contracts* (LLP, London 1998) 180, [8.40].

¹⁷ Hodges, S., *The Law of Marine Insurance* (Cavendish Publishing, London 1996) 92 (emphasis added).

¹⁸ “I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law...and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.” *The Governor and Company of The Bank of England v. Vagliano Brothers* [1891] A.C. 107, 144-145 (per Lord Herschell).

¹⁹ Chalmers, M.D., and Owen, D., *A Digest of the Law Relating to Marine Insurance* (Williams Clowes & Sons, London 1901).

Chalmers noted the case decided by Lord Esher M.R. in *The Bedouin*.²⁰ Although this case was not cited for the purpose of explaining the nature of representation, his Lordship's passage is worth mentioning. He said,

“The assured...is bound to tell...not every fact, but the material facts; and his other obligation is this, that *if he is asked a question*-whether a material fact or not-by the underwriters, *he must answer it truly*...”²¹

Since Chalmers did not put any notes to the contrary, it seems to suggest that this passage had his support. Although his Lordship did not call the duties he described as disclosure or representation, what he explained might not be understood as something else. The duty to answer the questions appears to be a representation. Due to the passage was cited by the draftsman, it provides the best, albeit not conclusive, evidence to support Bennett's analysis. The further question is: if the question put to the assured by the insurer does not concern material facts, can the response given by the assured be *material*? This question is asked in light of the passage of Lord Esher M.R. above which seems to suggest that the assured must answer truly to all the questions put to him whether or not such question relating to material facts. If so, what need is there for mentioning 'material representation' in s.20(1) and putting the definition to materiality in s.20(2)? However, one might say that his Lordship discussed fraudulent misrepresentation. In such a case, as shall be seen, the concept of materiality might be irrelevant.

In short, it is possible to conclude at this stage that the line between disclosure and representation is unclear. One line of thinking suggests that representation is the circumstance when the assured discloses the information that will *diminish* the risk in the mind of the insurer. This line of opinion is debatable on the basis that it seems illogical.²² Alternatively, another view supposes that representation is the circumstance when the assured has to answer the questions put to him by the insurer. This supposition might be questioned on the basis that,

²⁰ *Ibid.*, at 27-28. *The Bedouin* [1894] P.1 (Court of Appeal).

²¹ *The Bedouin* [1894] P.1, 12 (emphasis added).

²² Above, at 43-44.

taking this view, representation will be limited, especially in commercial insurance context. However, in light of existing authorities, there are great forces towards this line of opinion. Still, there might be some grounds to doubt whether representation can be wider than this. It might be possible to say that the wider representation is interpreted, the more it will intrude into the realm of disclosure and overlap with it. Indeed, it might be rather correct to confine representation to the duty to answer questions. The reason for this is that, suppose the information is required from someone, there appear to be only two ways to get it. He will be expected to either give the information, or he will be asked for it. If the former is disclosure, then the latter is representation.

Ultimately, the author is inclined to suggest representation not only covers the situation when the assured responds to questions in general, but also when the assured *volunteers* information that diminishes the risk under s.18(3)(a). This comes from the combination of both lines of opinion above and also the language of the provision itself. For example, the essence of s.18(3)(a) is that the assured does not have to disclose a fact that diminishes the risk *unless* the question is put to him. Therefore, if the question is put to him, his duty immediately falls under s.20 regarding representation. This seems to be the only way that the diminution of risk can fit into the realm of representation. Indeed, it is submitted that s.20 should govern all exceptions to the duty of disclosure listed in s.18(3).

The language of s.18(3) already precludes the application of the principles relating to disclosure set out in previous sub-sections. The requests for the information from the insurer will not invoke the application of the previous sub-sections. Instead, it triggers the application of s.20. To a certain extent, this section is different from s.18, such as the assured might represent what he expects or believes to be true and he does not have to ensure that the facts he tells the insurer are *strictly* correct as the term 'essentially correct' is employed in s.20.²³ It

²³ See s.20(3) and (4) of the Marine Insurance Act 1906. Ivamy explains the term "substantially correct" in s.20(4) as "[t]he question whether the representation is substantially correct is a question of fact for a jury, and will depend on the nature of the representation considered in reference to the risk and all the surrounding circumstances. Thus, in *Pawson v. Watson* the assured represented the ship carried 12 guns and 20 men. In fact, she carried 9 guns, 6 swivels, 16 men,

is true that s.20 sets out the same definition of materiality as in s.18, within this section, however, the rigour of the duty is reduced by subsequent sub-sections. This is understandable. The insurer might ask some unexpected questions. Thus, the assured is not deemed to *exactly* know the answer, so he might express his opinion or belief instead. Moreover, considering s.18(3)(a) to (d), all of the circumstances listed here are not so important in comparison with what the assured has to disclose in the sense that the insurer can either know some of them by himself, or they are already expressed in the warranty, or the insurer previously did not want to know such facts, or the facts tend to diminish the risk. Thus, for instance, the assured does not have to disclose the circumstance that the insurer is deemed to know. If the insurer asks such question, the duty on the part of the assured is immediately governed by s.20.

Similarly, the question from the insurer might be something that is supplemental in nature. For example, the assured had already disclosed some information but there are still some points which the insurer wants to enquire further. The use of a proposal form also falls into the same category. It must not be forgotten that the use of a proposal form does not free the assured from the duty to provide information. As mentioned by Eggers and Foss,

“The use of a proposal form generally will not revoke the assured’s duty of disclosure, although it might enlarge or restrict it. The mere fact that the proposal form does not ask a particular question does not mean that the insurer intended to waive disclosure of such matters.”²⁴

It would be, however, totally wrong to believe that such supplemental facts are lacking in importance. They may still be material. As Eggers and Foss give an explanation in relation to s.18(3)(a), “[t]he fact that an exception is applicable does not render the fact in question immaterial, it is merely an excuse not to

and 9 boys. It was held that the representation was substantially correct.” Ivamy, E.R.H., *Marine Insurance* (4th ed., Butterworths, London 1985) 72.

²⁴ Eggers and Foss, n.16 above, 182, [8.43].

disclose.”²⁵ This also answers why the concept of materiality can be found in s.20(1) and (2). This analysis is justifiable on the basis that it can clarify the relationship between disclosure and representation. Since it can provide the explanation what the representation is, the assured can know what he is *exactly* obliged to do. Moreover, it seems to fit well with the construction of the Act.

2.1.2. An examination of non-disclosure and misrepresentation

The question we will consider in this section is how the breaches of these duties can occur (and how such breaches can be distinguished). Park maintains that a breach of one duty might amount to a breach of the other duty.²⁶ Whether this statement is sustainable will be discussed. Perhaps what Chalmers mentioned in this regard should be traced. In his *Digest*, he gave the following illustrations in relation to non-disclosure,

“1. Insurance on ship. Lloyd’s List contains an entry that a ship of similar name had stranded. The broker, after inquiry, comes to the conclusion that the entry must relate to another ship, and *does not disclose* the information to the insurer. The insurer, not having seen the entry, may avoid the contract.

2. Policy on goods which are over-valued. The assured *did not disclose* the over-valuation. The insurer may avoid the contract.”²⁷

The above illustrations might be somewhat confusing and outdated. Taking the first example of the report in Lloyd’s List, perhaps during the time of Chalmers, this publication might not be so widespread. Regarding this modern era, the assured should not have a duty to disclose what has been reported in Lloyd’s List because this publication contains shipping news which every insurer that deals with marine insurance should subscribe to. Such fact should fall into the exception in s.18(3). In any event, it can be seen from the given examples that, in

²⁵ *Ibid.*, 165, [8.02].

²⁶ Park, S., *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing Company, Hants 1996) 18.

²⁷ Chalmers and Owen, n.19 above, 23 (emphasis added).

the case of non-disclosure, the assured failed to conduct his *active* duty. In misrepresentation, in contrast, the assured tells an untruth to the insurer. As illustrated by Chalmers,

- “1. Insurance on ship. The assured *falsely* informs the insurer that he has partially insured the ship elsewhere on certain terms. The insurer, relying on this, gives a policy on similar terms. The insurer may avoid the contract.
2. Policy on goods at sea. The assured represents to the insurer that the ship sailed from Baltimore to London on 12th January. *As the fact she sailed on the 1st January.* The insurer may avoid the contract.
3. Policy on goods to be shipped from abroad. The assured, *mistaking* the old ship “Socrates” from a new ship called “Socrate”, informs the insurer that the goods are to be shipped on the new ship. The insurer may avoid the contract.”²⁸

Superficially, in these two sets of illustrations, Chalmers seems to give a clear distinction between non-disclosure and misrepresentation. But, if X did not reveal the fact that the ship’s engine was defective to Y, at the same time, he told Y that the ship’s engine was in a good condition, what was X’s conduct? Non-disclosure or misrepresentation? Or both? The following analysis will suggest the answer to this question.

Ivamy explains the difference between non-disclosure and misrepresentation that:

“Between misrepresentation and non-disclosure there is this difference: that whereas in non-disclosure the undisclosed fact would tend to show the risk to be greater than it would otherwise seem to be, in cases of misrepresentation the fact so stated would make the risk appear smaller than it was in reality.”²⁹

²⁸ *Ibid.*, 27 (emphasis added).

²⁹ Ivamy, n.23 above, 71.

This is quite confusing. As might be recalled,³⁰ some academic commentators mentioned that a representation makes the risk seem smaller. Now, Ivamy suggests *misrepresentation* makes the risk smaller. To apply the explanation of Ivamy to the fact, the undisclosed facts regarding the broken ship's engine, in our illustration, if it was disclosed, would, no doubt, render the risk greater in the eyes of the insurer. A misrepresentation that the ship's engine is in a good condition would make the insurer think that the ship is in appropriate condition to face the casualty during the voyage. This will make the insurer view the risk as smaller than it should be. Superficially, Ivamy's explanation is correct. The problem is this explanation cannot be used with another illustration given by Chalmers.

In relation to non-disclosure, if one recalls, Chalmers gave an example of an over-valued policy.³¹ If such fact was disclosed to the insurer, he would view the risk as smaller than it should be. Suppose that on the face of the policy, the value of the goods was stated to be £ 100,000, which was over stated. If the facts had been disclosed, the insurer would know that the policy had been over-valued and he would also know the real value of the goods. Thus, the risk would be viewed as less than £ 100,000. The author is inclined to think that Chalmers might err in his example. The fact in this illustration can be both non-disclosure and misrepresentation. While the assured did not tell the real value of the goods, he also exaggerated such value. It is this grey area that concerns us and, with due respect, Chalmers gave us an ambiguous example.

It is submitted that non-disclosure and misrepresentation can be conducted simultaneously. It might be that the assured conducted *pure* non-disclosure such as he did not give information but at the same time he also did not tell any false information to the insurer. Logic suggests that such pure non-disclosure is actually rare. Once the assured decided not to inform something, he had to build up a story to substitute such undisclosed information otherwise the insurer might suspect that something is missing. For instance, if X in our situation did not tell Y about the broken engine and, at the same time, he did not tell Y that the engine is

³⁰ Above, 42-43.

³¹ Above, 49.

in a fine condition. In such a case, Y might suspect that he did not receive any information concerning the engine of the ship. This might lead Y to closely investigate the circumstance. Thus, Y will know about the broken engine. This appears to be the reason why misrepresentation and non-disclosure are always confused.

One might argue, however, that the above explanation is based on the premise that *fraudulent* non-disclosure is conducted. That is why the scheme was set and the lie was told. It is submitted that the result is the same even in non-fraudulent case. Suppose X *mistakenly* believed that the engine of his ship is in a fine condition and he told Y as such. By doing this, what he told Y is not the truth and he missed out the fact that the engine was broken. As such, non-disclosure and misrepresentation are conducted simultaneously even without an intention to deceive on the part of the assured.

Ultimately, the question can be reduced to this: when non-disclosure and misrepresentation are indistinguishable, should the courts apply s.18 or s.20? Parks appears to suggest that the courts can apply either provision. As he maintains,

“The similarity between Section 18 and Section 20 is obvious. The former can be characterised as *sins of omission*, the latter as *sins of commission*. The results are essentially the same.”³²

However, it might not be so simple. This is pointed out by Birds and Hird in relation to innocent misrepresentation,

“...an innocent misrepresentation can never be an actionable non-disclosure. A misrepresentation that the law deems to be innocent is a positive statement based upon the representor’s genuine belief in its truth...to be actionable, an innocent non-disclosure must involve the

³² Parks, A.L., *The Law and Practice of Marine Insurance and Average Volume 1* (Stevens & Sons, London 1988) 218 (italics adapted from the original text).

insured failing to disclose something which he knows, because he fails to realise it might be important to a prudent insurer.”³³

With respect, one might doubt whether such distinction does indeed exist. Otherwise, this might be merely an academic or procedural matter. As Birds and Hird admit, non-disclosure and misrepresentation are “often pleaded indiscriminately and this is bound to become even more common...the legal differences between the two are blurred.”³⁴ Is there still any need to distinguish between them? The author is inclined to think in the same way as Parks. Once the assured makes a material misrepresentation, it is safe to assume that he also makes a material non-disclosure. The test of materiality and the consequence of breach in both instances are set to be the same. This makes the necessity of s.20 questionable.

Once disclosure is understood as an active duty of the assured to volunteer information, one would feel that the logic should follow that the breach of the duty should be the ignoring of such duty or giving false information. Similarly, once a representation is perceived as the duty to answer a question, the breach of it should happen when the assured does not answer the question or gives a false answer. However, as seen above,³⁵ misrepresentation and non-disclosure cannot be defined in that way. To clarify the point by trying to make some sense in light of the Act as it now stands, it is suggested that the line between non-disclosure and misrepresentation is active *or* passive. The duty of disclosure is an *active* duty, the breach of which occurs when the assured does not conduct such duty, i.e. he does not give information. On the contrary, in misrepresentation, the assured does his active duty by giving the information, but the information he gives is false.

The above explanation is simply an attempt to make the issue as logical as possible within the ambit of the Act. To overcome an entire muddle, it is

³³ Birds, J., and Hird, N.J., “Misrepresentation and Non-Disclosure in Insurance Law-Identical Twins or Separate Issues” (1996) 59 MLR 285, 294-295.

³⁴ *Ibid.*, 294.

³⁵ Above, 49-50.

submitted that a re-interpretation of *Carter v. Boehm* (1766)³⁶ is needed. With respect to the draftsman, Sir McKenzie Chalmers, the author believes that when he drafted the MIA 1906, he either misinterpreted the judgment of Lord Mansfield or he may have been, to some extent, unaware of it. Alternatively, it might be how the concept has been misunderstood since post-Lord Mansfield period onwards. First, Lord Mansfield did not distinguish between disclosure and representation, as the Act does. Although concealment was discussed, the term *representation* certainly seems to be something contrary to concealment. It appears to connote the meaning of both disclosure and representation in the modern sense. Then, Lord Mansfield proceeded to say that the underwriter continued the contractual relationship with the assured in the belief that the assured did not conceal the facts.³⁷ Why was misrepresentation not mentioned?

It is submitted that while non-disclosure might not contain a misrepresentation, every misrepresentation contains a non-disclosure. Non-disclosure can occur solely when the assured does not tell the information. However, misrepresentation is unlike that. Normally, it tends to be the substitution of an undisclosed fact; as a result, the true information is omitted. If the assured fully discloses the information, it appears that misrepresentation cannot occur. As mentioned by Eggers and Foss,

*“...compliance with the duty of disclosure will automatically discharge the duty not to misrepresent.”*³⁸

From the above analysis, it is suggested that if reform of the MIA 1906 is undertaken in the future, the notion of representation and non-disclosure as set out in the judgment of Lord Mansfield is one potential area that should be restored, perhaps with some adaptations. There should be only one provision, either termed disclosure or representation, which embraces both concepts of disclosure and representation as understood nowadays. The breach of such duty should only take

³⁶ *Carter v. Boehm* (1766) 3 Burr. 1905.

³⁷ “...the under-writer trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge...” *Carter v. Boehm* (1766) 3 Burr. 1905, 1909.

³⁸ Eggers and Foss, n.16 above, 115, [7.03] (emphasis added).

place by way of non-disclosure due to the reason given above. There appears to be no point in keeping two provisions which cover similar ground in the same piece of legislation.

2.2. The scope of the general duty set out in s.17

The broader duty of utmost good faith enshrined in s.17 seems to be no less confusing than the two specific duties in respect of non-disclosure and misrepresentation. It thus becomes the subject of discussion here.

The first question to be considered is: what does the duty of utmost good faith require of the parties to a marine insurance contract? Tetley explains the term *uberrimae fidei* as:

“...referring to the basic principle of insurance, requiring the assured and his broker to disclose and truly represent every material circumstance to the underwriter before acceptance of the risk...”³⁹

From this, utmost good faith appears to be merely the combination of disclosure and representation. Is this the true meaning?

The construction of the Act appears to support the above explanation since s.17 is placed under the heading ‘Disclosure and Representation’ and below s.17 are ss.18-20 which deal specifically with disclosure and representation. However, Baatz warns that one should not rely so heavily on the construction of the Act. She points out,

“It is clear that the duty of utmost good faith imposes two obligations...spelled out in sections 18 to 21...What is also clear...is the Act is not comprehensive as the duty

³⁹ Although Tetley is renowned in Canada and the USA, he explains this term in general sense. Tetley, W., ‘Glossary of Maritime Law Terms, 2nd ed., 2004’
<http://www.mcgill.ca/maritimelaw/glossaries/maritime/#letter_u> accessed 22 July 2005.

of [utmost] good faith is, as we shall see, *wider than the two features given in the Act.*"⁴⁰

What are the other facets of the duty of utmost good faith set out in s.17? Baatz refers the reader to an article written by Bennett,⁴¹ in which the specific situations where s.17 might be applied are explored. However, with respect to both commentators, not all of these instances can be correctly regarded as falling into the realm of s.17. The analysis below will consider all the situations Bennett suggests by starting from the situation which is most likely to be within the application of this provision and gradually moving to the situation which is least likely to be within its ambit.

(a) Reciprocal duty

As two specific duties within a broad duty of utmost good faith, one would expect a duty of disclosure and a duty not to misrepresent to have a reciprocal nature, i.e. these duties should as well be rested upon the *insurer*. This is because the language of s.17 clearly refers to the term 'either party' to emphasise the duty of utmost good faith must be observed by *both* the assured and the insurer. Moreover, in his passage, Lord Mansfield also mentioned of the duty of disclosure by the *insurer*.⁴² However, such duties of the insurer fall into the ambit of s.17 because "ss.18 and 20 are directed solely at the assured, the reciprocal duties of the insurer can be based only on s.17".⁴³ Indeed, it seems to be a gap in the MIA 1906 that the duty of the insurer is not stipulated in details. Even resting such duty upon s.17, the language of this provision is too loose, with the result that although this section is used for justifying the duty imposed upon the insurer, in practice, the courts need to formulate the contents of such duty independent from the language of s.17. This is what the Court of Appeal in *La Banque Financiere v. Westgate*

⁴⁰ Baatz, n.6 above, 16 (emphasis added).

⁴¹ Bennett, H.N., "Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law" [1999] LMCLQ 165.

⁴² "The policy would equally be void, against the underwriter, if *he* concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived... Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain..." *Carter v. Boehm* (1766) 3 Burr. 1905 at 1910 (italics following the original text).

⁴³ Bennett, n.41 above, 177.

(1988),⁴⁴ a case which dealt with non-disclosure by the insurer of the broker's dishonesty, achieved. In this case, what the Court ultimately did was to resort to s.18 by analogy. This can be observed from the contents of the duty so formulated:

“...the duty falling upon the *insurer* must...extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under a policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.”⁴⁵

Whilst the application of s.17 in this context is unquestionable since the specific sections are silent upon the duties of the insurer, as such, his duties need to be placed upon a more general provision. This is also in line with the conceptual understanding that the duty of utmost good faith is of general nature, which the duty of disclosure is a facet of it. Yet, with the resort to the language of s.18 by the Court, this may cast some doubts upon the real value of s.17, other than justifying the existence of the duty. One may ask further why, in drafting the MIA 1906, Chalmers did not state the details of the insurer's duty of disclosure in the Act, perhaps as a sub-section to s.18.

The fact that the MIA is the codification of existing case law appears to suggest that this piece of legislation is rather backdated, i.e. each provision was derived from the state of law pre-1906. Apart from the passage of Lord Mansfield, the insurer's duties were hardly mentioned. As a result, the draftsman did not stipulate the details of such duties in the Act. It might also be the fact that, with respect, the draftsman did not envisage the future. He did not expect the dispute concerning the insurer's duty of disclosure to occur and thus the law was not stated. Even he did not fail to mention 'either party' in s.17, he did not manage to

⁴⁴ *La Banque Financiere de la Cite S.A.* (Formerly named *Banque Keyser Ullman En Suisse S.A*) v. *Westgate Insurance Co.Ltd.* (Formerly named *Hodge General & Mercantile Insurance Co.Ltd.*) [1988] 2 Lloyd's Rep. 513. This case will be discussed in Chapter 4 below, 114-127.

⁴⁵ *Westgate* [1988] 2 Lloyd's Rep. 513 (emphasis added).

stipulate *more* in details. Consequently, this provision does no more than providing the basis of the duty.

(b) Correction of a misunderstanding

Relying on a passage of Parker L.J. in the Court of Appeal in *CTI v. Oceanus* (1984),⁴⁶ Bennett suggests that s.17 should be applied:

“...if the assured realized in the course of negotiations that the insurer was proceeding upon a mistaken apprehension as to past fact such as a level of losses, or had made a serious mathematical error, then the assured would be obliged under s.17 to correct the insurer’s mistakes.”⁴⁷

There appear to be no arguments against the above proposition except for the fact that many questions can be asked regarding its application. How serious should such misapprehension be? Will the apprehension need to bear any relation to the insurer’s final assessment of risk? Another question to be asked is whether an objective standard needs to be introduced? It might happen that the insurer employs his own unique way of risk assessment and that the misunderstood information becomes important to him but *not* for other underwriters. Many factors need to be taken into account such as the insurer’s own stupidity. If the information is such as the other insurers would not misunderstand, to let the actual insurer avoid the contract due to his own intellectual inability to properly understand the data might not be *just*. Indeed, as shall be seen in Chapter 3,⁴⁸ with the current wide duty of disclosure imposed upon the assured, one may doubt how often such misunderstanding can happen in practice. It is submitted that this is likely to be quite rare. Taking the policy consideration into account, the insurer should be encouraged to carefully study the insurance proposal and all the information received therein. Unfortunately, s.17 does not contain the details of the duty.

⁴⁶ *Container Transport International Inc and Reliance Group Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd’s Rep. 416, 512.

⁴⁷ Bennett, n.41 above, 177.

⁴⁸ Below, 78-86.

(c) Duty to respond to immaterial questions

Again, Bennett gets the idea from the passage of Parker L.J. where his Lordship opined,

“...the duty imposed by s.17 goes...further than merely to require fulfilment of the duties under the succeeding sections. If, for example, the insurer shows interest in circumstances which are not material within s.18, s.17 requires the assured to disclose them fully and fairly.”⁴⁹

With respect, this view is doubtful. The first dubious ground is the subjectivity of s.17 contained in the above view. The reference to the particular insurer may be undesirable and can create uncertainty. For example, X insures a vessel with Y. Then, he insured another vessel with Z. He might not receive many immaterial questions from Y but he might receive such questions from Z. This might be because Z is a person who normally concentrates on the minute details. This might be the case even though both vessels are operated under the same owner under the similar standard and the basic information that X disclosed to both insurer is merely the same. Thus, X may find himself to be in breach of the duty of utmost good faith in relation to some questions which are asked by Z but X failed to provide the correct answers while the similar queries were not even put to him by Y.

While a duty of disclosure and a duty not to misrepresent are said to be derived from the broad concept of utmost good faith, they refer to the objective standard (i.e. prudent insurer) throughout, but according to above suggestion, the duty under s.17 here seems to be based upon the subjective standard. This is rather unlikely since disclosure and representation flow from the general duty of utmost good faith. As such, at least, all these duties should be similar in nature.

⁴⁹ Bennett, n.41 above, 177. *CTI* [1984] 1 Lloyd's Rep. 476, 512.

Moreover, the duty of utmost good faith is not supposed to impose too much burden on the assured as the above view suggests. The assured needs to disclose material facts under s.18 while he must not misrepresent such facts under s.20. The rationale for imposing these duties is understandable. Then, he will need to disclose the immaterial facts under s.17. With respect, what the assured needs to disclose "is limited by reference to the nature of the facts to be presented to the insurer. The facts *must be material*."⁵⁰ Apart from such role, it is submitted that materiality has another function, that is, to delimit the right of the insurer to avoid the contract. The insurer has no right to a remedy if the undisclosed fact is not material. Without such concept of materiality, the right to avoid would be endless. This is a matter of concern, especially with the present harsh remedy in s.17. This section does not refer to the concept of materiality. Does it mean that s.17 can be breached regardless of materiality? Why does the insurer need to know such information as it is irrelevant to the assessment of the risk?

Indeed, one needs to consider whether the concept of utmost good faith really imposes such a duty. It is submitted that this is doubtful. If one recalls, the rationale behind the duty of utmost good faith as proclaimed by Lord Mansfield (if his Lordship *ever* intended it to be as such) was that the lack of information on the part of the insurer leads to the misunderstanding of the risk on his part. But, the immaterial fact does not lead to such a result. Is the utmost good faith needed in this situation?

(d) Fraudulent non-disclosure

Bennett maintains in relation to fraud that:

"...it is arguable that fraudulent non-disclosure and misrepresentation should be considered under s.17...While s.20 contains fairly detailed provisions governing misrepresentation, it is not an exhaustive code and any aspect of the common law of misrepresentation not inconsistent with s.20 applies to insurance contract

⁵⁰ Eggers and Foss, n.16 above, 319, [14.10] (emphasis added).

law. Moreover, although there is no common law on non-disclosure, s.18 will be construed to maintain symmetry...between the law of misrepresentation and that of non-disclosure...a fraudulent misrepresentation will be actionable even if not material and the same should follow for fraudulent non-disclosure.”⁵¹

To understand what Bennett proposes here, a brief historical account of UK law is required. When the late Lord Mansfield proclaimed the doctrine of utmost good faith, his original intention was that this doctrine should be used in all kinds of contracts.⁵² Later on, common law only recognises the duty not to misrepresent.⁵³ Thus, the duty of utmost good faith - in the sense of both disclosure and representation – is limited to specific kinds of contracts such as contracts of insurance, contracts for the sale of land, contracts for suretyship, etc.⁵⁴ Therefore, the law of misrepresentation separately developed in the common law and the law of insurance.

With respect to Bennett, to start with the analysis of fraudulent misrepresentation, the reason why s.20(2) on materiality is not applied is due the application of another provision in the Act, that is s.91(2), which provides,

“(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance.”

This is in accordance with the historical background outlined above. In general contract law, it is admitted, “a fraudulent misrepresentation which has induced a contract or other transaction will...entitle the representee to rescind the

⁵¹ Bennett, n.41 above, 177.

⁵² Soyer, B., “Continuing Duty of Utmost Good Faith in Insurance Contracts: still alive?” [2003] LMCLQ 39.

⁵³ *Ibid.*

⁵⁴ Bower, G.S., et al, *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in relation of Confidence, Influence and Advantage* (2nd ed., Butterworths, London 1990) 89, [5.01].

transaction *ab initio*".⁵⁵ Then, this is adopted into insurance law by force of s.91(2). There is no need to refer to s.17 to justify the use of such rule.

Turning to fraudulent non-disclosure, with respect, the preliminary question that needs to be asked is: what is meant by fraudulent non-disclosure? Rix L.J. clearly struggled with this in *HIH v. Chase* (2001)⁵⁶ where he doubted,

"...The term has never been defined. Sometimes it is referred to as a deliberate concealment: but I am by no means sure that the two can be equated. A matter may be deliberately concealed in the honest but mistaken belief that it is not relevant or material or that enquiry of it has been waived."⁵⁷

Throughout the course of his judgment, Rix L.J. did not embark on defining fraudulent non-disclosure. Without giving the precise definition of it, the House of Lords, relying on s.84(3)(a) of the MIA 1906 which mentioned that the premiums are not returnable in case of fraudulent non-disclosure, proceeded with no doubt of its existence.⁵⁸

With respect, it is not entirely clear what the House of Lords' perception of 'fraudulent non-disclosure' is. If fraudulent non-disclosure cannot be understood or actually it is not recognised, then, it is hard to see how s.17 applies to such a case. It is indeed difficult to define fraudulent non-disclosure, as Eggers and Foss maintain,

"...it is difficult to contend that a fraudulent non-disclosure will be actionable...as the test of fraud cannot sensibly be defined in the context of concealment..."⁵⁹

⁵⁵ Bower, G.S., et al, *Actionable Misrepresentation* (4th ed., Butterworths, London 2000) 160, [241].

⁵⁶ *HIH Casualty and General Insurance Limited and Others v. Chase Manhattan Bank and Others* [2001] EWCA Civ. 1250; [2001] 2 Lloyd's Rep. 483. See Chapter 3 below, 105-106.

⁵⁷ *HIH* [2001] 2 Lloyd's Rep. 483, 514, [165].

⁵⁸ *HIH Casualty and General Insurance Limited and Others v. Chase Manhattan Bank and Others* [2003] UKHL 6; [2003] 2 Lloyd's Rep. 61, 77, [73].

⁵⁹ Eggers and Foss, n.16 above, 18, [7.11].

Despite the absence of judicial affirmation, Eggers and Foss attempt to define fraudulent non-disclosure and, in their view, it is a situation when the assured intends to conceal a fact that is known by him to be a material one.⁶⁰ As the law now stands, however, even if this definition of fraudulent non-disclosure is adopted, one may ask why it is necessary at all to focus on the assured's state of mind. It is very hard to prove the intention of the assured as it is something inside his mind at the time non-disclosure was made. It is easier for the insurer to prove the materiality of the undisclosed circumstance regardless of the intention of the assured since even in case of innocent non-disclosure, he might be able to avoid the contract by the application of s.18. The suggestion of Bennett appears to be academic in nature without any real practical implication. It is true that the intention of the assured might finally be relevant to the question whether the premium is returnable. However, this is unlikely to be a primary desire of the insurer whose main concern will be whether the contract can be avoided.

(e) "Seaworthiness admitted" policies

Another possible application of s.17, despite Bennett's argument to the contrary,⁶¹ is illustrated in *Cantiere Meccanico Brindisino v. Janson* (1912).⁶² The potential use of s.17 in this context is rather fact-specific and thus this case should be briefly outlined.

This case concerned a dry dock which is sold to the plaintiffs. By the sale contract, the seller agreed to seek insurance for the dock and then assign it to the plaintiffs.⁶³ Prior to the delivery, the seller hired a ship repairer to take the ship out of the basin and also to do some repairs and maintenance works.⁶⁴ What was done to the dock here made it more robust than it had previously been.⁶⁵ No further activities were done to strengthen it as both the seller and the ship-repairer

⁶⁰ *Ibid.*

⁶¹ Bennett, n.41 above, 178-179.

⁶² *Cantiere Meccanico Brindisino v. Janson* [1912] 3 K.B. 452 (Court of Appeal).

⁶³ *Janson* [1912] 3 K.B. 452, 453.

⁶⁴ *Janson* [1912] 3 K.B. 452, 453.

⁶⁵ *Janson* [1912] 3 K.B. 452, 453.

were of the opinion that the dock was sufficiently fit for the voyage.⁶⁶ The seller sought insurance for the dock and the insurance policy in this case contained the term “seaworthiness admitted”,⁶⁷ the consequence of which will be mentioned below.

On the way to the plaintiffs, the dock sank and was lost while it was being towed.⁶⁸ The plaintiffs thus sued the insurer. The insurer alleged that the assured did not disclose the fact that “...the dock was being sent on the voyage without additional strengthening usual and necessary for the despatch of a dock on an ocean voyage.”⁶⁹ Scrutton J. (as he then was), at first instance, held that the insurer had waived disclosure. The insertion of the term “seaworthiness admitted” should lead the insurer to enquire as such a floating dock cannot be *seaworthy* in any event because it has never been intended to be used at sea.⁷⁰ In the Court of Appeal, Vaughan Williams L.J. explained it further that:

“...the contract between the underwriter and the assured is something of this sort: *We will raise no defence that the dock was not seaworthy, from the very fact that the floating dock of this class of construction could not be expected to be seaworthy in the ordinary sense of word; but nevertheless if this dock has a particular defect not usual in docks of this construction which creates an extraordinary risk, this you must disclose; otherwise the policy may be avoided by the underwriter.* The avoidance of the policy in such a case...seem rather to be based on...s.17...than on s.18.”⁷¹

It must be explained that normally a voyage policy contains an implied warranty that the ship is seaworthy at the beginning of the voyage.⁷² Therefore, the duty to disclose on this matter is rather exempted.⁷³ The use of the term “seaworthiness

⁶⁶ *Janson* [1912] 3 K.B. 452, 454.

⁶⁷ *Janson* [1912] 3 K.B. 452.

⁶⁸ *Janson* [1912] 3 K.B. 452, 454.

⁶⁹ *Cantiere Meccanico Brindisino v. Janson* [1912] 2 K.B. 112 (Commercial Court).

⁷⁰ *Janson* [1912] 2 K.B. 112, 115-117.

⁷¹ *Janson* [1912] 3 K.B. 452, 463 (italics adapted from the original text).

⁷² See s.39(1) of the Marine Insurance Act 1906.

⁷³ See s.18(3)(d) of the Marine Insurance Act 1906.

admitted” seems to waive such warranty.⁷⁴ Thus, the duty of the assured to disclose revives.⁷⁵ Still, the assured did not have to disclose because the insurer was deemed to know that the dock was not in any way seaworthy for the ocean voyage. Moreover, the insurer waived information by not questioning the construction of the dock.⁷⁶ However, Bennett maintains that the insurer is not deemed to waive the information concerning the special faults of the dock and such defects need to be disclosed. Such disclosure should fall under the ambit of s.18 rather than s.17.⁷⁷ Indeed, it is rather unclear why the mere insertion of the term “seaworthiness admitted” can wipe out the application of s.18. Along with Bennett, the author sees no reasons why s.17 should be applied in such a case.

(f) Post-contractual duty of utmost good faith

The author would add to Bennett’s list of the situations in which s.17 might be applied, that the section might extend to cover the duties of the parties *after* the contract is concluded.⁷⁸ This is a large area which will be extensively analysed in Chapter 5. The only point to be noted here is that if the correct understanding of the notion of good faith as Lord Mansfield intended to impose, which we shall see below, is restored and thus it is applied according to its nature, it is submitted that the whole complication of the post-contractual utmost good faith issue will be easily solved.⁷⁹

Overall, to conclude this section, s.17 seems to be not simply the combination of disclosure and representation. It appears to be wider than these two duties. It covers disclosure and representation by the insurer. It might cover the duty of the assured to correct the misunderstanding on the part of the insurer and vice-versa. It might also cover the duty of the assured to respond to immaterial questions. Perhaps, s.17 can also extend to govern the post-contractual

⁷⁴ Bennett, n.41 above, 178.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, 178-179.

⁷⁸ See *Manifest Shipping Co.Ltd v. Uni-Polaris Co.Ltd and La Reunion Europeene (The “Star Sea”)* [2001] UKHL 1; [2001] 1 Lloyd’s Rep. 389.

⁷⁹ See further below 66-72. See also Chapter 5.

conduct of the parties. However, this analysis is far from unproblematic. Once Bennett's approach is adopted, it suggests that the duty of utmost good faith is attached to specific circumstances. This approach is doubtful as it cannot provide clear extent and scope of the duty of utmost good faith. The situations suggested by Bennett seem to be what were present in his mind while he was writing his article. This list is by no means exhaustive.

So, what exactly does utmost good faith require of the parties to a marine insurance contract? As mentioned earlier,⁸⁰ the present author is convinced that the doctrine of 'utmost good faith' is merely derived from the misunderstanding of the passage of Lord Mansfield and, as such, no sensible meaning can be gleaned from such a concept. This seems to remind us of the remark of Joubert J.A. in the case before the South African Supreme Court, Appellate Division, in *Mutual and Federal Ins v. Oudtshoorn Municipality* (1985),⁸¹ where the concept was condemned on the basis of its vagueness.⁸² Based solely on the historical reason, the Court sought to deny the doctrine of utmost good faith,⁸³ and substituted it with the concept of good faith (*bonae fidei*).⁸⁴ It is submitted that, by the entirely different reasoning, Joubert J.A. exactly reached what Lord Mansfield had tried to introduce in 1766.

2.3. Utmost Good Faith or Good Faith?-Doctrinal Analysis

The reason why a full exploration of the extent of the duty of utmost good faith (*uberrimae fidei*) is not possible is due to the fact that this doctrine has no root or doctrinal basis. As observed by Spiro, the reference to the term *uberrimae fidei*

⁸⁰ See Chapter 1 above, 14.

⁸¹ *Oudtshoorn Municipality* 1985 (1) S.A. 419.

⁸² Joubert J.A. described 'utmost good faith' or *uberrimae fidei* as "...an alien, vague, useless expression without any particular meaning in law...the time has come to *jettison* it." *Oudtshoorn Municipality* 1985 (1) S.A. 419, 433, column E-F (emphasis added).

⁸³ See Chapter 1 above, 32.

⁸⁴ "...I have been unable to find any Roman-Dutch authority in support of the proposition that a contract of marine insurance is a contract *uberrimae fidei*. On the contrary, it is indisputably contract *bonae fidei*." *Oudtshoorn Municipality* (1985) 1 S.A. 419, 432, column B.

might render one to expect the origin of it to be found in Roman law.⁸⁵ However, in the course of conducting a linguistic analysis, he observes,

“*Fides* means in itself good faith... “*bona*” *fides* is really a tautological term... “*uberrima*” *fides*...surely does not mean that there should be no liability for good faith falling short of utmost good faith...*Uberrima fides*...merely means that it is beyond doubt that good faith is a requisite.”⁸⁶

But, *bonae fidei* is different from *uberrimae fidei* because its origin is traceable to the Roman law as in *jus gentium*.⁸⁷ This origin is significant and thus the term *jus gentium* needs a brief explanation here as it is relevant to subsequent analysis.

The term has two meanings, as explained by Jolowicz,⁸⁸ one practical and one theoretical. In the practical sense, it is a law which applied equally to both Romans and non-Romans, as opposed to *ius civile*, which only applied to Romans.⁸⁹ In the theoretical sense, it means ‘natural law’, which is “...the same everywhere and had equal validity everywhere; as well as being *natural* it was *common*.”⁹⁰ During the Roman Empire, no significant distinction was made between these practical and theoretical senses.⁹¹ It is true that in the later case of *Pawson v. Watson*,⁹² Lord Mansfield mentioned that what he had proclaimed came from “the law merchant”.⁹³ But, what is the *law merchant*?

In an article which probes the same question, Burdick observes Lord Mansfield’s approach in a case, albeit not an insurance case, that his Lordship

⁸⁵ Spiro, E., “Uberrima Fides” (1961) 23 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 196.

⁸⁶ *Ibid.*, 197.

⁸⁷ Schermaier, M.J., “*Bona Fides* in Roman contract law” in Whittaker, S., and Zimmermann, R. (eds), *Good Faith in European Contract Law* (Cambridge University Press, Cambridge 2000) 63, 77.

⁸⁸ Jolowicz, H.F., *Historical Introduction to the Study of Roman Law* (2nd ed., Cambridge University Press, London 1954).

⁸⁹ *Ibid.*, 102-103.

⁹⁰ *Ibid.*, 103 (italics adapted from the original text).

⁹¹ *Ibid.*

⁹² *Pawson v. Watson* (1788) 2 COWP. 789; 98 ER 1361.

⁹³ “But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract.” *Pawson v. Watson* 98 ER 1361, 1362.

tried to formulate a rule which can be applied to “*all courts in all countries*”.⁹⁴ This suggests that his Lordship was clearly influenced by the theoretical dimension of *jus gentium* which forms the basis for Burdick to conclude that the law merchant is merely a strain of that.⁹⁵ How could Lord Mansfield be influenced by this theoretical view? One could find his Lordship as “...a thorough student of the civil law, was familiar with the writings of foreign jurists...”⁹⁶ At Christ Church, Oxford, his Lordship “...threw himself into classical studies, translating Cicero’s Latin orations into English and back again.”⁹⁷ Through the work of Cicero, his Lordship got a concept of the duty of disclosure, one which is different from what is being perceived in the modern day.⁹⁸ Thus, if one wants to understand the philosophy that underpins the concepts of (utmost) good faith and disclosure, one should realise that these notions are deeply associated with the ‘Natural Law School of Thought’,⁹⁹ in which Cicero was among one of the scholars in this line of philosophy.¹⁰⁰ How this relates to the duty of utmost good faith and disclosure will be expanded throughout the course of this work.

The background of Lord Mansfield alone might not be so robust a reason to convince that, in *Carter v. Boehm* (1766), he referred to *bonae fidei*. In that case, he mentioned ‘good faith’¹⁰¹ and he did not suggest something *more*. He intended this to be applied to “*all contracts and dealings*”.¹⁰² It is unlikely that he

⁹⁴ Burdick, F.M., “What is the Law Merchant?” (1902) 2 *Columbia Law Review* 470, 482 cited *Luke v. Lyde* (1759) 2 Burr. 882.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, 480.

⁹⁷ Oldham, J., *English Common Law in the Age of Mansfield* (The University of North Carolina Press, Chapel Hill 2004) 3.

⁹⁸ See Chapter 3 below, 103-108.

⁹⁹ “...the leading jurisprudential image of natural law theory presented...by the thesis that unjust laws are necessarily non-laws...coupled with a theory of the derivability of principles of justice from observation of nature...” McCormick, N., “Natural Law and the Separation of Law and Morals” in Goerge, R.P. (ed.), *Natural Law Theory Contemporary Essays* (Clarendon Press, Oxford 1992) 105, 106-107.

¹⁰⁰ Cicero is classified as the Natural Law jurist because he maintained the view that “[t]here is a necessary connection between law and morality.” D’Amato, A., “Lord Fuller and Substantive Natural Law” (1981) 26 *American Journal of Jurisprudence* 202.

¹⁰¹ *Carter v. Boehm* (1766) 3 Burr. 1905, 1910.

¹⁰² *Carter v. Boehm* (1766) 3 Burr. 1905, 1910 (italics following the original text).

envisaged it to be 'utmost good faith', in which "*good faith* does not suffice"¹⁰³ and which requires "...utmost fidelity."¹⁰⁴ Business can hardly be conducted if the parties need to be extremely careful in every step they take. The doubt remains, however, whether those who describe utmost good faith as such think of it any wider than disclosure and representation, the breach of both of which can occur despite an innocent intention. Indeed, Eggers et al explain utmost good faith in the sense of good faith (*bonae fidei*).¹⁰⁵ It is submitted that this explanation is correct. Indeed, the readiness of Lord Mansfield to import the notion of 'good faith' in the sense understood in natural law was confirmed, albeit in a non-insurance case, by Farwell L.J. in *Baylis v. Bishop of London* (1913),¹⁰⁶ where his Lordship explained,

"It is further clear that the equity to which he [Lord Mansfield] was referring is not "an equity" in the sense...used in the Court of Chancery...Lord Mansfield was referring to the *jus naturale* [natural law] of Roman Law..."¹⁰⁷

Thus, when Lord Mansfield mentioned either 'equity' or 'good faith and fair dealing', he referred to the same thing and, that is, *bonae fidei* so Eggers et al are right in this respect. However, what they fail to emphasise is that the way s.17 of the MIA 1906 is drafted is *completely* against this background.

In Roman Law, *bonae fidei* was associated with procedural matters. In that Empire, there had been a form of action known as *iudicia stricti juris*, which was a rigid procedural rule based on formality. In contrast to this, there were some

¹⁰³ Friedmann, D., "The Transformation of 'Good Faith' in Insurance Law" in Brownsword, R., et al (eds), *Good Faith in Contract: Concept and Context* (Ashgate Publishing Company, Aldershot 1999) 311 (italics adapted from the original text).

¹⁰⁴ Godfrey, K., "The duty of utmost good faith-the great unknown of modern insurance law" (2002) 14 *Insurance Law Journal* 56, 58.

¹⁰⁵ "This state of English law as regards good faith lies in luminous contrast to the attitude of other, particularly Continental jurisdictions...The common law in England has preferred to designate certain contracts as contracts *uberrimae fidei*, rather than import wholesale the duty of good faith..." Eggers, P.M., et al, *Good Faith and Insurance Contracts* (2nd ed., LLP, London 2004) 4, [1.09].

¹⁰⁶ *Baylis v. Bishop of London* [1913] 1 Ch. 127.

¹⁰⁷ *Baylis v. Bishop of London* [1913] 1 Ch. 127, 137.

transactions in which the clause known as *exceptio doli* was put into the contract.¹⁰⁸ Such a clause "...gave the judge an equitable discretion to decide the case before him in accordance with what appeared to be *fair and reasonable*."¹⁰⁹ As well as its potential application, the term 'fair and reasonable' is admittedly wide. Its close relation with the standard of morality is apparent.¹¹⁰ It is a term which is so difficult to define that there is a suggestion to the effect that "...good faith is simply that which is not bad faith."¹¹¹ Despite its elusive meaning, the reference to morality as a yardstick is clear. Associated with natural law, it is assumed that 'fair and reasonable' is known to everyone, of course, including the judge. This is what s.17 fails to do. By stipulating that the failure to observe utmost good faith would render the right of the other party to avoid the contract, it does not take into account the role of judges in bringing justice to specific cases. This point is evident in the realm of post-contractual utmost good faith, the issues being lively debated in the UK over recent years. By using the term 'based upon' and by making reference to 'either party', it is not clear whether good faith is meant to govern the conduct of the parties to a marine insurance contract or it might have a wider application, for example, it might be used as a means for contractual *interpretation*.¹¹²

Upon this stage, one might argue that the above conclusion is wrong since even *innocent* conduct can amount to a breach of the duty of disclosure. First, it is submitted that this is not the duty of disclosure as Lord Mansfield perceived it and we will turn to this point later.¹¹³ Secondly, in his Lordship's reasoning, the rationale behind the duty of disclosure, which is based upon the inequality of information, is in accordance with the concept of *bonae fidei*. Bearing in mind

¹⁰⁸ *Exceptio doli* was a clause translated as "...if in this matter nothing has been done, or is being done, in bad faith by the plaintiff..." Whittaker, S., and Zimmermann, R., "Good Faith in European contract law: surveying the legal landscape" in Whittaker, S., and Zimmermann, R., n.87 above, 7, 16.

¹⁰⁹ *Ibid.* (emphasis added).

¹¹⁰ Litvintoff, S., "Good Faith" (1997) 71 *Tulane Law Review* 1645, 1664.

¹¹¹ *Ibid.*, 1665.

¹¹² The interpretation of the contract by reference to the standard of good faith has been identified by Professor Clarke as one of the trends that might be taken in the future. Clarke, M., "Trends in the interpretation of marine insurance contracts" (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 30 June 2005).

¹¹³ See Chapter 3 below, 103-108.

here the difference between the duty of disclosure in the perception of Lord Mansfield and that which is understood nowadays, his Lordship equated the former with *fraud*. That is why he imposed the remedy of avoidance upon non-disclosure. Perhaps, his language needs to be recited here. He said:

“The keeping back such circumstance is a *fraud*, and therefore the policy is *void*. Although the *suppression* should happen through *mistake*...yet still the under-writer is *deceived*...”¹¹⁴

Strangely though, in South Africa, Joubert J.A. arrived at the same conclusion in the sense that he equated ‘non-disclosure’ with bad faith or *mala fides*. As he said,

“Breach of this duty of disclosure amounts to *mala fides* or fraud, entitling the aggrieved party to avoid the contract of insurance...”¹¹⁵

The rationale for the remedy of avoidance in non-disclosure might be strong if the consent of the other party is taken into account. As Litvintoff mentions, “...the duty to disclose...that is, a party’s duty to inform the other...about circumstances on which the consent of the party may depend...”¹¹⁶ But, it does not mean that this remedy is suitable for all bad faith situations. Good faith is elastic and not static. Indeed, within the duty of disclosure, since the modern understanding of it is not the same as what Lord Mansfield mentioned, the consequence is that the duty is operated in the UK now is far beyond the basic concept of good faith and thus it makes the remedy of avoidance as applied seem to be unjustifiable.¹¹⁷ As shall be suggested, there is nothing wrong for this remedy to stay as a sanction for non-disclosure, but the scope of the duty should be changed and the correct understanding of it must be restored.

¹¹⁴ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909 (italics followed the original text).

¹¹⁵ *Oudtshoorn Municipality* 1985 (1) S.A. 419, 432, column F. Nevertheless, this passage might be inconsistent with what he said later on in page 433 of the judgment that “[t]he duty of disclosure is imposed *ex lege*...” which means the duty is imposed by law. See Van Der Merwe, S., “Insurance and Good Faith: Exit Uberrima Fides-Enter What?” (1985) 48 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 456, 459.

¹¹⁶ Litvintoff, n.110 above, 1660.

¹¹⁷ See in general Chapter 4 below.

To conclude, the duty of utmost good faith is much wider than that of disclosure and representation,¹¹⁸ and its breadth will be explored further in this work. But, of course, the standard of 'fair and reasonable' in the end has to be identified by judges upon the circumstances in each particular case. What is certain is that non-disclosure which amounts to bad faith is not what it seems to be in the current marine insurance legal regime.

2.4. Conclusion

This chapter flows from a specific to more general point and moves from a technical to a theoretical perspective. The technical point involves the analysis of the relationship between ss.18 and 20 of the MIA 1906 which deal with the two specific duties within the broad general duty of (utmost) good faith, namely the duty of disclosure and the duty not to misrepresent. It begins by pointing out some similarities between these two duties so far as these can be seen from the language of the provisions. Afterwards, it questioned the differences between them by first examining how both duties are complied with. From this angle, representation apparently overlaps with disclosure. Academic commentators have tried to identify the differences between them. One line of explanation suggests that representation is used with the facts which, if known to the insurer, tend to decrease the risk he forms in his mind. But, this explanation is undermined on the basis that it is in conflict with the exception in s.18(3)(a) of the MIA 1906. Another line of opinion suggests that while disclosure is an *active* duty whereby the assured *volunteers* the information, representation is a *passive* duty, mostly in response to the questions put to him by the insurer. But, the language from the advocates of this view seems to signal to us that representation might not be so limited to this extent. However, other aspects of this are unknown.

Turning to the negative side, i.e. how breach of such duties can occur and, where it does, which provision of the Act should be applied? The analysis suggests that, like in the positive side, the line between non-disclosure and

¹¹⁸ For potential application of it, see Eggers et al, n.105 above, 6, [1.13].

misrepresentation is active *or* passive. In case of non-disclosure, the assured fails to do his active duty in volunteering information. In misrepresentation, however, the assured gives the information but what he gives is simply wrong. More often than not, breach of these duties occurs simultaneously. There might be a situation when *pure* non-disclosure is conducted. However, such situation is rare because, logically, the missing information tends to be substituted by false information. In contrast, there cannot be *pure* misrepresentation. Every misrepresentation contains a non-disclosure. In such a mixed situation, we have seen that the courts might apply either s.18 or s.20.

This leads to further argument in this work that there is no point to retain both s.18 and s.20 which overlap and are similar in the same piece of legislation. The analysis also suggests that the distinction between non-disclosure and misrepresentation may be no more than the simple misunderstanding of the passage of Lord Mansfield. Upon revisiting his passage in *Carter v. Boehm* (1766), one can see that he mentioned *representation* in the sense of both disclosure and representation understood in the modern sense. Then, he spoke of the contrary situation, so-called *concealment*. However, his Lordship did not mention *misrepresentation*. This seems to be in line with the above analysis that misrepresentation cannot stay alone without the element of non-disclosure and, from this point of view, there appears to be no reason to distinguish between non-disclosure and misrepresentation as the Act does in s.18 and s.20.

This chapter then addresses the theoretical point by asking the question of what the general duty of utmost good faith requires of the parties to a marine insurance contract. There is an explanation which seems to suggest utmost good faith to be the combination of disclosure and representation, an explanation support for which can be gained from the construction of the Act. However, the academic commentators, especially Bennett, suggest that utmost good faith goes far wider. He explores the specific situations where s.17 might be applied, such as the reciprocal duty of the insurer, the duty to correct the insurer's misunderstanding, the duty to respond to the immaterial questions, etc.

Nevertheless, as pointed out above, the application of s.17 to some situations here is doubtful. Moreover, there appears to be no indication that such exploration covers the full extent of the concept of utmost good faith in s.17. As such, the utmost good faith is vague, as condemned and ultimately rejected by the Court in South Africa.

The inspiration from South Africa leads to the doctrinal analysis in this chapter of the concept of utmost good faith (*uberrimae fidei*) and the concept of good faith (*bonae fidei*), the latter is recognised in South Africa. Such examination reveals no apparent meaning attached to the term 'utmost good faith' and only 'good faith' has been recognised since the time of the Roman Empire and later on it became part of 'natural law'. With the background of Lord Mansfield as a person who was well-versed in the works of natural legal theorists, especially of Cicero, coupled with the reference to good faith (and not *utmost*) in his passage, one can infer that his Lordship intended to refer to the concept of good faith, *not* the distinct concept of utmost good faith. This was distorted sometimes after Lord Mansfield's era. So far as non-disclosure is concerned, breach of which can occur with entirely innocent intention. It is respectfully submitted that this again has been distorted. Full argument will be advanced in Chapter 3. The question can be raised whether s.17 should be reformed to reflect the original understanding of Lord Mansfield. At least, the remedy of avoidance attached to this provision which gives no ways for the courts to do justice upon particular cases is clearly in contrast with the flexible notion of good faith which focuses entirely upon the standard of 'fair and reasonable'.

Chapter 3: Scope of the duty of disclosure

The duty of disclosure is a part of the notion of fair dealing and justice which Lord Mansfield sought to proclaim.¹ He viewed non-disclosure as a 'fraud' and he ordered the policy of insurance affected by such conduct to be *void* because, he said, the other party is deceived.² But, when Lord Mansfield spoke of non-disclosure, he did not envisage it in a sense we understand it today. The objective of this chapter is twofold. First, it will show how the distortion from what Lord Mansfield perceived leads the present state of law to be rigid, unjust, and unsuitable. Secondly, it will suggest that the re-establishment of Lord Mansfield's approach may provide the best option for the reform of the law on duty of disclosure as in the MIA 1906.

While such misconception can be traced back to the distant past, especially from the line of authorities in 1800s,³ at that time the problem was not so apparent. There might be every rationale to expect a wide duty of disclosure given the lack of sophisticated statistical data systems and the undeveloped communication method and technology, especially on the part of the insurer.⁴ In this modern era, the inappropriateness of the current law on duty of disclosure is much more apparent. From the benefit of the advancement of communication and technology, one would expect the insurer to rely less on information from the assured and thus the duty of disclosure should be narrower in scope. However, the law on duty of disclosure as stated in s.18 of the MIA 1906 does not appear to be adaptable. With the strict wording stipulated, it is hard for the courts to divert from it.

¹ See Chapter 2 above, 66-72.

² *Ibid.*, 71.

³ *Rivaz, on behalf of himself and others v. Gerussi Brothers & Company and T.M. Gerussi* (1880) 11 Q.B.D. 222; *Tate & Sons v. Hyslop* (1885) 15 Q.B.D. 368 See also Ivamy, E.R.H., *Chalmers' Marine Insurance Act 1906* (10th ed., Butterworths, London 1993) 30.

⁴ "The rule requiring disclosure was undoubtedly necessary to protect insurers when the context was marine and the year 1800. Communications were slow and unreliable. It was usually impossible to inspect the subject-matter or the scene of the risk. The insured usually knew much more about both...Today this is less true." Clarke, M.A., *The Law of Insurance Contracts* (4th ed., LLP, London 2002) 695, [23-1A].

The obvious challenge to the current legal regime as set out in s.18 are, of course, the proposals of the Australian Law Reform Commission (ALRC) to amend the equivalent provision in the Marine Insurance Act 1909 (Cth).⁵ However, as shall be seen, such proposals do not seem to appropriately respond to all the problems in this area of law. Among other things, the description of what the assured needs to disclose appears to be rather vague and can be difficult to apply in practice.

Before proceeding to further analysis, it is necessary to briefly outline the law on duty of disclosure as it currently presents itself in the UK. According to s.18 of the MIA 1906, the assured needs to disclose what he knows. He further needs to disclose what he is supposed to know in the ordinary course of business, so-called “constructive knowledge”.⁶ For example, it was once held that a reassured, in essence the underwriter in a primary policy, should know about the casualty before taking the reinsurance contract if he had read the casualty slip and such document is expected to be read by a person in his profession.⁷ Nevertheless, it would be equally wrong to assume that the assured has to disclose *everything* he knows or ought to know. It is impracticable for business purposes to impose such a wide duty.⁸ The assured thus needs to disclose only the *material* facts, defined in s.18(2) as:

“Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”

⁵ See the Australian Law Reform Commission, ‘Review of the *Marine Insurance Act 1909*’ (Report No.91, 2001) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch10.html#Heading1>> accessed 1 February 2006.

⁶ See s.18(1) of the Marine Insurance Act 1906 See also Park, S., *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing Company, Hants 1996) 15. However, the consumers affecting insurance does not have to disclose ‘constructive knowledge’. *Economides v. Commercial Assurance Co.Plc.* [1998] Q.B. 587.

⁷ Bailhache J. explained that the reassured should read the casualty slip as the main objective of it is to “...give *underwriter* the latest available information in advance about risk that might be shown to them during that day...” *London General Insurance Company Limited v. General Marine Underwriter's Association, Limited* [1920] 3 K.B. 23, 28 (emphasis added).

⁸ *Ionides v. Pender* (1874) L.R. 9 Q.B. 531, 539.

It is the above definition which in large part leads the law to be in the state of rigidity which then causes great injustice to the assured. The first part of this chapter will be dedicated to the problems caused by this provision. From it, three points can be raised for further analysis. To be material, facts must fall within two limbs of the definition. First, as to whether a fact can be regarded as 'material', the law relies on the view of the 'prudent insurer'. The characteristics of such an insurer will be discussed and further analysis will point out why this standard leads to injustice. The second limb relates to the degree of influence that facts must have on the prudent insurer in order to be material, since the Act employs the wording "...would influence the prudent insurer..." What does this phrase mean? Since the House of Lords decision in *Pan Atlantic v. Pine Top* (1994),⁹ a wide interpretation of this phrase has been taken, which widens the overall duty of disclosure. Is it just a matter of interpretation? Some Australian cases which dealt with the same issue will also be raised for consideration and comparative purposes. Once the assured failed to disclose such material facts, by the language of the Act, it appears that the insurer is entitled to the remedy of avoidance. In reality, however, the House of Lords chose to find an 'inducement' to be implied in s.18 of the Act.¹⁰ What is the role of inducement in the context of non-disclosure? Is it necessary and, if so, should it be set out in the Act? This issue will also be discussed.

In the second part of this chapter, the potential option for statutory reform to the scope of the duty of disclosure will be examined. The recent proposals of the ALRC will be the main subject of discussion and the reasons why such reform is viewed as inappropriate will be mentioned. Particular attention will be given to the concept of 'reasonable assured', a concept mentioned in a non-marine insurance context by the UK Law Commission,¹¹ apparently applied in South

⁹ *Pan Atlantic Insurance Co.Ltd and Another v. Pine Top Insurance Co.Ltd* [1994] 2 Lloyd's Rep. 427.

¹⁰ See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 452.

¹¹ See in general *The Fifth Report of the Law Reform Committee on Conditions and Exceptions in Insurance Policies*, Cmnd.62 (1957); *The Law Commission working paper no.73 on Insurance Law: non-disclosure and breach of warranty* (1979); *The Law Commission report on Insurance Law: non-disclosure and breach of warranty*, LAW COM No.104, Cmnd.6084 (1980) (hereinafter *The Law Commission Report 1980*).

African marine insurance law,¹² and recently imported into the draft provision of the revised Australian Act.¹³

Ultimately, by the end of this chapter the author hopes to show that all the problems concerning the scope of the duty of disclosure are due to the fact that the courts have over a 200-year period misconceived what Lord Mansfield proclaimed and have in consequence over-complicated this area of law. The Act, by codifying such authorities, followed such misconception. The issue can be resolved in the simplest way, that is, to adopt what Lord Mansfield laid down in his seminal judgment.

3.1. Certain problems attached to the language of s.18(2)

This part will be separated into three main sections. The first two sections will deal with the problems with the two limbs of the test for materiality set out in s.18(2). The last section will examine the additional requirement of inducement identified by the courts.

3.1.1. 'Prudent insurer' (MLA 1906 s.18(2))

While s.18(2) refers to the prudent insurer in assessing materiality, it does not define such standard. While discussing its meaning, Park refers to the following passage of Atkin J.,

“...[t]here seems no good reason to impute to the insurer a higher degree of knowledge and foresight than that *reasonably possessed by the more experienced and intelligent insurers* carrying on business in that market at that time.”¹⁴

¹² See *Mutual and Federal Ins v. Oudtshoorn Municipality* 1985 (1) S.A. 419; *Potocnik v. Mutual and Federal Insurance Co.Ltd.* 2003 (6) S.A. 559 See also s.53(1)(b) of the Short-Term Insurance Act 53 of 1998 as substituted by s.35 of the Act No.17 of 2003 quoted in Chapter 1 above, 32-33.

¹³ See especially Clause 20 of the “Draft Marine Insurance Amendment Bill” attached as an Appendix 2 to this thesis.

¹⁴ Park, n.6 above, 77. *Associated Oil Carriers, Limited v. Union Society Insurance of Canton, Limited* [1917] 2 K.B. 184, 192 (emphasis added).

According to this test, the prudent insurer is no more than the idea of assuming the opinion of the *reasonably* experienced insurer. But, how can the assured, in preparing the information to disclose, identify which facts will *influence* the prudent insurer? As once observed by the United Nations Conference on Trade and Development (UNCTAD), the standard of the prudent insurer requires "...an assessment which is difficult to make in many circumstances..."¹⁵ Such a nebulous concept for the assured can lead the insurer to maintain later that non-disclosure was made even though the insurer was satisfied at the time with the information received and accepted the risk. We should, however, leave aside this issue for the moment as the requirement of inducement can be involved here.

Once non-disclosure is raised in litigation as a defence, it is as hard for the courts to know the opinion of the prudent insurer as it is for the assured. As Merkin puts it, "...no judge can pretend to be a prudent insurer."¹⁶ Thus, in practice, the expert witness is admitted to represent the view of the prudent insurer. This practice in itself gives an advantage to the insurer in the litigation. As succinctly summarised by Park,

"The insurer can be more protected by the practice of accepting expert evidence...through his years of experience in the insurance industry, [he] is much more accustomed to expert evidence which mostly comes from his fellow insurers. On the other hand, the insured may have a very limited opportunity to get access to expert evidence."¹⁷

Whether the assured can gain access to expert evidence might be left to be a matter for his counsel. One major concern which Park does not seem to emphasise is potential for 'professional bias'. Apart from observing the demeanour of the witness, judges do not seem to have other means to ensure the moral standard of

¹⁵ The United Nations Conference on Trade and Development (UNCTAD), 'Legal and Documentary aspects of the marine insurance contract', United Nations Publication, New York, 1982, TD/B/C.4/ISL/27/Rev.1, <<http://ro.unctad.org/ttl/docs-legal/rep-doc/Legal%20and%20Documentary%20Aspects%20of%20the%20Marine%20Insurance%20contract.pdf>> accessed 9 July 2005, 20, [105].

¹⁶ Merkin, R., "Uberrimae Fidei Strikes Again" (1976) 39 MLR 478, 480.

¹⁷ Park, n.6 above, 84.

such witnesses. How can the judge ensure that the statement given is a *prudent* one? How can he know that the expert witness was not biased in favour of people from the same profession? It is submitted that it seems to be human instinct that we tend to help people who belong to the same group with us, either same nationality or profession.

The potential prejudice arising from the standard of the prudent insurer is apparent. Why is this standard adopted in s18(2)? The author assumes that in the mind of the lawyers in the past, the possible tests of materiality were divided between actual insurer and prudent insurer only as their mind was consumed by the belief that the insurer knows less while the assured possesses more.¹⁸ Thus, in their view, only the test of materiality associated by the insurer can bring the fairness to the insurer. Among these two tests, they opted for the prudent insurer test which seems preferable due to its objectivity. As Park explains:

“It has been said that the adoption of the prudent insurer test provides an objective and ascertainable test, at least in theory, independent of idiosyncrasies of the actual insurer in question.”¹⁹

As shall be seen below,²⁰ however, the application of the actual insurer test is more in accordance with the original intention of Lord Mansfield. But, in that context, the application of it is not what seems to be understood here. What does the author mean by this? It is recommended that, before the view of Lord Mansfield is discussed in the final part, one should prepare to abandon the usual paradigm.

¹⁸ This also appears to be what Lord Mustill believed. See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 441.

¹⁹ Park, n.6 above, 75.

²⁰ At, 103-108.

3.1.2. 'Would influence' (MIA 1906 s.18(2))

(a) UK interpretation

Perhaps, any discussion on the degree of influence in marine insurance law in the UK needs to start with the decision of Lloyd J. (as he then was) in the trial of the case *CTI v. Oceanus* (1982),²¹ the first case in which the degree of influence was explicitly considered. The judicial authorities prior to this were in his view unhelpful.²² Lloyd J. proclaimed what later became known academically as the "decisive influence test",²³ the essence of this being:

"...the underwriters ought only to succeed on a defence of non-disclosure if they can satisfy the Court...that *a prudent insurer, if he had known the fact in question, would have declined the risk altogether or charged a higher premium.*"²⁴

From the assured's point of view, this test is unhelpful. This test is expressed in a rather unrealistic sense. His Lordship focused his attention on how materiality can be proved once non-disclosure is raised in litigation. By reading the above passage, it is hard for the assured to know what exactly he should disclose. This point is envisaged by Lord Mustill in the House of Lords in *Pan Atlantic v. Pine Top* (1994):

"...it is not the Court after the event but the prospective assured and his broker before the event, at whom the test is aimed; it is they who have to decide...what material they must disclose...the *decisive influence test* faces them with an almost impossible task."²⁵

²¹ *Container Transport International Inc and Reliance Group Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 178.

²² "A very large number of cases were cited on both sides...they did not help one way or the other..." *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 459 (per Lord Lloyd).

²³ See e.g. the use of this term in *Park*, n.6 above, 94.

²⁴ *CTI* [1982] 2 Lloyd's Rep. 178, 187.

²⁵ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440 (italics adapted from the original text).

Indeed, even a proponent of the decisive influence test such as Park is unable to discern such intrinsic difficulty:

*"It is true that this decisive influence test interpretation may have a problem in practice. The insured may need a two-step process. Firstly, the insured has to decide whether a fact is influential or not. Then, secondly he has to decide whether or not it is decisively influential."*²⁶

The second step is difficult in practice because the assured needs to assume himself in the position of the prudent insurer and to then see the fact from that perspective to decide whether the fact should be disclosed to the insurer. Despite the above sound rationale provided by Lord Mustill, regrettably the degree of influence as propounded by the majority of the House of Lords is also far from satisfactory.²⁷

The majority came to affirm the degree of influence as had been construed by the Court of Appeal in *CTI v. Oceanus* (1984)²⁸ and thus expressed the material facts to be what "*a prudent insurer would take...into account...*"²⁹ Apart from the practical difficulty arising from the decisive influence test, the majority advanced other reasons why such a broad interpretation of the degree of influence sounds more sensible. These included linguistic and evidential reasons. The linguistic argument, which focused entirely on the wording of the Act, should not concern us here. As a matter of semantics, it is possible for one word to have more than one sense of meanings and thus the judges in the *Pan Atlantic* case (1994) found themselves to be in disagreement upon the wording of the Act.³⁰ As far as the evidential matter is concerned, the majority emphasised the problem of

²⁶ Park, n.6 above, 115 (emphasis added).

²⁷ The majority judgments were delivered by Lord Mustill, Lord Goff of Chieveley and Lord Slynn of Hadley while the minority judgments were delivered by Lord Templeman and Lord Lloyd of Berwick.

²⁸ "By a bare majority the House upheld *CTI...*" Bennett, H.N., "Utmost Good Faith, Materiality and Inducement" (1996) 112 LQR 405, 406. *Container Transport International Inc and Reliance Group Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd's Rep. 476.

²⁹ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440 (emphasis added).

³⁰ Their Lordships considered what should be meant by "would" or "might" or "influence". See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440 and 459.

how the decisive facts can be pinpointed by the expert witnesses who represent the prudent insurer.³¹ Such reason should be seen as irrelevant. As observed above,³² one may doubt whether the expert witnesses, in reality, are willing to search for the 'material facts'. Either the test is decisive or otherwise, we are likely to see the expert witnesses who prepare to help the insurer in litigation no matter how trivial such fact in reality is.³³ This is linked with the previous point that the prudent insurer test should not be retained.

Such a wide interpretation that the material fact is the fact that the prudent insurer would like to take into account is the position of the law in the UK as now stands. It can be further condemned on the basis of its unsuitability for business practice. As Clarke observes, "[t]he traditional London practice of rapid placement of risks would be blocked by an avalanche of information".³⁴ A similar view was expressed by Lord Justice Steyn in the Court of Appeal in *Pan Atlantic v. Pine Top* (1993).³⁵ Faced with the test formulated by the Court of Appeal in the *CTI* case (1984), Steyn L.J. unhesitatingly tried to limit the scope of the duty of disclosure. His re-interpretation, as correctly observed by Bennett, was not really considered by the House of Lords.³⁶ According to his Lordship,

"...there were at least two feasible alternative solutions to be considered in *C.T.I.*... The first solution was that a fact is material if a prudent insurer would have wished to be aware of it in reaching his decision. The second solution involves taking account of the fact that avoidance for non-disclosure is the remedy provided by law because the risk presented is different from the true risk. But for the non-disclosure the prudent underwriter would have appreciated that it was a different and increased risk...*the test is whether a prudent underwriter, if he had known the undisclosed facts, would have regarded the risk as*

³¹ See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440-441.

³² Above, 79-80.

³³ See some examples of such bias in Merkin, n.16 above, 479.

³⁴ Clarke, M., "Failure to Disclose and Failure to Legislate-is it material?-II" [1988] JBL 298, 304.

³⁵ "...this is particularly important in the London insurance markets where risks are accepted at astonishing speed..." *Pan Atlantic Insurance Co.Ltd and Another v. Pine Top Insurance Co.Ltd* [1993] 1 Lloyd's Rep. 496, 506 (emphasis added).

³⁶ Bennett, H.N., "Utmost Good Faith in the House of Lords" (1995) 111 LQR 181, 184.

*increased beyond what was disclosed on the actual presentation...*³⁷

Once again, the test was propounded on the basis that non-disclosure already occurred. One might not have immediate understanding of how this test can be applied in practice. Lord Justice Steyn explained this further in the following scenario:

“Let us assume that a shopkeeper takes out a fire policy. Twenty years ago he had a fire. Subsequently, he introduced extensive fire precautions. If the first approach prevails, it will be easy for a prudent insurer to say that he would have wished to be aware of all previous losses. On the other hand, if the second approach is adopted, the prudent insurer may find it more difficult to say that the earlier fire increased the risk. The first approach requires far wider disclosure than the second approach.”³⁸

It is respectfully submitted that the factual circumstance, especially in marine insurance, is not as simple as the scenario proposed by his Lordship.

To demonstrate the point, a similar scenario to that raised by his Lordship will be used. Suppose 20 years ago, the ship had caught fire. Subsequently, the shipowner installed a fire precaution system on his ship. The prudent underwriter can always say that the previous fire should be disclosed and it can be viewed as increasing the risk. This is because, without disclosing it, the insurer might fail to instruct the marine surveyor to inspect the part which had caught fire before accepting the risk. The insurer cannot know whether this particular part of the ship was properly replaced or repaired. The mere fault of one piece of equipment can cause the loss of the ship no less than fire. By employing the word ‘increased the risk’, Steyn L.J. seemed to have in mind the term ‘risk’ in the sense of the risk

³⁷ *Pan Atlantic* [1993] 1 Lloyd's Rep. 496, 505 (emphasis added).

³⁸ *Pan Atlantic* [1993] 1 Lloyd's Rep. 496, 505.

insured against.³⁹ In case of the shop, of course, the shopkeeper might take out fire insurance for his premises. The existence of the precaution system renders the fact to be immaterial, in terms of not increasing the risk. In marine insurance, however, if we inspect the standard form contracts used in the market, the insurance against the loss of one ship can cover loss caused by a wide range of situations. Non-disclosure of the previous fire might not necessarily increase the risk of fire. It might increase other related risks insured against. The difficulty with the increased risk test lies on the question of proof.

Nevertheless, in a passage of the Court of Appeal judgment in *St. Paul Fire & Marine v. McConnell* (1995),⁴⁰ Evans L.J. mentioned that the test formulated by Steyn L.J. and the one which was adopted by the majority of the House of Lords are essentially the same.⁴¹ But, as correctly argued by Hird,⁴² his Lordship rather erred in reading the judgment of the House of Lords. As Hird mentions,

“If materiality is determined only by a reference to something which might be of interest to a prudent insurer, this does not come close to a test which defines materiality in terms of an appreciated *increased risk*.”⁴³

Since Evans L.J. in the *St. Paul* case (1995) adopted the materiality test established in the *Pan Atlantic* case (1994) with no objection⁴⁴ and the reference to the increased risk was a mere misreading, the test of materiality which is based on what the prudent insurer wants to know can be taken as the conclusive one in the UK. Such a test, however, leads to further concern as Lord Justice Steyn put it in the Court of Appeal in the *Pan Atlantic* case (1993):

³⁹ This can be seen from what his Lordship suggested that the increased risk might still lead the underwriter to conclude the contract on the same terms. See *Pan Atlantic* [1993] 1 Lloyd's Rep. 496, 506.

⁴⁰ *St. Paul Fire & Marine Insurance Co. (UK) Ltd v. McConnell Dowell Constructors Ltd and Others* [1995] 2 Lloyd's Rep. 116.

⁴¹ “Lord Mustill expressly approved the Court of Appeal's definition and no *gloss*...” *St. Paul* [1995] 2 Lloyd's Rep. 116, 124 (italics adapted from the original text).

⁴² Hird, N.J., “Pan Atlantic-Yet More to Disclose?” [1995] JBL 608.

⁴³ *Ibid.*, 610 (italics adapted from the original text).

⁴⁴ See *St. Paul* [1995] 2 Lloyd's Rep. 116, 123-124.

“...brokers will in practice often be compelled to disclose virtually endless material about the insured’s past. But...it could always be said by an expert...that by disclosing the whole record, running into hundred pages, the material circumstances were not fairly presented.”⁴⁵

Certainly, what the assured can do to ensure that non-disclosure will not be alleged at the later stage is perhaps to disclose *everything*. But, is this what should be required from the assured? From insurer’s point of view, this test is not appropriate either because the insurer then has to sift through vast amount of information. For policy reason and business efficacy, there needs to be a reasonable limit to what should be disclosed.

(b) The Australian interpretation

The Australian experience with the interpretation of materiality does not seem to be better than in the UK. This issue has been raised in only three states of Australia and the courts in these states have not yet reached a consensus as to the meaning of materiality.⁴⁶ In her thesis,⁴⁷ Derrington analyses all these cases state by state. However, the present author believes that among all these cases, in reality, there is a line of opinion developed in three cases which seems to be influential and deserves closer analysis. These are *Mayne Nickless v. Pelger*⁴⁸ (1974), *Barclay Holdings (AUST) v. British Nat Ins*⁴⁹ (1987), and *Akedian Co.Ltd v. Royal Insurance Australia Ltd and Others*⁵⁰ (1999).

Starting from the first case, one will find what can be seen as a rather vague passage of Samuels J. where he proclaimed:

⁴⁵ *Pan Atlantic* [1993] 1 Lloyd’s Rep. 496, 506.

⁴⁶ These three states are New South Wales, Victoria, and Queensland. Derrington, S.C., *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance A Case for Reform*, Thesis submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy in The University of Queensland, St.Lucia, 1998, 96-105.

⁴⁷ *Ibid.*

⁴⁸ *Mayne Nickless Ltd v. Pegler and Another* [1974] 1 NSWLR 228.

⁴⁹ *Barclay Holdings (Australia) Pty Ltd v. British National Insurance Co.Ltd and Another* (1987) 8 NSWLR 514.

⁵⁰ *Akedian Co.Ltd. v. Royal Insurance Australia Ltd and Others* [1999] 1 V.R. 80.

“...a fact is material if it would have *reasonably* affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions...”⁵¹

As may be recalled from the last section, the fact that the assured may face with some difficulty in realising what the prudent insurer might regard as material is discussed, now Samuels J. expected the assured to know what *reasonably* affected the mind of the prudent insurer. This is difficult. As appropriately criticised by Derrington, it also does nothing more than rejecting the decisive influence test and showing that, in contrast with the UK law after the *Pan Atlantic* case (1994), inducement is not a requirement.⁵²

The decision of Samuels J. received further interpretation in the *Barclay* case (1987), which is not a marine insurance case but related to a contract concluded prior to the enactment of the Insurance Contracts Act 1984 (Cth) and thus the same common law as in the MIA 1909 (Cth) applied.⁵³ The appellate judges in this case did not really understand the test propounded by Samuels J. in the same direction. The majority⁵⁴ was of the view that the difference between the test of materiality in the UK as in the Court of Appeal case of *CTI* (1984) (which was later adopted by the House of Lords in the *Pan Atlantic* case (1994)⁵⁵) and the one stated in the *Pegler* case (1974) lies in the time when materiality is judged. As Glass J.A. mentioned,

“The difference it seems to me between the two views is whether the relevance of the hypothetical facts, assuming they had been disclosed, is judged at the moment the underwriter is deciding whether or not to accept the risk or at the moment when he undertakes an investigation of the risk. The former is...*Pegler* view...”⁵⁶

⁵¹ *Pegler* [1974] 1 NSWLR 228,239, column B (emphasis added).

⁵² Derrington, n.46 above, 97.

⁵³ *Ibid.*

⁵⁴ The majority judgment was given by Glass J.A. whom Priestley J.A. concurred.

⁵⁵ See above, 82.

⁵⁶ *Barclay* (1987) 8 NSWLR 514, 523 column C.

Derrington merely describes this distinction as “difficult to sustain”.⁵⁷ However, she does not expand her argument. Perhaps, it might be because the point of time was not really mentioned in both cases. It is Yeo who suggests that the judgment of the majority in the *Barclay* case (1987) can be made more sense of if the minority decision of Kirby P. is taken into account. According to her, “...the appellate judges arrived at the same conclusion via slightly different approaches.”⁵⁸

Thus, the minority view will be stated here before further analysis of the *Barclay* case (1987) will be undertaken. Kirby P. asked what Samuels J. in the *Pegler* case (1974) intended to be meant by “affected the mind”.⁵⁹ He then proceeded to interpret this to mean:

“...should be something more than the effect produced by information which the insurer would have been generally interested to have. If though interested to have it, such information would not, in the end, have determined for a reasonably prudent insurer the acceptance or rejection of insurance, the setting of premium or the attachment of conditions, there is not such effect on the mind as requires disclosure by the insured. The information, although of interest, is not material...”⁶⁰

How can the views of the majority and the minority be reconciled? Yeo refers to the underwriting process that one should comprehend. The first stage is the investigative stage where all information seems to be what the insurer wants to know. After obtaining so much information, the insurer then tries to categorise them into those relevant and those irrelevant to the consideration of the risk. Afterwards, there is a crucial step, that is:

“...after a consideration of the full circumstances...he then makes a study of the proposal and thereupon decides

⁵⁷ Derrington, n.46 above, 97-98.

⁵⁸ Yeo, H.Y., “Common Law Materiality-an Australian Alternative” [1990] JBL 97, 102.

⁵⁹ *Barclay* (1987) 8 NSWLR 514, 517 column C.

⁶⁰ *Barclay* (1987) 8 NSWLR 514, 517 column D-E.

whether to accept the risk and whether the terms in the policy need to be varied.”⁶¹

Following this, Yeo maintains that both the majority and minority views rejected the duty of the assured to disclose the information at the investigative stage of the underwriting process.⁶² What difference is there with the decisive influence test proclaimed at first instance in the *CTI* case (1982)?⁶³ Perhaps, their Lordships in the *Barclay* case (1987) viewed the final stage of the underwriting process to be somewhat wider than the decisive influence theory. This includes the determination whether to accept or reject the risk, and, if to accept, what premiums charge and what conditions to set. It is not limited to the rejection of the risk, or the charging of higher premiums, as in the first instance of *CTI* (1982).

However, one may doubt whether in practice, by the time of making disclosure, the assured has *ever* run through this process at all. This point is crucial. Whether the assured realises what the (prudent) insurer would take into account at this final stage? The present author does not suggest here that the assured should have a duty to disclose *all* facts the insurer requires at the investigative stage since that will place the assured under too much of a burden. As Yeo aptly puts it, “...pinning materiality at the initial investigative stage will be like giving the insurer *a blank cheque*...”⁶⁴

Nevertheless, it is submitted that it is only practicable to pin the assured’s duty at this investigative stage because the assured does not go through all the underwriting process. But, to investigate is not the same as to sit and wait for the information. One has to take into account *what* the insurer knows or should be able to know by all his means of investigation, i.e. communication tools and technologies he possesses, and what he should reasonably require from the assured to enable him to view the risk correctly. As will be suggested, this is what Lord Mansfield understood. Still, this view faces two significant problems. First,

⁶¹ Yeo, n.58 above, 102.

⁶² *Ibid.*

⁶³ Above, 81.

⁶⁴ Yeo, n.58, 102 (emphasis added).

one might argue that the assured - at the time of making disclosure - does not know what the insurer *can* investigate. Secondly, since the prudent insurer is only a hypothetical person, it is very difficult for the assured to understand such person's willingness or ability to investigate.

Concerning the first difficulty, one should imagine the scene of the negotiation process prior to the placing of the risk. Such a process starts with the assured - either a cargo-owner or shipowner - who wants to insure the risk with the insurer. Despite the fact that he has never underwritten any risks himself, as a business man, at least he realises what might be regarded as the significant facts in a commercial sense. Indeed, in some large companies, the assureds even have their own insurance section which is experienced in dealing with insurance matters. All the essential information is well-recorded. The assured then contacts the professional broker who is generally in direct contact with the insurer, and, in most cases, he is even a person who chooses which insurer the risk should be placed with. Thus, he is likely to know the individual insurer's potential to investigate. They know each other. Turning to the insurer's side, in the insurance companies or syndicates, one would find that these are further separated into sections depending on expertise, i.e. marine section, aviation section, etc. In each section, we can expect an underwriter who has expertise in a specific kind of risk and particular market. Thus, in the context of marine insurance, the insurer deals with the assured with fair amounts of knowledge. One should not envisage the insurer as a novice person.

Furthermore, the insurer, during the negotiation process, can always ask for the information from the assured if, by his investigation, he still does not receive sufficient information. So, why do not place the duty of the assured to disclose as a supplement to the insurer's investigation? As mentioned in Chapter 2, Lord Mansfield in *Carter v. Boehm* (1766) was referring to the concept of good faith and fair dealing, which underpins all contractual relationships. Surely, he was expecting the fairness and justice between the *actual parties* in the contract. How is a prudent insurer relevant? It is submitted that this standard of materiality

came to the scene after Lord Mansfield's seminal judgment and did not reflect his Lordship's original intention.

After a long digression, now we should turn to the interpretation of the degree of influence in Australia. The point is further considered in the *Akedian* case (1999) before the Supreme Court of Victoria. The significance of this case lies in the fact that it was handed down after the judgment of the House of Lords in the *Pan Atlantic* case (1994) and thus there was great opportunity for the Court to consider materiality test. However, Byrne J. did not seize this golden opportunity. His way of reasoning is, with respect, no more than doing some linguistic analysis and following some previous authorities. Influenced by some New Zealand post-*Pan Atlantic* cases, he observed that these cases expressed the test of materiality in the following terms: "*whether the relevant information would have had an effect on the mind of a prudent insurer in weighing up the risk*".⁶⁵ He said the use of the phrase 'effect on the mind' is similar to the test propounded by Samuels J. in the *Pegler* case (1974) and thus he proceeded straightaway to the *Barclay* case (1987). Consequently, he said:

"The question of the impact upon the mind of the reasonable underwriter should therefore be assessed at the time the underwriter is deciding whether or not to accept the risk..."⁶⁶

He tried to reconcile the above test with the judgment of the House of Lords in *Pan Atlantic* (1994) by saying that Lord Mustill rejected the relevance of the investigative stage where the latter mentioned "the thought processes of the insurer in weighing up the risk..."⁶⁷ It is respectfully submitted that he erred in reading the judgment of the House of Lords. True, Lord Mustill mentioned 'thought processes'. However, he mentioned it in contrast with the decisive influence test when his Lordship interpreted the term '*whether*' in s.18(2). It was

⁶⁵ *Akedian* [1999] 1 V.R. 80, 89, [25] (emphasis added).

⁶⁶ *Akedian* [1999] 1 V.R. 80, 91, [26].

⁶⁷ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440; *Akedian* [1999] 1 V.R. 80, 91.

not the interpretation of the whole sub-section.⁶⁸ Lord Mustill then came to conclude on the duty of disclosure as required in s.18 later in the following terms: "...if all that they have to consider is *whether the materials are such that a prudent insurer would take them into account...*"⁶⁹ Byrne J. further drew some support from what Lord Mustill mentioned in passing that the *Pegler* case (1974) is along the line with his view.⁷⁰ But, this is not conclusive. Lord Mustill mentioned this very shortly when he was discussing the relevance of one particular authority. His approval of Samuels J.'s view was rather confined to the understanding of that specific case.⁷¹

Therefore, it is submitted that in reality Byrne J. opted for the test as in the *Barclay* case (1987) and, thus, as Derrington concludes of the interpretation of the degree of influence in Australia:

"...there is no consensus as to the interpretation of that definition amongst any of the courts in the United Kingdom or Australia...It is certainly not possible to reconcile the views expressed by the various judges."⁷²

What is to be noted further is that, despite the absence of explicit reasoning, Byrne J. did accept the additional requirement of inducement. This seems to move along the line of UK law concerning non-disclosure.

Nevertheless, as far as materiality is concerned, one can see that the courts in both jurisdictions have been striving to work around the limited wording of the Act to find a suitable scope for the duty of disclosure. They argued extensively without even realising that the Act was drafted with a completely wrong perception that had been carried along since sometime after Lord Mansfield's seminal judgment. Still, they seemed to get it right on the matter of inducement.

⁶⁸ See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 440.

⁶⁹ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 441 (emphasis added).

⁷⁰ See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 442.

⁷¹ This case is *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.Ltd.* [1925] A.C. 344 . See also *Pegler* (1974) 1 NSWLR 228, 237-238.

⁷² Derrington, n.46 above, 105-106.

3.1.3. Additional requirement of 'inducement'

For those who are familiar with general contract law and the law of misrepresentation, the term 'inducement' is used there in the sense that, to be entitled to a remedy, a representee must prove that he agreed to enter into a contract in the belief that a statement was true. In other words, it has to prove that such a misrepresentation "operated in the mind of the representee".⁷³ Nevertheless, the representee does not have to prove that such untrue statement was the *sole* cause which induced him into the contract.⁷⁴ The additional requirement of inducement which the House of Lords in the *Pan Atlantic* case (1994) found to be implied in relation to non-disclosure in s.18 of the MIA 1906 was also understood in the same sense.⁷⁵ The rationale for finding such an implication was stated by Lord Mustill to be: "...to enable an underwriter to escape liability when he has suffered no harm would be positively unjust..."⁷⁶ This is certainly in accordance with what Lord Mansfield mentioned: "...the underwriter is *deceived*, and the policy is *void*".⁷⁷

Thus, in the present author's view the House of Lords was correct in saying that it is not enough for the insurer to avoid the contract by merely proving that the undisclosed fact was material. If the insurer could not prove that such misrepresentation or non-disclosure induced him to enter into the contract, then he is not entitled to the remedy of avoidance.⁷⁸ On the other hand, the introduction by the House of Lords of the need for inducement into s.20 on misrepresentation might not go beyond the established law. This is because the same can be found in general law of misrepresentation and, as s.91(2) of the MIA 1906 indicates, the position in the general law can be applied in marine insurance contract so far as it is not against the language of the MIA 1906. However, the House of Lords went further in order to maintain symmetry in insurance law by implying the same into

⁷³ Beale, H.G., et al (eds), *Chitty on Contracts Volume 1 General Principles* (29th ed., Sweet & Maxwell, London 2004) 447, [6-031].

⁷⁴ *Ibid.*, 448, [6-033] cited *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459.

⁷⁵ See *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 452-453.

⁷⁶ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 452.

⁷⁷ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909 (italics following the original text).

⁷⁸ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 453.

s.18 on non-disclosure.⁷⁹ As Hird argues, it is strange “to suggest that something the insurer has no idea of the existence of can actually induce him into making a contract”.⁸⁰ While there is some force in this argument, one should not aim for perfection. There seems to be no other way to test the effect of an undisclosed fact. Of course, the courts have to find their best approach to this. In *Glencore v. Alpina* (2003),⁸¹ Moore-Bick J. dealt with the issue of inducement as follows:

“An underwriter...must show that *if proper disclosure has been made he would not have written the policy in the same terms*, but in order to consider that question *it is necessary to know what circumstances would have been disclosed* to the insurer if the insured had complied with his duty.”⁸²

While the rationale in imposing the additional requirement of inducement to the case of non-disclosure appears to be unarguable, the approach, it is submitted, might not be so practicable. In the case of misrepresentation, it can be easily seen where the untrue statements led the insurer. However, in a non-disclosure case, the insurer is asked at the time of the litigation what he would do if he had known of the undisclosed facts by the time of making the contract. With the strong incentive to win in the litigation and to be entitled to avoid the contract, one can expect the insurer to strive to insist that he would not underwrite the risk on the terms he did. This similar point is raised by Byrne J. in the *Akedian* case (1999) in Australia where he mentioned “cases such as the present demonstrate the difficulty...where the underwriter, without fear of contradiction, is able to swear that it was so induced.”⁸³ The concern is the inducement is tested against the mind of the actual insurer which will be difficult to probe in practice.

⁷⁹ “...if one looks at the problem in the round, and asks whether it is a tolerable result that the Act accommodates in s.20(1)...and yet no such requirement can be accommodated in s.18(1), the answer must surely be that it is not.” *Pan Atlantic* [1994] 2 Lloyd’s Rep. 427, 452.

⁸⁰ Hird, N.J., “Rationality in the House of Lords” [1995] JBL 194, 196.

⁸¹ *Glencore International A.G v. Alpina Insurance Company Limited and Others* [2003] EWHC 2792.

⁸² *Glencore* [2003] EWHC 2792, [75] (emphasis added).

⁸³ *Akedian* [1999] 1 V.R. 80, 91, [27].

Nevertheless, such concern can be somehow over-stated, especially when considering the recent Court of Appeal case of *Assicurazioni Generali Spa v. Arab Insurance Group (B.S.C.)* (2002).⁸⁴ There, the majority⁸⁵ held significantly that, to be entitled to avoid the contract, the insurer must prove that:

“...the non-disclosure or misrepresentation *was an effective cause* of his entering into the contract on the terms on which he did. He must...show at least that, *but for* the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was *the sole effective cause* of his doing so.”⁸⁶

With greatest respect, the above language is confusing. Among many causes involved at the time of making the contract, how can one pinpoint an ‘effective cause’? This point is raised by Yeo,

“There is...some difficulty in reconciling Clarke LJ’s adumbration of the ‘but for’ test with his other assertion that there is no need for a sole effective cause where inducement is concerned...”⁸⁷

Observing that the ‘but for’ requirement is normally used in tort law in relation to causation,⁸⁸ Yeo thus ponders around tort. What such a rule suggests is, however, that the ‘but for’ formulation cannot be applied when there are many causes involved.⁸⁹ Relying further on tort law analysis, Yeo suggests one should rather ask whether non-disclosure or misrepresentation *materially contributed* to induce

⁸⁴ *Assicurazioni Generali Spa v. Arab Insurance Group (B.S.C.)* [2002] EWCA Civ. 1642.

⁸⁵ The majority were delivered by Clarke L.J. and Sir Christopher Staughton.

⁸⁶ *Assicurazioni* [2002] EWCA Civ. 1642, [62] (emphasis added).

⁸⁷ Yeo, H.Y., “Of inducement and non-disclosure in insurance contracts” (2004) 10 *Journal of International Maritime Law* 84, 88.

⁸⁸ “The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant?”. Dugdale, M.A., et al (eds), *Clerk & Lindsell on Torts* (19th ed., Sweet & Maxwell, London 2006) 48, [2-07].

⁸⁹ “Where there are two simultaneous, independent events, each of which would have been sufficient to cause the damage, the “but for” test produces the patently absurd conclusion that neither was a cause...” *Ibid.*, 97, [2.72].

the insurer into the contract where there are many potential factors.⁹⁰ It is not entirely clear that this approach will be appropriate.

When we ask in tort whether misconduct is among the causes of loss, we view the matter of *cause* and *effect* and the difficulty generally lies in establishing the factual situation.⁹¹ Once this is established, the answer can be quite straightforward. Transposing the material contribution into insurance law, the same does not seem to be so easy. The significant difference between inducement and causation is that the former involves a human's mind, which is so individual. It can be very easy to see the insurer who is, in litigation, striving to insist that non-disclosure or misrepresentation materially contributed to his decision. Above all, one should be reminded that it is not certain that the Court of Appeal in *Assicurazioni* (2002) did try to adopt the tortious approach as Yeo did in her analysis. Indeed, the language of Sir Christopher Staughton in this same case is rather definite. His Lordship mentioned: "causation cannot in law exist when even the *but for* test is not satisfied".⁹²

With the present language used by the Court of Appeal, it is extremely difficult for the insurer to prove that he was so induced, especially if there were many causes which led him into the contract. This is because, in such a case, he is unlikely to successfully prove that a particular non-disclosure or misrepresentation induced him into an agreement.

But, the significance of the *Assicurazioni* case (2002) does not end here. It further clarified a point which the House of Lords in the *Pan Atlantic* case (1994) left open. There, Lord Mustill mentioned the 'presumption of inducement'.⁹³ However, such presumption can be made by factual circumstance or by law. The

⁹⁰ This 'material contribution' test originated from the case laws involving the industrial disease in which the exact cause of damages can be hardly proved. In such case, "[t]he claimant does not have to prove that the defendant's breach of duty was the sole, or even the main, cause of his damage provided he can demonstrate that it made a material contribution to the damage." *Ibid.*, 63, [2-26] cited *Bonnington Castings Ltd v. Wardlaw* [1956] A.C. 613.

⁹¹ *Ibid.*, 44, [2-01].

⁹² *Assicurazioni* [2002] EWCA Civ. 1642, [187] (italics adapted from the original text).

⁹³ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 452.

former means that, in the absence of proof to the contrary, “the presumed fact *may* be found to exist on proof of a basic fact”.⁹⁴ The latter means that “...if the insurer proves materiality and gives no evidence for inducement, the judge *may* rely on the presumption of inducement”.⁹⁵ The majority of the Court of Appeal in the *Assicurazioni* case (2002) came to reject the latter. As Clarke L.J. mentioned,

“There is no presumption of law that an insurer...is induced to enter in the contract by a material non-disclosure or misrepresentation.”⁹⁶

It is submitted that this is in accordance with the basic rationale that, to be entitled to a remedy, the insurer must prove that he was deceived.⁹⁷ The proof of materiality which is based upon the standard of the prudent insurer should not be used to indicate what the reaction of the actual insurer was likely to be if he knew of the undisclosed fact at the time of the contract.

Nevertheless, the presumption by law came to be accepted, in principle at least, again in the more recent case of *Narinder Pal Kaur Mundi v. Lincoln Assurance Limited* (2005)⁹⁸ where Lindsay J. stated the law to be:

“...an insurer wishing to avoid...bears the burden of *proving* inducement but he may in some circumstances be assisted by the presumption [of inducement]...whilst the law...will presume inducement from materiality, the presumption is neither universal nor irrebuttable.”⁹⁹

Still, the question is whether this passage is good law. His Lordship did not seem to bear in mind the judgment in the *Assicurazioni* case (2002) and, since the statement was pronounced at first instance, it is doubtful whether this can stand against the passage of the Court of Appeal.

⁹⁴ Park, n.6 above, 166 (italics followed the original text).

⁹⁵ *Ibid.*, 166-167 (italics followed the original text).

⁹⁶ *Assicurazioni* [2002] EWCA Civ. 1642, [62].

⁹⁷ Above, 75.

⁹⁸ *Narinder Pal Kaur Mundi v. Lincoln Assurance Limited* [2005] EWHC 2678 (Ch).

⁹⁹ *Mundi* [2005] EWHC 2678 (Ch), [6]-[7] (italics followed that of his Lordship).

Overall, the examination of the problems concerning the duty of disclosure by the assured caused by s. 18 of the MIA 1906 shows at least that inducement is not a problem which requires statutory attention. Its implication is a suitable step which the House of Lords chose to take, albeit the standard of proof required from the insurer might remain unclear. The existence of such a requirement is justifiable on the basis of the rationale that Lord Mansfield sought to proclaim. Nevertheless, inducement does not come to be proved until the insurer can establish materiality of the undisclosed fact in litigation. At the time of contractual negotiation, what seems to be more important are the *material* facts which the assured needs to disclose. But, such facts are based upon the notion of the prudent insurer and thus very hard for the assured to determine. The wide interpretation of the degree of influence leads to the extremely wide definition of material facts. To avoid litigation costs at the later stage, it is perhaps better for the assured to disclose *everything*. Whilst this might prove to be wiser for the assured, it is impracticable for the London Market where the risk is accepted at rapid speed. The insurer cannot browse through all the information. Thus, if statutory reform will be undertaken in the UK, the standard of materiality and the degree of influence should be subjected to review. Although some changes to similar issues were proposed in Australia, as the analysis below will show, these suggestions are unlikely to be successful in practice.

3.2. An alternative approach to the scope of the duty of disclosure

In 2001, the ALRC proposed an important change to s.24 of the MIA 1909 (Cth), which is equivalent to s.18 of the MIA 1906. Strangely however, no changes were recommended to sub-section (2) concerning the definition of materiality. However, a change was recommended to be made to sub-section (1) concerning the duty of disclosure.¹⁰⁰

The recommendation does not suggest the concept of the 'reasonable person in the circumstances' to be used for judging materiality. It is rather used as

¹⁰⁰ Clause 20 of the "Draft Marine Insurance Amendment Bill".

a substitution for the concept of constructive knowledge. The scope of the duty of disclosure is thus changed to be what, in the understanding of the assured or a reasonable person, is material.

With respect, the author does not think such provision will provide a workable solution. Speaking particularly of Australia, to leave the definition of materiality in s.24(2) undefined is not a wise option. The courts in Australia have not yet reached a consensus on the meaning of materiality.¹⁰¹ What does it mean by *material*? Indeed, before coming to this question, the first question to be asked is: what does it mean by *reasonable person in the circumstances*?

The clause has its origin from s.21 of the Insurance Contracts Act 1984 (Cth).¹⁰² Prior to its enactment, the ALRC, in 1982, was of the view that:

“The duty should itself extend to facts which the insured knew or which a *reasonable person in the insured’s circumstances* would have known, to be relevant...*Literacy, knowledge, experience and cultural background are all vitally important factors affecting the behaviour which can reasonably be expected of the insureds...*”¹⁰³

Of course, the phrase ‘in the insured’s circumstances’ was deleted by the Australian Parliament and thus the provision remains as it is. However, as Tarr and Tarr have pointed out, some courts in Australia still interpret s.21 by following the ALRC’s original intention.¹⁰⁴ Such an interpretation shows a “high degree of subjectivity”.¹⁰⁵ The question to be asked is whether the courts will be able to distinguish between the hypothetical reasonable person and the actual

¹⁰¹ Above, 86-92.

¹⁰² The Australian Law Reform Commission, n.5 above, [10.93].

¹⁰³ The Australian Law Reform Commission, ‘Insurance Contracts, 1982’ (Report No.20, 1982) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/20/chap90.pdf>> accessed 23 October 2005 (emphasis added).

¹⁰⁴ See Tarr, A.A., and Tarr, J.A., “The Insured’s Non-Disclosure in the Formation of Insurance Contracts: A Comparative Perspective” (2001) 50 *International and Comparative Law Quarterly* 577, 594-597.

¹⁰⁵ *Ibid.*, 594.

assured in question. It is not only a question for the courts. The same can be put to the actual assured at the time he makes disclosure.

In contrast to the ALRC, the UK Law Commission in its report in 1980, suggested that the assured needs to disclose the facts,

“...which a *reasonable man in the position of the proposer* would disclose to the insurer, having regard to the nature and extent of the insurance cover which is sought and the circumstance in which it is sought.”¹⁰⁶

The intention of the Law Commission in proposing the above formulation was:

“The words...would allow the courts to have regard to the knowledge and experience to be expected of a reasonable person in the position of the applicant...*we would not wish the court to take account of the individual applicant's idiosyncrasies, ignorance, stupidity or illiteracy...*”¹⁰⁷

With respect, despite trying not to take idiosyncrasies of the actual assured into account, still - as argued by Derrington - identifying the reasonable assured in the context of marine insurance is not easy in practice:

“Such a formulation however...in fact would result in greater difficulty in assessing the standard by which to judge the information which ought to be disclosed...and would result in greater degree of uncertainty...the myriad of *reasonable assureds* who could vary as widely as minor exporter/importer to multibillion dollar shipowning company.”¹⁰⁸

¹⁰⁶ *The Law Commission Report* 1980, Appendix A “Draft Insurance Reform Bill with explanatory notes”, clause 2(1)(b) (emphasis added).

¹⁰⁷ *Ibid.*, 49, [4.51] (emphasis added).

¹⁰⁸ Derrington, n.46 above, 82 (italics adapted from the original text). See similar line of opinion, albeit specifically expressed in marine insurance context, in Eggers, P.M., et al, *Good Faith and Insurance Contracts* (2nd ed., LLP, London 2004) 348, [14.22].

The Law Commission probably had only non-marine insurance in mind. In that context, as opposed to the marine insurance context, the reasonable assured might not be so difficult for the courts to identify. This is because non-marine insurance often follows the same pattern. For example, in motor insurance, the matters the assured needs to disclose and the insurer wants to know in assessing the risks are likely to be the condition of the car, and the assured's driving experience, including his previous driving convictions. The pattern is so recurring that the standard questions can be set out and proposal forms are thus widely used in a non-marine insurance context. Such forms become so general that you can even find them in some shopping centres nowadays. It is widely known among laymen. Thus, it might be possible to expect from the assured "to undertake his duty with reasonable care and skill..."¹⁰⁹ Once non-disclosure is alleged in litigation, the courts can seek further help from the jury who represents the views of the consumers.¹¹⁰ The same cannot be said for marine insurance. With the variants of the assured and the peculiarity of each marine risk, it will be very hard for the courts to acquire the opinion of the reasonable assured. Such view does not lie on the Clapham omnibus.

Despite how impracticable it is, this concept seems to be adopted in assessing materiality in a marine insurance context in South Africa. Following the judgment in the *Oudtshoorn Municipality* case (1985),¹¹¹ for some time there have been some doubts in which context or circumstance the hypothetical reasonable man is placed upon.¹¹² Such doubts received judicial response in a case before Sandi J. in the South Eastern Cape Local Division. That was in the *Potocnik* case (2003).¹¹³ In this case, the judge, after considering the *Oudtshoorn Municipality* case (1985), proceeded to say that "[t]he Court does not judge the issue from the subjective point of view of the plaintiff but from that of a *reasonable man in the*

¹⁰⁹ Park, n.6 above, 87.

¹¹⁰ *Ibid.*

¹¹¹ "It is implicit in the Roman-Dutch authorities and also in accordance with the general principles of our law that the Court applies the *reasonable man test*...The Court personifies the hypothetical *diligens paterfamilias*, i.e. the reasonable man or the average prudent person." *Oudtshoorn Municipality* (1985) 1 S.A. 419, 435, column F-G (emphasis added).

¹¹² See Kerr, A.J., "The Duty to Disclose in a Pre-Contractual Context-Good Faith and the Role of the Reasonable Man" (1985) 102 SALJ 611.

¹¹³ *Potocnik* 2003 (6) S.A. 559.

plaintiff's position."¹¹⁴ In this case, the plaintiff was the assured in a marine insurance contract. Thus, it seems that the judge accepted 'the reasonable man in the position of the assured' as a standard of materiality. It should be noted, however, that he neither gave any reasons nor analysed the advantages or disadvantages of such a standard. Moreover, this case had been handed down before the insertion of sub-section (b) into s.53(1) of the South African Short-Term Insurance Act 1998.¹¹⁵ In this sub-section, while the reference is made to the reasonable or prudent person, no circumstance is indicated. Nevertheless, the *Potocnik* case might influence the interpretation of s.53(1)(b) of the Short-Term Insurance Act.¹¹⁶

Given the fact that this case is not from the highest judicial authority, the application of the reasonable assured test in marine insurance law in South Africa thus remains to be seen.

Perhaps, the only benefit from applying the reasonable assured test is the effective abolition of the evidential prejudice that arises from the prudent insurer test.¹¹⁷ Still, it is necessary to weigh whether it is worthwhile to adopt the uncertainties in exchange for avoiding such prejudice. Surely, the concept of reasonable assured is not the only way to eliminate this. In the context of the ALRC's proposal, at least, one can ask further whether such evidential prejudice is totally abolished. The assured needs to disclose what he or a reasonable person knows to be material. But, whether what he knows is *really* material, still the view of the prudent insurer is needed. But, what does 'material' mean?

Overall, the ALRC's proposals can lead to some practical difficulties—from the identification of the reasonable assured, to the meaning of materiality, to the

¹¹⁴ *Potocnik* 2003 (6) S.A. 559, 567, column A (emphasis added).

¹¹⁵ Ombudsman for Short-Term Insurance, 'The Ombudsman's Brief Case' (Issue No.03/2004) <<http://www.ostil.co.za/newsltr0304.htm#Potocnik>> accessed 20 May 2005. The text of s.53(1)(b) of the Short-Term Insurance Act 1998 can be seen in Chapter 1 above, 32-33.

¹¹⁶ *Ibid.*

¹¹⁷ Park, n.6 above, 86-87.

question of proof. It does not seem to be a smooth road ahead if these are implemented. What then should be the duty of disclosure in marine insurance?

3.3. The resurrection of Lord Mansfield's perception of duty of disclosure

As mentioned from the beginning of this chapter, Lord Mansfield did not understand the duty of disclosure in the same sense that lawyers nowadays understand it. To begin this section, it might be wise for us to try to forget all that has been said above in relation to the duty of disclosure. To read what will follow, one should prepare to abandon the usual paradigm because arguably we have been under a misconception all along. What did Lord Mansfield intend to say about the duty of disclosure?

In *Carter v. Boehm* (1766), Lord Mansfield mentioned crucially:

“The special facts...lie...*in the knowledge of the insured only*...keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake...yet still the under-writer is deceived...”¹¹⁸

The passage above suggests that the assured has a duty to disclose a fact which is only in his *own* knowledge and the insurer has no means to know it. However, this is not all that Lord Mansfield told us.

After the above oft-cited passage, his Lordship concluded the rule on duty of disclosure in Latin terms.¹¹⁹ Surely, these phrases were not cited in vain. It is these terms which the post-Lord Mansfield authorities ignored. In reality, these words help clarifying the scope of the duty of disclosure.

¹¹⁸ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909 (emphasis added).

¹¹⁹ “*Aluid est celare; aluid tacere; neque enim id est celare quicquid reticeas; sed cum quod tu sias, id ignorare emolumenti tui causa veils eas, quorum interfit id faire.*” *Carter v. Boehm* (1766) 3 Burr. 1905, 1910.

As mentioned in Chapter 2, Lord Mansfield was influenced by the idea of natural law, especially from the work of Cicero. Unsurprisingly, these Latin terms originated from the classical literature of this scholar in Book III of the classical work *De Officiis*.¹²⁰ In paragraph 52, we find the phrase “*aluid est celare, aluid tacere*”, which is the opening of the Latin phrase quoted by his Lordship. This phrase means “[i]t is one thing to conceal...not to reveal is quite a different thing.”¹²¹ Lord Mansfield then quoted the rest from paragraph 57 which means:

“...the fact is that merely holding one’s peace about a thing does not constitute concealment, but *concealment consists in trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it.*”¹²²

But, these statements of Cicero need to be set in context. Two situations were in Cicero’s contemplation. In the first scenario, he raised the circumstances of the island of Rhodes which was desperately lacking food. The seller got some grain from Alexandria and was bound to Rhodes to sell them. While he was on his way, he saw other sellers also carrying grain from Alexandria, bound for the same destination. He did not tell the Rhodian people and thus sold his grain at “the highest market price”.¹²³ Another scenario is the seller of a house who puts in the advertisement to sell his house that it is in good condition, when in fact it is not.¹²⁴ Both examples are described by Cicero as the situation where “expediency may see to clash with moral rectitude.”¹²⁵

In both scenarios, one could not say with certainty that the vendors had any intention to deceive. In other words, one may not confidently accuse the vendors of fraudulent conduct in the strict sense. In the first case, provided that the sellers did not sell defective goods without telling the buyer, then, “he may try

¹²⁰ Cicero, T., *De Officiis* (William Heinemann Ltd, London 1913) (with an English translation by Walter Miller) 320-321 and 324-327, [52] and [57] respectively.

¹²¹ *Ibid.*, 320-321, [52].

¹²² *Ibid.*, 325-327 (emphasis added).

¹²³ *Ibid.*, 318-319, [50].

¹²⁴ *Ibid.*, 324-325, [55].

¹²⁵ *Ibid.*, 318-319, [50].

to sell them to the best possible advantage.”¹²⁶ For the second scenario, the argument is that “[in circumstances] where the purchaser may exercise his own judgment, what fraud can there be on the part of the vendor?”¹²⁷

Nevertheless, what is common in both cases is that the sellers had a deliberate intention not to let the buyers know the information when he realised that the buyers needed it. For example, the present author doubts whether Cicero would maintain the same in the first case if this land of Rhodes was not lacking food or that those Rhodians happened to know the coming of other vessels. In such a case, even if the seller concealed the availability of other lots of grain, his selling would just follow normal competitive rules. Similarly, in the second situation, if the buyer may observe the house before making his decision, the consequence would not be the same.

Transposing this consideration to non-disclosure in marine insurance law, at least a deliberate intention on the part of the assured is required. The assured needs to know that the insurer does not know of such facts and, like those Rhodians, the insurer has no means to acquire such facts. However, such facts are essential to the insurer’s consideration of risk. As Lord Justice Rix, writing extra-judicially, rightly observes, Lord Mansfield had in his mind at least a deliberate intention on the part of the assured.¹²⁸

Now, we are facing the exact same difficulty that Lord Justice Rix struggled with in his judgment in the Court of Appeal in *HIH v. Chase* (2001),¹²⁹ that is, whether deliberate concealment and fraudulent concealment are the same. In his judgment, Lord Mansfield did not seem to treat them interchangeably. But,

¹²⁶ *Ibid.*, 320-3210, [51].

¹²⁷ *Ibid.*, 324-325, [55].

¹²⁸ See Rix, L.J., “Good faith: To be or not to be?” Paper presented at the BILA’s President Lunch, 19 December 2001 attached as an Appendix B to the 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, 25, 27.

¹²⁹ *HIH Casualty and General Insurance Limited and Others v. Chase Manhattan Bank and Others* [2001] EWCA Civ. 1250; [2001] 2 Lloyd’s Rep. 483.

what is the difference? The author believes that the answer lies in what Lord Mansfield mentioned:

“Whether there was, under all circumstances at the time the policy was under-written, a fair representation, or a concealment; fraudulent, *if designed*; or, *though not designed*, varying materially the object of the policy, and changing the risk understood to be run.”¹³⁰

If the assured realised that the fact was one which the insurer could not know by any means of skills or investigation and the insurer would like to know it in assessing the risk, by not disclosing it, the assured conducts ‘deliberate concealment’. If such deliberate concealment, coupled with the intention that, by not knowing it, the insurer would understand the risk differently, that is the fraudulent concealment, because the assured *designed* the likely outcome of the insurer’s understanding in advance. As Rix L.J. mentioned,

“The matter may be deliberately concealed in the honest but mistaken belief that it is not relevant or material...”¹³¹

Thus, the difference between deliberate concealment and fraudulent concealment is only marginal and, indeed, the former alone cannot lead the insurer to be entitled to avoid the contract. To be able to do so, the insurer must prove that the consequence of such deliberate concealment is the same as that of fraudulent concealment, as Lord Mansfield said, the insurer was *deceived*,¹³² i.e. the insurer understood the risk differently.

Overall, the law on the duty of disclosure as set out by Lord Mansfield is that the assured has a duty to disclose facts relating to the risk which he *realises* that the insurer does not have any means to get to know and that the insurer would want to know it in assessing the risk. There is no concept of prudent insurer. Of course, one might be concerned with the individuality attached to the concept, i.e.

¹³⁰ *Carter v. Boehm* (1766) 3 Burr. 1905, 1911 (emphasis added).

¹³¹ *HIH* [2001] 2 Lloyd’s Rep. 483, 514, [165].

¹³² *Carter v. Boehm* (1766) 3 Burr. 1905, 1909.

the extent of the ability of each insurer to investigate the facts can be different, and thus the scope of the duty of disclosure by the assured can then be varied. But, this should not be a great concern because, as observed earlier,¹³³ generally the broker and the insurer know each other and thus the broker is in the best position to advise the assured of what should be disclosed. Moreover, once the insurer alleges non-disclosure, he is the person who needs to prove that he cannot investigate such facts and the assured realised this. Obviously, such proof is not at all easy for the insurer. He then, to be able to avoid the contract, needs to prove further, in the sense of inducement, that if he knew of such undisclosed facts, he would not have written the risk on the terms he did.

But, what if the assured *innocently* believed that the fact is not important at all for the insurer and thus he did not disclose it, but then it appeared later on that non-disclosure of such facts led the insurer to understand the risk differently? Should the insurer be able to avoid the contract? As described above, from what Cicero explained, non-disclosure can only occur by *deliberate* intention. Thus, an innocent non-disclosure in the sense of not realising what the insurer may need to know is out of context for the remedy of avoidance to operate. However, a deliberate concealment can be *innocently* made. The assured realises that the insurer does not have means to acquire such information and he knows that the insurer wants it in considering the risk, but, either *innocently* or *negligently*, he does not feel that such facts will ultimately affect the insurer's calculation of risk. He therefore does not disclose it. In these circumstances, he does not have a fraudulent intention. The aim of the law is to punish the assured who has 'moral guilt' and *no more*. Thus, the law does not touch upon innocent non-disclosure without deliberate intention.

Now, as the law on duty of disclosure is described above, one might attack it from the practical perspective that it might not be so possible for the assured to realise what the insurer cannot investigate but the insurer wants to know. It is submitted also that this is not a matter of concern as the insurer can investigate

¹³³ Above, 90.

and he can further ask the assured directly of the matters he does not know. In the context of marine insurance in particular, the assured is a businessman. True, the assured never underwrites the risk, but, at least, he has some ideas of what might be relevant to the risk, and he should prepare for that information to be handed in to the insurer if he is requested to do so. This does not include the role of the professional broker in this context.

Still, one might argue further that such a rule on the duty of disclosure would surely cause hardship to the insurer who will have an extremely heavy burden of proof. He may suffer loss due to the undisclosed fact and yet he still needs to prove that the assured realised that the insurer would like to know of it. Especially, a strong ground of argument can be that it is unlikely that Lord Mansfield would expect an insurer of his time to investigate almost all the facts, which would have been difficult. But, it is equally unfair to impose a duty on the assured to disclose what he does not realise that the insurer requires. Especially, with the harsh remedy of avoidance, Lord Mansfield surely did not aim it to be applied to a person free from moral guilt.

3.4. Conclusion

One can see that the law on duty of disclosure as Lord Mansfield intended to proclaim it has been misunderstood and distorted to a great extent. Such misconception has existed in the UK for over one-hundred years, given that the law pre-dated the Act. Without realising this, Australia closely followed the UK on this point. When the reform of the MIA 1909 (Cth) was suggested, however, it is revealed that no one seemed to be alarmed by such departure from Lord Mansfield's original intention and thus the recommendation of the ALRC are likely to complicate the matter even further.

The duty of disclosure is tied together with the perceived notion of good faith. This was in the mind of Lord Mansfield. Of course, fairness must be judged in light of the particular parties involved. What need is there to bring in the

external concepts of prudent insurer or reasonable assured? While the former is clearly unjust, the latter is hard to comprehend. The characteristic of such reasonable man in the position of the assured cannot be clearly ascertained. So far as the question of materiality is concerned, such reasonable assured formulation, according to the proposal in Australia, does not seem to be so relevant.

Without realising the misconception, the discourse goes further in both the UK and in Australia, where the degree of influence upon the prudent insurer has been discussed. With due respect, this is all the assumption out of the fiction. There is no such thing as a prudent insurer and neither the parties nor the judges can accurately probe what this hypothetical person thinks. Upon the language of the MIA 1906, a wide interpretation of the degree of influence is given which then leads further to the unrealistic burden of the assured to disclose. However, the courts cannot be blamed for this as the language of the Act is rather clear on this point.

Nevertheless, the fact is that the Act followed previous authorities. Perhaps, it might be that judges in those cases had overlooked the meaning behind the Latin phrases cited by Lord Mansfield in his judgment. Of course, it can be rather illogical for one to conclude that his Lordship did cite those Latin terms in vain. Indeed, those terms significantly clarified his speech.

Within the underlying philosophy of good faith, Lord Mansfield envisaged non-disclosure or what he called 'concealment' to have some element of moral guilt on the part of the person in breach. As a result, he imposed the most severe remedy for such failure to disclose. He never envisaged that such remedy of avoidance would be applied to a person whose morality was not in question. The conduct of both parties need to be examined: what the assured knows and what he realises that the insurer does not know; and what the insurer can investigate and what he cannot possibly acquire. It was only such facts that Lord Mansfield intended the assured to disclose and *no further*. Looking from this angle, as shall be seen in the next chapter, the existing remedy of avoidance is *justifiable*.

Chapter 4: Consequences of the breach of the duty of disclosure

When the assured fails to disclose, and the undisclosed fact induces the insurer to enter into the contract, it is stated in s.18(1) of the MIA 1906 that the insurer can avoid the contract. This is the only remedy available for breach of the duty of disclosure. Due to the misconception regarding the scope of the duty of disclosure discussed in Chapter 3, this remedy has been applied and seen in quite a harsh manner and has been even condemned on the basis that it is “unnecessarily severe”.¹

The primary aim of this chapter is to argue that, if the correct understanding of the law is re-instated, the current remedy of avoidance would not be inappropriate. It will start in the first section with a brief overview of the current remedy system for breach of the duty of disclosure in the UK and also its problems. Two important features of the system will be examined. These are the fact that avoidance is the sole remedy stipulated in the Act and the rejection of damages as a remedy by the courts - even in some (seemingly) appropriate circumstances when such a remedy should exist.² This will only be an introduction to the nature of the problems within the system. More detailed analysis will run throughout the chapter. Then, in the second section of the chapter, the judicial role in solving the problems arising from the remedy system will be explored. It will mainly ask whether such judicial approach is solving or aggravating the problems. This includes an examination of the recent attitude and action the Court of Appeal took in the important case of *Drake Insurance v. Provident Insurance* (2003)³ and an analysis of the theoretical question as to

¹ The United Nations Conference on Trade and Development (UNCTAD), ‘Legal and documentary aspects of the marine insurance contract’, United Nations Publication, New York, 1982, TD/B/C.4/ISL/27/Rev.1, <<http://r0.unctad.org/ttl/docs-legal/rep-doc/Legal%20and%20Documentary%20Aspects%20of%20the%20Marine%20Insurance%20Contract.pdf>> accessed 9 July 2005, 20, [106].

² See *La Banque Financiere de la Cite S.A.* (Formerly named *Banque Keyser Ullman En Suisse S.A.*) v. *Westgate Insurance Co.Ltd.* (Formerly named *Hodge General & Mercantile Insurance Co.Ltd.*) [1988] 2 Lloyd’s Rep. 513 (Court of Appeal) affirmed by *La Banque Financiere de la Cite S.A.* (Formerly *Banque Keyser Ullman En Suisse S.A.*) v. *Skandia (UK.) Insurance Co.Ltd.* *Westgate Insurance Co.Ltd.* (Formerly *Hodge General & Mercantile Insurance Co.Ltd.*) and *Others* [1990] 2 Lloyd’s Rep. 377 (House of Lords).

³ *Drake Insurance Plc v. Provident Insurance Plc.* [2003] EWCA Civ. 1834; [2004] 1 Lloyd’s Rep. 268.

whether the courts should maintain discretion in granting avoidance.⁴ Then, in the third section, the main challenge to the current remedy regime in the UK will be considered. This is the proposal of the Australian Law Reform Commission (ALRC) to reform the similar provision in the Marine Insurance Act 1909 (Cth), an idea which appears to be partly derived from the Norwegian Marine Insurance Plan of 1996.⁵ This chapter will argue, however, that this proposal ultimately appears to ‘deform’ rather than reform the law because this proposal is still based on the incorrect paradigm. Ultimately, in the final section, the author will present the resurrection of the remedy system in the UK based upon the correct paradigm.

4.1. Remedy system for non-disclosure in the UK

As mentioned above, this part will focus on two issues: the remedy of avoidance and the unavailability of damages.

4.1.1. Avoidance

Whilst the language of the Act is ‘avoidance’, this remedy is sometimes referred to as ‘rescission’.⁶ However, rescission can have many meanings and thus the use of such term may lead to confusion.⁷ Mostly, in general contract law, however, rescission is used in the sense of termination of contract with prospective effect.⁸ However, this term may be used in a sense of ‘voidable’⁹ and, in this work, unless otherwise stated, the reference to ‘rescission’ is used in this sense of meaning. It is submitted that the term ‘voidable’ should be used to avoid confusion as, in case of non-disclosure, it is a *right* of the party who was prejudiced by such breach, usually the insurer, to choose to avoid the contract, except if he had chosen to

⁴ See generally Clarke, M., “Refusing Rescission? Contracts of Utmost Bad Faith” [2003] CLJ 556; Eggers, P.M., “Remedies for the failure to observe the utmost good faith” [2003] LMCLQ 249.

⁵ Derrington, S.C., “Marine Insurance law in Australia: the Australian Law Reform Commission proposals” [2003] LMCLQ 214.

⁶ Clarke, M.A., *The Law of Insurance Contracts* (4th ed., LLP, London 2002) 763, [23-17C].

⁷ For detailed explanation of rescission, see Beale, H.G., et al (eds), *Chitty on Contracts Volume 1 General Principles* (29th ed., Sweet & Maxwell, London 2004) 1293-1294, [22-025]-[22-026].

⁸ *Ibid.*, 1294, [22-026].

⁹ See Martin, E.A. (ed.), *A Dictionary of Law* (4th ed., Oxford University Press, Oxford 1997) 400 and 494.

waive such information¹⁰ or affirm the non-disclosure.¹¹ If the insurer chooses to avoid, the contract is treated as if it was never made.¹² The effect of this is essentially stated further in s.84(3)(a) of the Act to be:

“(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured...”

Thus, the premium already paid by the assured to the insurer must be returned, except in a case of fraudulent non-disclosure. In turn, the assured must also return to the insurer any payment made by the insurer for loss previously claimed for under the same contract. Moreover, the insurer is discharged from paying out for any prospective claims.¹³ To be able to avoid the contract, causation is not a requirement. Thus, the insurer does not have to show that the loss - prior or subsequent - occurred due to the undisclosed facts. Such consequence is too harsh. As best summarised by Baatz:

“The right to avoid the contract is an extremely draconian remedy. *It does not, in any way, depend on the fault of the party in breach of the duty...* Thus the marine insurance contract differs from the commercial contract in that first there is an obligation to disclose material facts prior to the conclusion of the contract. Secondly...the remedy for non-disclosure is always rescission.”¹⁴

¹⁰ Before the insurance contract is concluded, the insurer may waive, i.e. shows that he does not require the information. Such waiver may appear in two forms. First, the insurer might accept the total or limited duty of disclosure by the assured, for example, by asking limited questions. Such questions may imply the intention to waive the information. Secondly, the insurer, by his act, might indicate that he does not require further information. See Clarke, n.6 above, 740-743, [23-11]-[23-12B] See *WISE (Underwriting Agency) Ltd v. Grupo Nacional Provincial S.A.* [2004] EWCA Civ. 962; [2004] 2 Lloyd's Rep. 483.

¹¹ Affirmation, or sometimes known as 'waiver of the right to rescind' or 'election not to rescind' is when the insurer knowing of all the facts undisclosed clearly indicates to the assured that he will not rescind the contract due to such non-disclosure. See *ibid.*, 764-769, [23-18]-[23-18B3].

¹² Park, S., *The Duty of Disclosure in Insurance Law* (Dartmouth Publishing Limited, Hants 1996) 12.

¹³ *Ibid.*

¹⁴ Baatz, Y., "Utmost Good Faith in Marine Insurance Contracts" in Huybrechts, M., et al (eds), *Marine Insurance at the turn of the Millenium Volume 1* (Intersentia, Antwerp 1999) 15, 25.

Avoidance also operates regardless of the degree of culpability of the assured. The consequence appears to be particularly severe when non-disclosure was *innocently* made. To clarify this, an illustration will be provided.

Suppose that X wants to insure a ship against loss with Y, an underwriter. He might disclose all information regarding his ship and the fire-fighting equipment on board the ship. Following such disclosure to the satisfaction of Y, the policy was issued. Within the policy year, a fire occurred while the ship sailed from the UK to the USA. The assured claimed from the insurer and the insurer paid for the claim. Subsequently, within the same policy year, the ship was damaged while it sailed from the UK to Turkey. X got the ship repaired and then claimed for the costs of repair from the insurer. Unlike last event, this time the insurer refused to pay and, instead, sought to avoid the contract on grounds of non-disclosure that the assured failed to inform him of the repair to the fire-fighting system that had been done two years prior to the conclusion of the contract. The assured might not think that such facts need to be disclosed because it had happened long before the conclusion of the insurance contract and, at that time, the old machine had been replaced by the new and modern machines. Moreover, the vessel was damaged due to the storm, *not* the failure of the fire-fighting system. Unfortunately, the significance of the undisclosed facts is not judged upon his view, but that of the 'prudent insurer'.

If the expert witnesses who represented the views of the prudent insurer insisted that they would like to know the facts about the repair to the fire-fighting system, such facts become material facts which the assured must disclose. If Y can prove that, if he had known of such repair, he would not have entered into the contract on the terms he did, then, Y is entitled to avoid the contract. The consequence of the avoidance is retrospective, i.e. from the beginning of the contract, so-called avoidance *ab initio*. The insurer has to return the premiums to the assured. The assured needs to return any payment made by the insurer in respect of earlier claims under the same contract. Thus, he needs to return the payment made earlier by the insurer for the damage to the ship caused by fire

during the last voyage to the USA. The insurer does not have to pay for the loss caused by storm during the voyage to Turkey. Among other things, the contract is treated as it has never existed so - from the time of avoidance - the assured *loses* the insurance cover for his ship.

We should not forget that the above consequence can happen following *innocent* non-disclosure by the assured. But, sometimes a far-reaching effect may fall upon an innocent *third* party. This is what UNCTAD pointed out in its report which examined the marine insurance legal system in the UK.¹⁵ Imagine the scenario in cargo insurance. The cargoes were sold en route and the insurance policy in respect of the goods being assigned to the buyer. The cargoes, on the way to the buyer, were lost. The buyer thus claimed from the insurer and then the insurer sought to avoid the contract on grounds of non-disclosure by the seller, who was the previous policy holder.¹⁶ Of course, the result does not seem to be *fair*.

The worst consequence the remedy of avoidance can bring is, perhaps, when non-disclosure was caused by the insurer, and the assured was a person who suffered. In such a case, it appears that the assured does not have any other remedies apart from choosing to avoid the contract, which obviously he does not want to do as he would lose his cover.

What has been said so far above is just an introduction to the remedy of avoidance. Further details of it, especially its nature, will be gradually dealt with in this chapter.

4.1.2. Damages

In certain circumstances, especially non-disclosure by the *insurer*, damages would be an ideal remedy as the most unwanted situation for the assured is to lose his

¹⁵ See the United Nations Conference on Trade and Development, n.1 above.

¹⁶ See *ibid.*, 20, [105].

cover. If the assured chooses not to avoid the contract, he presently has no remedy at all for breach of the duty of disclosure by the insurer.

This was what happened in *Banque Keyser Ullman v. Skandia* (1987).¹⁷ The brief facts were that the insurer knew of the dishonesty of the broker but he did not tell the banks which were named as the assureds. By failing to do so, the banks advanced large sums of monies for loans.¹⁸ The banks thus claimed under credit insurance from the insurer but the insurer denied liability on the grounds that the insurer did not cover the loss caused by fraud and, in this case, the loss of the banks was caused by an individual who managed to extract the monies from the banks.¹⁹ As such, the banks sought to allege non-disclosure on the part of the insurer and claimed damages.²⁰ Mr. Justice Steyn (as he then was) at the first instance was convinced by the loss suffered by the banks and went on to award damages on the basis that:

“The question whether an action for damages lies for breach of the obligation of the utmost good faith in an insurance context must be considered from the point of view of legal principle and policy...*avoidance of a policy and a claim for return of the premium will be a wholly ineffective remedy if the breach of the duty of the utmost good faith by the insurer caused the insured to be unprotected and exposed to great loss.*”²¹

It appears to be fair in this particular case for damages to be awarded if one considers the banks' loss. The Court of Appeal came to overturn this decision upon some dubious reasons.

First, it said that avoidance in non-disclosure is derived from equitable jurisdiction.²² The right to avoid the contract in case of duress and undue

¹⁷ *Banque Keyser Ullman v. Skandia (UK) Insurance Co. Ltd. and Others* [1987] 1 Lloyd's Rep. 69.

¹⁸ See *Skandia* [1987] 1 Lloyd's Rep. 69, 72-74.

¹⁹ *Skandia* [1987] 1 Lloyd's Rep. 69, 72.

²⁰ *Skandia* [1987] 1 Lloyd's Rep. 69, 96.

²¹ *Skandia* [1987] 1 Lloyd's Rep. 69, 96 (emphasis added).

²² “...part of English law originally administered by the Lord Chancellor and later by the Court of Chancery, as distinct from that administered by the courts of common law...Under the Judicature

influence also stemmed from the same source. Since damages are not available in case of duress or undue influence, they should also not be available in non-disclosure.²³ To maintain this, the Court of Appeal heavily relied on the passage of Lord Justice Luxmore in *Merchants & Manufacturers v. Hunt* (1941),²⁴ which, with respect, seemed to be *irrelevant*. It is out of context as Lord Justice Luxmore expressed that passage in the context of misrepresentation. As explained earlier,²⁵ the law on misrepresentation has been developed in both general contract law and the law of insurance, while the duty of disclosure has not been through the same history. What Lord Justice Luxmore mentioned in relation to misrepresentation cannot be applied to non-disclosure by default. As his Lordship himself carefully pronounced,

“*Whatever may be the position with regard to non-disclosure...I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, depends not on any implied term of the contract but arises by reason of the jurisdiction originally exercised by the Courts of Equity.*”²⁶

While the Court of Appeal expressed its opinion that avoidance in non-disclosure originated from the same source,²⁷ it completely failed to present any historical evidence to support. This can only be seen as quite a *loose* assertion, however.

Surely, Lord Justice Luxmore was cautious in assuming that avoidance for non-disclosure shared the same origin. Park argues that the Court of Appeal clearly erred on this point.²⁸ He explains that the duty of utmost good faith is derived from the jurisdiction of the common law courts and damages were

Acts 1873-75, with the establishment of the High Court of Justice to administer both common law and equity, the Court of Chancery was abolished...” Martin, n.9 above, 167.

²³ *Westgate* [1988] 2 Lloyd’s Rep. 513, 549.

²⁴ *Merchants and Manufacturers Insurance Company, Limited v. Charles and John Hunt (an infant) and Percy Thorne and Matilda Thorne* [1941] 1 K.B. 295.

²⁵ See Chapter 2 above, 61.

²⁶ *Merchants and Manufacturers* [1941] 1 K.B. 295, 318 (emphasis added).

²⁷ *Westgate* [1988] 2 Lloyd’s Rep. 513, 549.

²⁸ Park, n.12 above, 209.

available in common law.²⁹ But, of course, one cannot rely solely on the fact that Lord Mansfield sat in the King's Bench Division at the time when *Carter v. Boehm* (1766) was proclaimed to say that avoidance for non-disclosure was derived from common law. Indeed, the origin of the remedy of avoidance for non-disclosure seems to be blurred. As Yeo observes, in delivering the judgment, Lord Mansfield often took some principles from the law merchant and mixed them with common law. The Court of Equity was also influenced by this law merchant.³⁰ As such, the origin is not at all clear.

Even if we proceed on the basis that avoidance for non-disclosure is derived from the equitable jurisdiction, there appears to be room to argue that damages can be available. The equitable jurisdiction as exercised by the Court of Equity was already merged with that of the Common Law Court by the result of the Judicature Act 1873.³¹ Since then, the division of the jurisdictions was abolished and the High Court of Justice, which can exercise both common law and equity, was set up.³² Thus, Davenport argues,

“How can anyone sensibly justify an English insurance policy to a foreign would-be user by explaining that the obligation to make full disclosure is still solely based upon the special powers of some separate system of courts which has not existed over a century?”³³

The above passage warns us not to stick to history. But, the passage itself is not without an argument. The Judicature Act 1873 only had an effect on the power of the courts but not the rules of law. “It...assumes the continued existence of separate bodies of rules...”³⁴ Thus, if the remedy of avoidance is really based on equity, it seems inevitable that the complicated history of equitable doctrine needs

²⁹ *Ibid.*

³⁰ Yeo, H.Y., “Of reciprocity and remedies-duty of disclosure in insurance contracts” (1991) 11 *Legal Studies* 131, 152.

³¹ Meagher, R.P., et al, *Equity Doctrines and Remedies* (2nd ed., Butterworths, Sydney 1984) 36-37, [201]-[203].

³² *Ibid.*, 38, [203].

³³ Davenport, B.J., “The Duty of Disclosure *La Banque Financiere v. Westgate; The Good Luck*” [1989] LMCLQ 251, 258.

³⁴ Meagher et al, n.31 above, 43, [214].

to be explained to the foreign prospective user of the policy. The English lawyers should be fairly familiar with the confusion caused by the previous existence of the common law rules and equity since such muddle also surfaces in many areas of English law. Nevertheless, within the context of non-disclosure in insurance law, its origin is inconclusive.

In criticising the judgment of the Court of Appeal above, Davenport appears to suggest that the historical part should be discarded. In his words, "...in 1988, it was surely possible to examine a fundamental insurance problem using the analytical tools now available, tools very different from those available 200 years ago."³⁵ What is meant by "the analytical tools now available"? Davenport does not describe such tools. Perhaps such tools can be the broad consideration of good faith and fair dealing as recognised by Mr. Justice Steyn at first instance. The Court of Appeal would not reach such a conclusion if it took into account the broad perspective of fairness and justice.

However, one can understand that the Court of Appeal followed the above path in order to reject the submission of the banks' counsel that the duty of utmost good faith is an implied term of the contract. As the Court of Appeal recognised, damages should be certainly available if the duty of utmost good faith is based upon implied terms.³⁶ In view of the Court, damages are only available in contract, by statute, in the parties' fiduciary relationship, and in tort.³⁷ Damages imposed by the statute do not concern us here. Damages available in contract were already rejected.³⁸ So, we are left with damages in fiduciary relationship and in tort. The former can be dealt with rather shortly even though it is suggested by Birds that an insurance contract has a "quasi-fiduciary nature".³⁹ This basis is doubtful. More can be said for the damages available in tort even though the Court of

³⁵ Davenport, n.33 above, 258.

³⁶ *Westgate* [1988] 2 Lloyd's Rep. 513, 548.

³⁷ *Westgate* [1988] 2 Lloyd's Rep. 513, 550.

³⁸ Although, it *may be* possible for the parties to agree 'damages' as remedy for breach of non-disclosure and thus agree to exclude the remedy of avoidance. This is because the courts recognised freedom of contract. See Introduction above, 7.

³⁹ Birds, J., "Insurers not liable in damages for failure to disclose" [1988] JBL 421,423.

Appeal advanced three reasons to insist that a *novel* heading of tort for breach of utmost good faith should not be created.⁴⁰

(a) Damages available on the basis of a fiduciary relationship

Damages rested upon this ground appear to be strongly advanced by Matthews.⁴¹ With respect, however, he struggles in trying to justify this view. His confidence lies solely in one kind of insurance, namely liability insurance.⁴²

First, Matthews explains the fiduciary relationship as:

“...a fiduciary relationship occurs (in a broad sense) when one person is entrusted with some power by another, which power will in some material way affect that other once it is exercised.”⁴³

Influenced by an idea from American law, he insists that a liability insurer owes a fiduciary duty to the insured “...at least in cases where the insurer had powers to take over the insured’s legal defence and to settle claims made against him”.⁴⁴ Turning to credit insurance, as in the *Skandia* case (1987), he seems not so certain with his explanation. In his words,

“It *may be* that, where a potential lender is looking to an insurer for guarantee insurance, and the insurer knows that the lender will not lend without such insurance, the insurer could be said to be in a position of power *vis-à-vis* the lender: effectively he has the power either to prevent the loan or to allow it to go ahead...In failing to pass on information which it is material for the insured to know, the insurer is allowing his duty to the insured (it may be argued) to conflict with his interest in receiving the

⁴⁰ See *Westgate* [1988] 2 Lloyd’s Rep. 513, 550.

⁴¹ Matthews, P., “Uberrima Fides in Modern Insurance Law” in Rose, F.D. (ed), *New Foundations for Insurance Law Current Legal Problems* (Stevens & Sons, London 1987) 39.

⁴² See *ibid.*, 42-43.

⁴³ *Ibid.*, 42.

⁴⁴ *Ibid.*, 43.

premium, a classic characteristic of breaches of fiduciary duty.”⁴⁵

The problem is he does not cite any authorities to support the above view, not even American authorities. In addition, this work of Matthews had been written prior to the Court of Appeal’s decision in the *Skandia* case (1988). Indeed, Matthews admitted in his work that if the duty of utmost good faith is not based upon a fiduciary relationship, then it might originate from equity.⁴⁶ The latter is what the Court of Appeal held. Thus, it might be difficult to really base damages upon a fiduciary relationship.

(b) Damages available on the basis of tort

In addition to the assumption made in respect of the origin of the remedy of avoidance in non-disclosure, the Court of Appeal in the *Skandia* litigation (1988) made a further assumption in respect of the intention of those who engaged in enacting the 1906 statute:

“...the clear inference from the 1906 Act is that Parliament did not contemplate that a breach of the obligation would give rise to a claim for damages in the case of such contracts.”⁴⁷

Perhaps, the situation as in the case before the Court of Appeal did not present itself to the mind of Chalmers or those Members of the Parliament at that time. Otherwise, we might see damages as one of the remedies available in s.17. But, can the language of the Act be seen as conclusive for every matter? Davenport argues that since the Act, like other pieces of legislation drafted by Chalmers, is merely the codification of existing case law, no Parliamentary intention can be extracted from such language.⁴⁸

⁴⁵ *Ibid.*, 44 (emphasis added).

⁴⁶ *Ibid.*, 45.

⁴⁷ *Westgate* [1988] 2 Lloyd’s Rep. 513, 550.

⁴⁸ Davenport, n.33 above, 258.

Upon considering the argument of Davenport, one would be reminded of the parallel history of the Bills of Exchange Act 1882, another statute drafted by Chalmers. A comment made by Lord Herschell in the House of Lords in *Bank of England v. Vagliano Brothers* (1891)⁴⁹ is of interest to us. His Lordship said,

“One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act *was certainly not intended to be merely a code of existing law*. It is not open to question that *it was intended to alter, and did alter it in certain respects*. And I do not think that *it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment*.”⁵⁰

Some weight needs to be attached to the above remark of Lord Herschell given the fact that he was a mentor of the draftsman and the draft Bill of the Marine Insurance Act was first introduced to the House of Lords by him in 1894.⁵¹ Even though one might interpret the MIA 1906 from its language without going through the bulk of previous authorities and the intention of Parliament might be deemed from such language, there is room to argue that the legislators did not aim for damages as a ‘contractual’ remedy for breach of the duty of disclosure. As the Act governs only contractual matters, it was not concerned with tort, which is *extra-contractual*. From this point, the Court of Appeal did not seem to be barred by the language of the statute.

Apart from the above two reasons, one of origin and one of parliamentary intention, the Court of Appeal advanced a third reason why damages should not be available. It said that material non-disclosure is based upon the view of the prudent insurer or prudent assured. The Court does not concern itself with the effect of non-disclosure upon the *actual* assured or *actual* insurer. As such, how

⁴⁹ *The Governor and Company of The Bank of England v. Vagliano Brothers* [1891] A.C. 107.

⁵⁰ *Vagliano* [1891] A.C. 107, 145 (emphasis added).

⁵¹ “Chalmers, having been called to the bar in 1869, joined Sir Farrer Herschell QC’s chambers...in 1875...” Eggers, P.M., “The Marine Insurance Act 1906: Judicial Attitudes and Innovation: Time for Reform?” (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 1 July 2005).

damages would be assessed and awarded is questionable.⁵² This reasoning of the Court of Appeal surely cannot stand against the present state of authority. The judgment in this case had been handed down before the House of Lords in *Pan Atlantic v. Pine Top* (1994)⁵³ found the requirement of inducement to be implicit in s.18 of the Act.⁵⁴ From 1994 onwards, the courts need to assess the impact of non-disclosure on the *actual* insurer. By the same token, since the insurer's duty of disclosure is merely an analogy from s.18,⁵⁵ it is safe to assume that the inducement is also implicit in s.17 in relation to the insurer's non-disclosure. Following this, the courts also have to look into the impact of non-disclosure on the *actual* assured. As such, how can it be difficult for damages to be assessed?

Finally, as the fourth reason, the Court of Appeal said that the award of damages could cause some difficulties to the insurer or the assured because the duty of disclosure rests on that party regardless of his intention. So that,

“An insured who had in complete innocence failed to disclose a material fact when making an insurance proposal might find himself subsequently faced with a claim by the insurer for a substantially increased premium by way of damages before any event had occurred which gave rise to a claim.”⁵⁶

The above reasoning is expressed on the basis of reciprocity in the sense that, if damages can be available for the assured, it must equally be available for the insurer. As far as tort is concerned, the rationale for the imposition of damages is to “compensate the claimant for the losses...sustained as a result of the defendant's tort.”⁵⁷ The aim of damages in tort is to put the claimant back into the same position he would have been if the tort had not been committed.⁵⁸

⁵² *Westgate* [1988] 2 Lloyd's Rep. 513, 550.

⁵³ *Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Insurance Co. Ltd.* [1994] 2 Lloyd's Rep. 427.

⁵⁴ *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 452.

⁵⁵ See Chapter 2 above, 57.

⁵⁶ *Westgate* [1988] 2 Lloyd's Rep. 513, 550.

⁵⁷ Dugdale, M.A., et al (eds), *Clerk & Lindsell on Torts* (19th ed., Sweet & Maxwell, London 2006) 1803, [29-06].

⁵⁸ *Ibid.*

Transposing this into insurance law, assuming that a tort for breach of utmost good faith is available, the insurer perhaps can claim damages which reflect the discrepancy between the rate of premiums he has charged and the rate he would have charged if he had known of the undisclosed matters. And, as Yeo argues, this result is unsurprising. In her words,

“...one could argue from another perspective that this was only fair since the additional premiums were after all just payment for the services rendered (ie coverage of probably increased risk in the light of the new information hitherto undisclosed). If on the contrary the insured was not made to pay the additional premiums, he would then be unjustly enriched.”⁵⁹

Moreover, even though the insurer may advance the claims in tort, it does not mean that he will get the exact amount of monies which he advanced for. In the end, it is the courts who will adjust damages pursuant to the notion of “fair reasonable and just”.⁶⁰ One of the factors the courts will take into account is the chance and ability of the insurer to ‘mitigate’ such loss. This means damages are unrecoverable if it is found that the insurer might reasonably have prevented such losses.⁶¹ The question is whether the insurer can eventually recover anything if the courts found that he would *not* have misunderstood the risk and miscalculated the premium if he had taken an active approach in investigating the facts when the insurance contract was about to be concluded and that he did not *blindly* believe in the facts he received from the assured. He might have known of the undisclosed matters if he had carried out the proper investigation and not just sat in his office. It is this consideration that will engage the courts in assessing the insurer’s actual and potential ability to know the facts. Thus it is suggested that the duty of the assured to disclose should be limited to *what* the insurer cannot find out by any means. Thus, liability in tort may not really incur as great a hardship for the assured as it superficially seems.

⁵⁹ Yeo, n.30 above, 150.

⁶⁰ Dugdale et al, n.57 above, 1803, [29-06].

⁶¹ *Ibid.*, 1805, [29-08].

Turning to the case of non-disclosure by the insurer which is our prime concern here, in such a case, damages present the best remedy for the assured. As Park rightly mentions, the most unwanted situation for the assured is to lose his insurance cover. The assured normally desires to claim the loss he suffered from the insurer and also anticipates that future loss will be covered by the policy.⁶² While avoidance of the contract cannot respond to such a desire, damages can. A similar line of opinion is expressed by Eggers: “[i]t is difficult to imagine a circumstance where the award of damages will cause more hardship than the lack of a remedy.”⁶³

All the reasons relied upon by the Court of Appeal in the *Skandia* case (1988) to refuse to create a tort in respect of the duty of utmost good faith appear to be debatable. So, should there be such a tort? Speaking of the facts in this particular case before the Court of Appeal, it might be appropriate for a tort to be established. But, such a case may only once in a while.⁶⁴ In the broader context, the problem is that if such a tort is created, the question of the interrelationship between the right of avoidance and damages in tort might be asked. Can the assured choose either to avoid *or* to claim in tort, or does he have to avoid *and* claim damages? The question can be put in case of non-disclosure by insurer and assured alike. Eggers suggests how damages should come into play even though he does not seem to base damages on the notion of tort. He says,

“...it is suggested that the court should recognize an entitlement to damages in the event of a breach of the duty of utmost good faith. Whether or not damages should be available *instead of or in addition to* avoidance of the insurance contract will depend on the full analysis of the circumstance of the case.”⁶⁵

This seems to suggest whether damages will be an addition to or a substitution for the remedy of avoidance should depend on each factual circumstance in the case.

⁶² Park, n.12 above, 209.

⁶³ Eggers, n.4 above, 276.

⁶⁴ Davenport, n.33 above, 260.

⁶⁵ Eggers, n.4 above, 277 (emphasis added).

This will be an appropriate solution only when the suggestion of Eggers to the effect that the courts should have discretion to grant avoidance is endorsed.⁶⁶ Otherwise, it is likely that avoidance is surely available in non-disclosure. Damages can only be an addition to it. This may not render justice in most cases. Whether the courts should have discretion in granting avoidance will be considered below.

In the light of the courts' willingness to award damages in certain categories of cases, tort presents the best candidate as a basis since there appears to be no restriction for creation of new torts. As recognised by the learned editors of *Halsbury's Laws of England*, "...it seems indisputable that from time to time in the past *the common law has recognised new duties and liabilities and has the capacity to do so in the future...*"⁶⁷

However, one needs to be reminded that the above analysis is conducted on the assumption that the bases for the availability of damages are confined to contract, statute, fiduciary duty, and tort. One might question, however, that it might be too rigid an approach to confine the availability of damages upon a certain category. As Eggers argues, it is neither a doctrine nor a principle that damages need to be so confined.⁶⁸ As pointed out in Chapter 2, the broad doctrine of good faith itself should form an appropriate basis for imposing any remedies which a court sees fit in each particular circumstance because this doctrine is based upon the wide notion of 'fairness'.

Before this part ends, a few observations should be made. First, in some circumstances such as in the *Skandia* case (1988), where non-disclosure by the insurer caused the assured great loss, it appears to be appropriate to award damages as the alternative to avoidance. To avoid the contract, the assured normally can get only the return of premiums, which is "a paltry sum when compared with the compensation that the insured would have otherwise been

⁶⁶ See *Ibid*.

⁶⁷ *Halsbury's Laws of England*, Volume 45(2), 4th ed. (Reissue), 222, [302] (emphasis added).

⁶⁸ Eggers, n.4 above, 275.

entitled to under the policy”.⁶⁹ Conversely, in case of non-disclosure by the assured, it seems that avoidance is an adequate remedy for the insurer. He only has to return premiums.⁷⁰ He does not have to pay for the claims and he will not have to pay for the claims. But, such a situation is rare. Yet, there are also some other situations in which the remedy of avoidance may be perceived as inappropriate, notably an inadvertent non-disclosure by the assured. However, it is submitted that the law in this respect is likely to be derived from the wrong perception and that the purpose of the remedy of avoidance is only to sanction deliberate non-disclosure, *not* inadvertent one.⁷¹

Secondly, the reasons given by the Court of Appeal in the *Skandia* case (1988) for rejecting damages are not at all sustainable. The courts had more than one occasion to review the issue and reverse the law. But, they lost their chances. The first occasion was when the *Skandia* case went further to the House of Lords. The issue was not really addressed there since the focus turned on the fraud exclusion clause. Without conducting extensive analysis, Lord Templeman clearly endorsed the view of the Court of Appeal on rejecting damages.⁷² The issue arose again in the complicated litigation in *HIH Casualty v. Chase*,⁷³ the facts of which need not be mentioned here. By turning a blind-eye to the arguments academic commentators have been raising since the *Skandia* case (1988), all the courts endorsed the rejection of damages.⁷⁴

The third point that should be raised is that what has been mentioned above is only applied to the case of *pure* non-disclosure. In a case where misrepresentation is involved, one should also take the specific piece of legislation, namely the Misrepresentation Act 1967, into account. The relevant

⁶⁹ Yeo, n.30 above, 144.

⁷⁰ *Ibid.*

⁷¹ See Chapter 3 above, 103-108.

⁷² “...I agree with the Court of Appeal that a breach of the obligation does not sound in damages. The only remedy open to the insured is to rescind the policy and recover the premium.” *Westgate* [1990] 2 Lloyd’s Rep. 377, 387.

⁷³ *HIH Casualty and General Insurance Ltd and Others v. Chase Manhattan Bank and Others* [2001] 1 Lloyd’s Rep. 30 (Commercial Court); [2001] EWCA Civ. 1152; [2001] 2 Lloyd’s Rep. 483 (Court of Appeal); [2003] UKHL 6; [2003] 2 Lloyd’s Rep. 61 (House of Lords).

⁷⁴ See [2001] 1 Lloyd’s Rep. 30, 41; [2001] 2 Lloyd’s Rep. 483, 514; [2003] 2 Lloyd’s Rep. 61, 78.

provision is s.2(2). This sub-section grants the courts the power to consider awarding damages instead of rescission in case of non-fraudulent misrepresentation.⁷⁵ To what extent is this sub-section applicable to misrepresentation in marine insurance law? Park refers to the remark of Mr. Justice Steyn (as he then was) in *Highland Insurance Co v. National Insurance Co* (1987)⁷⁶ where he mentioned that this section should not be applied to “commercial contracts of insurance”,⁷⁷ which no doubt including marine insurance. The reason rested upon the public policy ground that the remedy of avoidance performs a policing function.⁷⁸ However, his Lordship expressed this view in the context of misrepresentation by the *assured*. From what can be gleaned from his attitude in the *Skandia* case (1987), it is doubtful whether he would maintain such opinion in the case of a misrepresentation by the *insurer*. Nevertheless, it is hard to see how s.2(2) can be used with misrepresentation by the insurer but not with misrepresentation by the assured. Thus, such rejection appears to be applied in both cases.

4.2. Possible roles of the courts in adjusting remedy

In this part, we will examine the approach the Court of Appeal took in *Drake v. Provident* and then the theoretical consideration of whether the courts may have discretion in granting avoidance.

⁷⁵ Beale et al, n.7 above, 477-478, [6-094]-[6-095]. Section 2(2) of the Misrepresentation Act 1967 states that “Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to other party.”

⁷⁶ Park, n.12 above, 14. *Highland Insurance Co v. Continental Insurance Co.* [1987] 1 Lloyd’s Rep. 109.

⁷⁷ *Highland* [1987] 1 Lloyd’s Rep. 109, 118.

⁷⁸ “The rules governing material misrepresentation fulfil an important ‘policing’ function in ensuring that the brokers make a fair presentation to underwriters. If s.2(2) were to be regarded as conferring a discretion to grant relief from avoidance on the grounds of material misrepresentation the efficacy of those rules will be eroded. This policy consideration must militate against granting relief under s.2(2) from an avoidance on the grounds of material misrepresentation in the case of commercial contracts of insurance.” *Highland* [1987] 1 Lloyd’s Rep. 109, 118.

4.2.1. Rejection of the right to avoid exercised in 'bad faith' in *Drake v. Provident* (2003)

This case is complicated in both its facts and the legal issues involved. In summary, in 1995, an individual engaged in motor insurance with an insurer, Provident. The insurance was extended to cover his wife, as the named driver of the car. Prior to engaging in this insurance contract, his wife had a car accident and, by the time of making the contract, whether the accident relevant to his wife's fault was yet to be ascertained. By the automated system employed by Provident in calculating the premium, the accident was procedurally and provisionally classified as 'fault accident' but the premium was charged at the normal level. In 1996, the time of renewal came. The individual did not disclose the fact that, before the renewal, he had been charged with a speeding conviction. He also did not inform the insurer that the provisional 'fault' accident had been resolved in his favour. The insurer relied on non-disclosure of the speeding conviction and sought to avoid the contract on the basis that this conviction and the 'fault' accident, taken together, could lead the insurer to charge the higher premium.⁷⁹

What the Court mentioned in relation to the remedy issue in this case should only be considered as *obiter* since the insurer was deprived of his right to avoid the contract on the failure to prove inducement.⁸⁰ Nevertheless, the Court proceeded to consider whether the insurer's right of avoidance should be limited by the doctrine of good faith. By realising the potentially draconian effect of the remedy of avoidance and relying mainly on the rationale given by Lord Lloyd of Berwick in *Pan Atlantic v. Pine Top* (1994),⁸¹ the Court of Appeal insisted that the right of avoidance must be exercised in good faith.⁸² However, the term 'good

⁷⁹ See *Drake* [2004] 1 Lloyd's Rep. 268, 273-276, [1]-[8].

⁸⁰ This is because the Court found that if the conviction had been disclosed, it is likely that the 'fault' accident point should be raised for discussion and that it would be reclassified as 'no fault' accident and thus, by the speeding conviction alone, the insurer could not charge the higher premium." See *Drake* [2004] 1 Lloyd's Rep. 268, 283-284, [62]-[64].

⁸¹ "...there may be some circumstances in which an insurer, by asserting a right to avoid for non-disclosure, would himself be guilty of want of utmost good faith." *Pan Atlantic* [1994] 2 Lloyd's Rep. 427, 456.

⁸² *Drake* [2004] 1 Lloyd's Rep. 268, 288, [87].

faith' can be elusive,⁸³ and the scope of it must be tailored. According to Lord Justice Rix, with whose opinion Lord Justice Clarke concurred,

“I would hazard the opinion that *knowledge* or *shut-eye knowledge* of the fact that the accident was a no fault accident would have made it a matter of bad faith to avoid the policy.”⁸⁴

Before beginning this analysis, one should first understand what is meant by ‘shut-eye knowledge’. In short, it means that there is a ground to suspect the truth but that the insurer refrains from ascertaining it.⁸⁵ Thus, if by the time of avoidance, the insurer should know or should have the blind-eye knowledge that the undisclosed facts he so relied upon to avoid the contract did not exist, i.e. it was not the true fact, then, such right is exercised in bad faith and he is not allowed to do so. As Lord Justice Rix further mentioned, from the fact in the case, if, prior to the avoidance, the insurer had knowledge or shut-eye knowledge of the ‘no fault’ accident, it would not be able to avoid the contract.⁸⁶ As explained by Naidoo, however, the true fact, which the insurer should know, must exist by the time of making the contract and *not* any time later. As he maintains,

“...the principle taken from the majority must be construed as referring to knowledge or blind-eye knowledge of true facts (disproving the materiality or inducement of the non-disclosure) that existed and were available at the time of the relevant non-disclosure, like the ‘no fault’ status.”⁸⁷

Two points should be observed. First, the reference to knowledge or blind-eye knowledge can render the doctrine of good faith in avoiding the contract to be of

⁸³ “Unhelpfully, there was no clear view on exactly when an insurer would be in breach by avoiding.” Hird, N.J., “Utmost Good Faith-forward to the past” [2005] JBL 257, 262.

⁸⁴ *Drake* [2004] 1 Lloyd’s Rep. 268, 289, [91] (emphasis added).

⁸⁵ “If a man, suspicious of the truth, turns a blind-eye to it, and refrains from inquiry-so that he should not know it for certain-then he is to be regarded as knowing the truth...” *Compania Maritima San Basilio S.A v. Oceanus Mutual Underwriting (Bermuda) Ltd (The “Eurysthenes”)* [1977] 1 Q.B. 49, 68 (Lord Denning M.R.); *Drake* [2004] 1 Lloyd’s Rep. 268, 301, [173]-[174].

⁸⁶ *Drake* [2004] 1 Lloyd’s Rep. 268, 289, [91].

⁸⁷ Naidoo, A., “Post-Contractual Good Faith-A Further Change in Judicial Attitude” (2005) 68 MLR 464, 467-468 (emphasis added).

extremely limited use. How many cases on non-disclosure can be like in the *Drake* case (2003) where true existing facts and the facts which came to the mind of the insurer are different? Most of the cases would be that the assured did fail to disclose the *existing* facts but that non-disclosure was innocently made. It is also in such a case that avoidance can be found to be too severe a remedy. For example, the assured takes out hull and machinery insurance of his ship. He might fail to disclose the fact that, twenty years ago, there was a fire on his ship which led to subsequent decision to overhaul the fire extinguishing system on his ship. In such a case, the insurer or (prudent insurer) can always maintain that he would like to know of the facts so he can investigate the effect of that fire on the engine and also the effectiveness of the overhauled fire extinguishing system. However, the necessity to disclose such fact might not be evidently present in the mind of the assured at the time of making the contract given the duration from the time of the fire to the existence of the precaution system. In such a case, the remedy of avoidance can still be seen as unduly harsh since the insurer does not have to establish the relation between the loss of the ship and the previous fire. But, the fact of the fire did *exist* and it was not disproved by other facts afterwards. It is unlike the 'fault' accident which then turned to be 'no fault' and then rendered the undisclosed speeding conviction to be immaterial because if the insurer had known of it, he could not have altered the contractual terms of the insurance.

Secondly, the reference to the knowledge and blind-eye knowledge leads to a further problem in respect of the question of proof. It will be extremely difficult for the assured to prove that the insurer has a knowledge or blind-eye knowledge of the true facts. For example, the assured failed to disclose the pending allegation against him which he knew to be untrue.⁸⁸ As opposed to the allegation, the assured did nothing which could lead to the suspicion of his good morality. Suppose that the assured is in Greece but he placed the risk with the underwriter in London, how can he prove that the London underwriter had knowledge or blind-eye knowledge of the untruthfulness of the allegation?

⁸⁸ Compare the consideration in *Strive Shipping Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Grecia Express")* [2002] EWHC 203; [2002] 2 Lloyd's Rep. 88.

Perhaps, the approach suggested by the minority judgment of Pill L.J. can put the assured in a better position. In his view,

“...a failure to make any enquiry of the insured before taking the drastic step of avoiding the policy was...a breach of the insurer of the duty of good faith.”⁸⁹

What Pill L.J. tried to say was that before being able to avoid the contract, the insurer has a duty to tell the assured *why* he wishes to avoid the contract and then give a chance for the assured to explain. For example, from the facts of the case before him, if the insurer had told the assured of why he would like to avoid the contract, the assured would be able to explain that the insurer did not know the latest position and indeed it was a no fault accident. Still, the question is whether the insurer has a duty to ask in every situation or whether such duty is limited to circumstances which the insurer should suspect of the non-existence of the ground for avoidance. In the *Drake* case (2003), Lord Justice Pill pointed to many facts which could lead the insurer to *suspect* that, at the time of avoidance, the accident became ‘no fault’.⁹⁰ He proceeded to mention, however, that he did not think such circumstances could establish knowledge or blind-eye knowledge on the part of the insurer. If the duty to ask is limited to some suspicious circumstances, the argument which can be raised during litigation, especially in some unclear cases, can be whether the circumstances should raise the suspicion of the insurer. Such a proof might as well be subjective upon each underwriter.

Despite the fact that the minority approach is more attractive, it was clearly rejected by the judgment of the majority. In the passage of Lord Justice Rix,

“The question then arises whether something less than such knowledge would have been enough to qualify an unrestricted right to avoid...Is it then enough that Provident was put on notice?...*I would be inclined to say that notice was not enough* unless there were to be a

⁸⁹ *Drake* [2004] 1 Lloyd’s Rep. 268, 301-302, [177].

⁹⁰ *Drake* [2004] 1 Lloyd’s Rep. 268, 301, [176].

general principle that, at any rate where there is notice, it would not be in good faith to avoid a policy without first giving the insured an opportunity to address the reason for which the insurer is minded to avoid the policy.”⁹¹

But, whatever the scope of the duty of good faith might be at this stage, either upon majority or minority view, the ultimate problem the analysis faces is the ‘remedy’. The Court appeared to say nothing more than that the insurer cannot avoid the contract but it did not suggest any further consequence. As Naidoo convincingly argues,

“In the context of a breach of the insurer’s duty, avoidance is hardly an appropriate remedy for the assured with a view to the fact that the insurer’s breach of the duty would arise after a claim...following a breach of the insurer’s post-contractual duty...the assured only gains a right to choose to avoid...*The insurer can avoid in bad faith knowing that it will either be successful, and if not, then it will lose nothing* because the former position would remain.”⁹²

However, as mentioned in the last section, theoretically it is open for the courts to find the remedy of damages either from the nature of the doctrine of good faith itself or in a novel tort in respect of such duty which the courts are free to devise. In the event of a breach by the insurer, damages should be imposed, at least to cover the assured’s claims and his litigation costs. The term ‘bad faith’, as well as good faith, can be elusive. Its scope should be left for the courts on a case-by-case basis. There appears to be no point to limit it to either knowledge or blind-eye knowledge, or failure to give notice. For example, if the conduct of the insurer implies that he affirmed non-disclosure, but then, he raises avoidance in the litigation, in such a case the courts might also find that the insurer is exercising his right to avoid the contract in bad faith and damages should be awarded. The question is whether the courts can go beyond the finding of ‘bad faith’ to disallow avoidance in other appropriate circumstances?

⁹¹ *Drake* [2004] 1 Lloyd’s Rep. 268, 289, [92] (emphasis added).

⁹² Naidoo, n.87 above, 471-472.

4.2.2. A general discretion of the courts to grant avoidance

‘Discretionary avoidance’ is only an idea. Without implementation, it is useless. Eggers supports such a notion and is prepared to go so far as to suggest that the courts can implement this idea without the statutory support.⁹³ Many reasons are advanced by Eggers to justify this and these are subject to the analysis below.

First, Eggers maintains that the Court of Equity exercised discretion over the remedy of rescission.⁹⁴ His reasoning on this point runs in very long and complicated style. He seeks to explain the difference of avoidance and rescission and how the Common Law Courts and the Court of Equity dealt with these remedies.⁹⁵ However, since the distinction between these two remedies tends to be blurred in modern era and there was an apparent assumption of the Court of Appeal that the remedy for breach of the duty of utmost good faith is equitable in nature,⁹⁶ there seems to be no need to proceed with the complicated discussion of Eggers on this point.

To support the belief that the courts have discretion over the remedy, some authorities however are referred to by Eggers.⁹⁷ Indeed, there appears to be a line of authorities which supported such a belief. As mentioned by Clarke,⁹⁸ five years after the enactment of the Judicature Act and the end of the Court of Equity, the court in *Erlanger v. New Sombrero Phosphate Company* (1878)⁹⁹ seemed to accept that it had such discretion. In this case, Lord Blackburn stated:

“... [the] Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief...the

⁹³ “Such an injustice...may be cured without any intervention by the legislature. The injustice may be redressed on a judicial basis open to the higher courts...such an attempt to change the law...might be viewed as species of judicial activism...the tenor of this paper is such a change is juristically defensible.” Eggers, n.4 above, 250.

⁹⁴ *Ibid.*, 265-266.

⁹⁵ *Ibid.*

⁹⁶ Above, 115-116.

⁹⁷ See Eggers, n.4 above, 267.

⁹⁸ Clarke, n.4 above, 558.

⁹⁹ *Emile Erlanger and Others v. The New Sombrero Phosphate Company and Others* (1878) L.R. 3 App.Cas 1218.

practice has always been for a Court of Equity to give this relief whenever, *by the exercise of its power, it can do what is practically just*, though it cannot restore the parties precisely to the state they were in before the contract.”¹⁰⁰

Later on, the above passage was further explained by Lord Wright in *Spence v. Crawford* (1939),¹⁰¹ the case which Eggers relies upon, that:

“LORD BLACKBURN is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing *what is practically just*. How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its *discretionary powers* in a case of fraud than in a case of innocent misrepresentation.”¹⁰²

It can be seen that Lord Wright clearly spelled out the term ‘discretionary powers’, which the judge can exercise when he sees fit upon the particular facts of the case.

Despite such clear passages above, there might be room to argue that both cases are not insurance cases and these are not direct authorities. But, counter-argument can be provided that these cases spelled out how the Court of Equity exercised rescission. However, this counter-argument appears to be recently undermined by Moore-Bick J. in his trial judgment in *Drake* (2003),¹⁰³ which came to be reaffirmed by the more recent Court of Appeal in *Brotherton & Anr v. Aseguradora Colseguros S.A. & Anr* (2003),¹⁰⁴ the decision which came out almost contemporaneously with the Court of Appeal’s decision in the *Drake* case (2003) and seemed to be contradictory with it. In the language of Lord Justice Mance (as he then was),

¹⁰⁰ *Erlanger* (1878) L.R. 3 App.Cas. 1218, 1278-1279 (emphasis added).

¹⁰¹ *Spence v. Crawford* [1939] 3 All.E.R. 271.

¹⁰² *Spence v. Crawford* [1939] 3 All.E.R. 271, 288, column F (capital letters contained in the original text, emphasis added).

¹⁰³ *Drake Insurance Plc v. Provident Insurance Plc* [2003] EWHC 109 (Comm), [31].

¹⁰⁴ *Brotherton & Anr v. Aseguradora Colseguros S.A. & Anr.* [2003] EWCA Civ. 705.

“It is clear that rescission in the general law of contract is by the act of the innocent party operating independently of the court...I see no basis for saying that avoidance of an insurance contract for non-disclosure or misrepresentation is any different...Moore-Bick J. was right to hold accordingly...”¹⁰⁵

Two non-insurance cases were cited to support the above opinion.¹⁰⁶ Ultimately, the question is which line of opinion should be followed?

The matter proves to be more complicated due to two factors. First, it appears that a distinction needs to be drawn between fraudulent and non-fraudulent non-disclosure and misrepresentation. As Meagher et al explain, in a case of fraudulent misrepresentation, it is the choice of the innocent party whether to rescind the contract and “...intervention of the court is not a necessary precondition.”¹⁰⁷ In a case of a non-fraudulent misrepresentation, however, the position is less clear. “... [I]t is not clear whether rescission was...effective by act of the party so that the Court confirmed something already accomplished, or whether rescission was entirely the decree of the Court.”¹⁰⁸ Thus, in a non-fraudulent situation, it *may be* possible for the courts to exercise discretion.

Secondly, even in a fraudulent situation, the courts might not have discretion over the right of avoidance; but, the courts might maintain discretion afterwards. When the right of avoidance is exercised, the parties have to return to the same position as if the contract between them was never made. This process is known as ‘*restitutio in integrum*’.¹⁰⁹ In some situations, it might not be practicable to fully restore the parties to their original position. In such a case, equity enforces the restitution on the basis of the *justice* between the parties.¹¹⁰ The question then is the

¹⁰⁵ Brotherton [2003] EWCA Civ. 705, [27].

¹⁰⁶ Brotherton [2003] EWCA Civ. 705, [27] *Abram Steamship Co v. Westville Shipping Co.* [1923] A.C. 773; *Horsler v. Zorro* [1975] Ch. 302.

¹⁰⁷ Meagher, et al, n.31 above, 620, [2403]. Actually, the explanation of Meagher does not limit to fraudulent misrepresentation but it seems to be applicable in all cases where the remedy available in the Common Law Courts appear to be avoidance or voidable.

¹⁰⁸ *Ibid.*, 620 and 625, [2404] and [2416].

¹⁰⁹ *Ibid.*, 621, [2407].

¹¹⁰ *Ibid.*, 622, [2409].

authorities cited by Clarke, which employed the terms ‘practically just’ or similar ones, maintained discretion in the context of the right to avoid *or* in the context of restoration in restitution. If it was in the former sense, the right of avoidance depends on the perception of justice; if it was in the latter context, definitely contract can be avoided but to what extent the restoration can be done is a separate question.

Some passages quoted above¹¹¹ might not be so clear that one can tell which sense discretion is meant to be used by the courts. These passages need to be read in context. In the *Erlanger* case (1878), before pronouncing the passage quoted above, Lord Blackburn envisaged the following problems,

“It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party’s hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration.”¹¹²

This passage led to the discussion of his Lordship on the difference between the Common Law Courts and the Court of Equity’s approach to restitution. That was why the term ‘practically just’ was mentioned. This term is not used in referring to the discretion of the courts whether to avoid *or not* to avoid.

Thus, in *Spence v. Crawford* (1939), before quoting the passage of Lord Blackburn, Lord Wright said this:

“On the basis that the fraud is established, I think that this is a case here the remedy of rescission, accompanied by *restitutio in integrum*, is proper to be given. The principles governing that form of relief are the same in Scotland as is in England. The remedy is equitable. Its application is discretionary, and, where the remedy is applied, it must be

¹¹¹ See above, 133-134.

¹¹² *Erlanger* (1878) L.R. 3 App.Cas. 1218, 1278.

moulded in accordance with the exigencies of the particular case.”¹¹³

This passage is not entirely clear. What did Lord Wright intend to mean by utilising the term ‘remedy’: rescission or restitution? This depends on the interpretation. The High Court of Australia in *Vadasz v. Pioneer Concrete (SA) Pty Ltd* (1995),¹¹⁴ after quoting the passage of Lord Wright, explained,

“Underlying Lord Wright’s judgment is the idea that restoration is essential to the idea of restitution and that the *purpose of the relief is not punishment, but compensation.*”¹¹⁵

However, a different understanding can be seen from Eggers:

“In this case, Lord Wright highlighted the court’s discretion, first, whether to apply the remedy in the first instance and, secondly, to determine the restitutionary basis upon which the remedy, once applied is given effect.”¹¹⁶

The passage of the judge cannot stand in isolation; it must be put in context. After pronouncing the above vague passage, Lord Wright went on to quote the passage of Lord Blackburn which explained restitution. But, the explanation of Lord Wright following the quotation appears to again blur the distinction between rescission and restitution. With respect, the present author is inclined to agree with the interpretation of the High Court of Australia and he is of the opinion that the attempt of Lord Wright, if it was the case, to interpret the passage of Lord Blackburn further than in the context of restitution might be misconstrued.

Turning to the authorities cited by the Court of Appeal in *Brotherton* (2003), as mentioned earlier, the reaction of the Court of Equity towards non-

¹¹³ *Spence v. Crawford* [1939] 3 All.E.R. 271, 288, column B-C.

¹¹⁴ *Vadasz v. Pioneer Concrete (SA) Pty Limited* (1995) 184 CLR 102

¹¹⁵ *Vadasz* (1995) 184 CLR 102, 114 (italics adapted from the original text).

¹¹⁶ Eggers, n.4 above, 267.

fraudulent misrepresentation was not at all clear. In *Abram Steamship* (1923),¹¹⁷ a case of innocent misrepresentation, the court was of the view that rescission is a choice of the party. "The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."¹¹⁸ With respect, Eggers seemed to err in thinking that the Court of Equity had discretion over rescission. Certainly, discretion, in so far as the Court had any, was limited to the case of non-fraudulent misrepresentation. But, even this is not at all certain.

However, Eggers further supports his view with a second reason:

"Given that equity traditionally provides its assistance to prevent a statutory remedy being used as engine of fraud, as a matter of principle, there is no reason why the court should not have regard to the oppressive nature of the duty in moulding the remedy for its breach, particular so in light of the statutory remedy of avoidance in the Marine Insurance Act 1906."¹¹⁹

To form the above view, Eggers appears to be convinced by the notion of 'the equity of a statute', a term which appears in the work of Gummow.¹²⁰ The essence of this idea is "...an interpretative approach that encourages a teleological search of legislation despite the imprecision of its language".¹²¹ Through academic discussion, this idea is about how the statutory language in the common law legal system can be adapted to any *new* situation that arises.¹²² In relation to the equity of a statute, Eggers cites from the following passage of Gummow,

"...[T]he phrase may be said to identify a doctrine that the common law courts render more effective the

¹¹⁷ *Abram Steamship* [1923] A.C. 773.

¹¹⁸ *Abram Steamship* [1923] A.C. 773, 781.

¹¹⁹ Eggers, n.4 above, 268.

¹²⁰ See *ibid*, footnote 114 See also Gummow, W., *Change and Continuity-Statute, Equity and Federalism* (Clarendon Press, Oxford 1999) (a sample of the book downloaded in the PDF Format from <<http://www.oup.co.uk/pdf/0-19-825823-4.pdf>> accessed 1 August 2004).

¹²¹ Herman, S., "The *Equity of the Statute* and *Ratio Scripta*: Legislative Interpretation Among Legislative Agnostics and True Believers" (1994) 69 *Tulane Law Review* 535, 538.

¹²² See *ibid*, 535-560.

legislative will or, more broadly, *guided by the dictates of conscience and natural justice, could modify the rigour of a statute or apply its rules to cases not provided for, to avert hardship and injustice.*"¹²³

With respect, this passage is irrelevant to what Eggers is considering. This passage does not mean that the courts can modify the statute to avert hardship or injustice. Indeed, the phrase 'to avert hardship and injustice' clarifies the whole sentence earlier, not only the verb 'modify'. Thus, the actual meaning is that, in applying the statute to the novel heading of cases that shall arise, the courts may adapt the statute to avoid difficulty or injustice. Certainly, it does not mean the courts should adapt the language of ss.17-20 of the MIA 1906 to the case of non-disclosure, which is not a *new* situation and it is what these provisions are directed at anyway. It is not the case of *modifying* the provisions. This idea does not help in justifying the role of the courts in exercising discretion upon the application of the Act.

Despite the irrelevance of his second line of reasoning, Eggers continues to justify his belief upon a third ground with the analogy to s.2(2) of the Misrepresentation Act 1967. He says,

"The extensive use of the discretion in the Misrepresentation Act 1967 and the desirability of having a uniform remedy for breaches of the duty of good faith might allow the common law to develop its remedy of avoidance to introduce a discretion to ensure that the remedy is deployed in accordance with current notions of justice and fairness."¹²⁴

In the area of misrepresentation, discretion is available due to the statute that grants the courts such a power. The same cannot be said of the MIA 1906. Speaking narrowly of non-disclosure or misrepresentation by the assured, if one understands it as Lord Mansfield so understood,¹²⁵ there appears to be a public

¹²³ Gummow, n.120 above, 20 (italics adapted from the original text).

¹²⁴ Eggers, n.4 above, 269.

¹²⁵ See Chapter 3 above, 103-108.

policy consideration behind the imposition of the remedy of avoidance, especially to punish the person with moral guilt, although the courts did not seem to recognise that such public policy exists.¹²⁶ Upon the misunderstanding of what Lord Mansfield tried to convey, the remedy of avoidance has been applied to situations which were beyond its original objective. It is now applied “to punish those who are guilty of no more than an oversight”.¹²⁷ With such an application of the remedy of avoidance, modern judges and academic commentators thus try to find a way to soften the harsh consequence of this remedy. However, it is submitted that the arguments are over-complicated and unnecessary.

What is important now is to revert back to the understanding at the time of Lord Mansfield. Perhaps, what is strange in relation to the current state of law is that, in the context of the broader notion of good faith in s.17, where the breaches of the duty may appear in various forms and the available remedy should be flexible enough to encompass the range of these breaches, the law, however, fixes the remedy of avoidance for such breaches. The discretion of the courts, if it should be exercised anywhere, should be used in the breach of this broader notion of good faith. In such a case, in contrast to what Eggers proposes, the discretion should not be limited to the question of whether the innocent party can *avoid* the contract, but should go further. It should extend to the discretion of the judge to impose whatever remedy he deems appropriate in the particular circumstance of the case before him. In this context, the role of the judge will be like the courts in the Roman period where the concept of ‘good faith’ was found.¹²⁸ In case of breach of the duty of disclosure by the *insurer*, ss.18-20 are silent upon it. It is correct that the courts resorted to s.17 as the duty of disclosure is part of the broader concept of good faith. But, the existence of the remedy of avoidance stipulated in this particular provision deters the courts from exercising discretion (which the courts should have) in granting damages to the assured. It is true that,

¹²⁶ See Introduction above, 7.

¹²⁷ Eggers, n.4 above, 249.

¹²⁸ See Chapter 2 above, 69-70.

in *Carter v. Boehm* (1766),¹²⁹ Lord Mansfield mentioned the breach of the duty of disclosure by the insurer but he did not refer to damages as a remedy. He said,

“The policy would equally be void, against the *underwriter*, if *he* concealed, as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.”¹³⁰

But, Lord Mansfield seemed to mention this in passing while his mind was focusing more on the duty of disclosure by the assured. Moreover, his Lordship was unlikely to have in his mind the situation where the assured suffered grave loss as in the *Skandia* case (1988). Basing his opinion upon the broad notion of good faith, which focuses on fairness as between the parties, it is also quite unlikely that, Lord Mansfield, if he faced such a situation, would not impose damages on the insurer. But, his Lordship may need to be satisfied that the insurer knew that the assured, by all means, could not know of the fact and, that, if the assured knew of it, he might not enter into the contract or he might enter it on different terms.

Instead of reverting back to what Lord Mansfield understood, as the author has attempted to argue, the Australian Law Reform Commission (ALRC) proposed reform of the remedy scheme in the Marine Insurance Act 1909 (Cth). However, as will be argued below, the present author is of the view that this proposal is a diversion from the original intention of Lord Mansfield. The Australian variant, if implemented, would undoubtedly create more uncertainties and difficulties in applying the law. The next section will be devoted to pointing out why the proposals of the ALRC are unsustainable.

¹²⁹ *Carter v. Boehm* (1766) 3 Burr. 1905.

¹³⁰ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909 (italics followed the original text).

4.3. The Australian Alternative: A Muddle

The analysis in this part will involve Clause 26B of the Draft Marine Insurance Amendment Bill produced by the ALRC, the language of which can be found in Appendix 2 to this work and as such it will not be reiterated here.

From the language of the provision, the first observation that can be made is that this clause focuses only on the remedy available in a case of non-disclosure by the *assured*. But, this does not appear to be a problem, given the fact that the ALRC sought to suggest that the duty of utmost good faith is an implied term of the contract,¹³¹ a legal status which the Court of Appeal in the *Skandia* (1988) rejected.¹³² If the duty has an implied term basis, unless the statute expresses otherwise, it is usually open for the parties to contract out of the provisions by contractual term and so the parties may stipulate the remedies for breach of the duty of disclosure by the insurer to be otherwise.¹³³ As such, the consequence of the breach of such duty can then depend upon the negotiating power of each party to the contract.

The second observation that can be made in respect of clause 26B is that its opening words in sub-clause (1) “[s]ubject to any contrary term in the contract...” seem to also govern sub-clause (2). This raises the question whether there is a public policy consideration to deter fraud in the revised MIA 1909 (Cth). Derrington explains that “[a]n insurer will be entitled to avoid the policy and retain the premium only where the insurer proves that breach of the duty of disclosure (or the misrepresentation) was fraudulent”.¹³⁴ But, she seems to be silent on the possibility of the parties contracting out of sub-clause (2). At least, the language of the draft provisions appears to open the possibility for such a contractual clause to be drafted.

¹³¹ See Clause 23 in the “Draft Marine Insurance Amendment Bill”.

¹³² See above, 118.

¹³³ See Beale et al, n.7 above, 785, [13-023].

¹³⁴ Derrington, n.5 above, 222.

The third point to note is in relation to non-fraudulent non-disclosure. In such a case, the draft provision provides a clear distinction between the case where the insurer would not enter into the contract at all and the case where the insurer would enter into the contract on different terms if he had known of the material facts. Such a distinction will eventually require quite specific proof once the litigation arises. This could be difficult in practice. As Lewins points out, the burden of proof will be on the insurer who has to point out what he would have done if he had known of the undisclosed facts and “the remedies aspect of non-disclosure disputes will be the subject of greater contests than is currently the case”.¹³⁵ Nevertheless, Lewins mentions that most of the evidence will be the same as that for proving the materiality of the undisclosed matter anyway.¹³⁶ To a certain extent, this might be true. But, as argued elsewhere,¹³⁷ inducement has more to do with the human mind and as such to what extent evidence is relied upon is questionable. The test is upon the actual insurer’s mind and it is not objective. Most of the time, the author believes, the insurer will try to prove that he would not have entered into the contract at all if he had known of the undisclosed facts. Then, he will be entitled to avoid the contract and he only needs to return the premium, the result of which is similar to the right of the insurer under the current remedy regime.

The separate consideration between the case where the insurer would not have entered into the contract at all and the case where the insurer would have entered into it on different terms seems to be derived from the Norwegian Marine Insurance Plan (NMIP), especially in § 3-3 but this provision of the Plan only applies to negligent non-disclosure as it provides:

“Other breaches of the duty of disclosure

If the person effecting the insurance has, at the time the contract is concluded, in any other way been in breach of the duty of disclosure, and it must be assumed that the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosure

¹³⁵ Lewins, K., “Australian Proposes Marine Insurance Reform” [2002] JBL 292, 301.

¹³⁶ *Ibid.*

¹³⁷ See Chapter 3 above, 96..

as it was his duty to make, the contract is not binding on the insurer.

If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he shall only be liable to the extent that it is proved that the loss is not attributable to such circumstances as the person effecting the insurance should have disclosed. Liability is limited in the same manner if the person effecting the insurance has been in breach of the duty of disclosure after the contract was concluded, unless it is proved that the loss occurred before the person effecting the insurance was able to correct the information supplied by him.

In the cases referred to in subparagraph 2, the insurer may terminate the insurance by giving fourteen days' notice."¹³⁸

Even though, the phrase "...any other way been in breach of the duty of disclosure" in § 3-3 seems to be wider than negligent non-disclosure, with the present of § 3-2 deals with fraud and § 3-4 deals with innocent non-disclosure, this sub-section is thus limited to "...any case of negligent breach of the duty of disclosure, from ordinary, negligent breach to demonstrated gross negligence where the conduct would be characterised as dishonest."¹³⁹ In this respect, it is different from the proposal of the ALRC. As one can see, in the Australian draft provision, the division is rougher: between fraudulent and non-fraudulent. However, the proposal becomes similar to § 3-3 of the Plan, in the sense, as Derrington explains, "...the proposed remedial structure introduces an element of causation which is similar to that incorporated in the...Plan."¹⁴⁰

So far as § 3-3 of the Plan is concerned, a Norwegian lawyer such as Stang Lund does not see the need to subjectively prove what the insurer would have done if he had known the undisclosed facts to be a problem. As he points out,

¹³⁸ The Central Union for Marine Underwriters (CEFOR), 'The Norwegian Marine Insurance Plan of 1996, version 2003' <<http://www.norwegianplan.no/eng/index.htm>> accessed 21 August 2005.

¹³⁹ The Central Union for Marine Underwriters (CEFOR), 'Commentary to the Norwegian Marine Insurance Plan' <<http://www.norwegianplan.no/eng/index.htm>> accessed 21 August 2005.

¹⁴⁰ Derrington, n.5 above, 223.

“In principle it is a subjective test...it is a question of what the individual insurer would have done. But it will in practice be difficult for him to satisfy the burden of proof if his risk evaluation is very peculiar as compared with other insurers. Thus, if there are several co-insurers, and some of them have no difficulty in accepting the risk...it will be difficult for one individual insurer to succeed in court...”¹⁴¹

But, how can the courts know whether the insurer’s risk evaluation method is peculiar or not? Even in the above explanation, Stang Lund is able to mention only the case of co-insurers. The ultimate question is upon the case where only one insurer is involved. With respect, the unfairness lies in the question of proof.

The Australian draft provision further brought from the Plan how to deal with the situation when the insurer can only prove to the extent that, if he had known of the undisclosed facts, he would accept the risk on different terms. In that case, the insurer is liable for the loss to the extent that it was not *proximately* caused by the undisclosed facts. This came from paragraph 2 of § 3-3 of the Plan, which broadly states that the insurer does not have to be liable for loss which is ‘attributable to’ the undisclosed matter. Neither in the Commentary to the Plan nor the explanation from Stang Lund is there a clear indication of how the causal connection is tested. As far as the Australian draft provision is concerned, the concept of ‘proximate causation’ is imported into the clause. But, this notion is far from unproblematic. Proximate causation is “...enough to describe and to justify, but sometimes rather difficult to apply.”¹⁴² To briefly explain, the concept of proximate cause is that it must be proved that the matter or event is not “too distant in time or space” from the loss.¹⁴³ Thus, in the context of non-disclosure, the insurer must prove that the undisclosed fact is not too remote to cause the loss. The question of remoteness is generally judged by “the common sense and

¹⁴¹ Stang Lund, H., “Comparative Lessons derivable from The Norwegian Marine Insurance Plan 1996” (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 1 July 2005) 5.

¹⁴² Lowry, J., and Rawlings, P., “Proximate Causation in Insurance Law” (2005) 68 MLR 310.

¹⁴³ *Ibid.*, 311.

intelligence of the common man”,¹⁴⁴ a standard which is difficult to understand. The problems mostly occur where there are more than one potential causes of the loss, i.e. “multiple causes”.¹⁴⁵ In such a case, perhaps the insurer should ensure his comfortable position in the litigation by trying to establish that, without non-disclosure, the loss would not have occurred. Again, the litigation will be further prolonged by the issue of causation.

Of more concern perhaps in clause 26B(iii) is that the insurer is entitled to reduce his liability to reflect the variation in premium, deductible, etc. Most non-disclosure cases are raised before the courts long after the insurance contract has been concluded. How can we prove how much premium, deductible, etc. the insurer would have charged at the time of the contract if he had known of the undisclosed facts? With respect, again, the clause seems to engage the courts in an *artificial* question of proof. If there are still some contemporaneous documents which can be examined by the courts, that should be fine. But, in some litigation, such documents will have been lost.

Overall, as one may see, the above explanation of clause 26B of the ALRC’s proposal seems to indicate that it introduces an extremely difficult burden of proof which can potentially prolong the litigation process and tends to create many unrealistic presumptions, for example, what the insurer would do if he had known of the facts, how much premium he would charge, etc. This draft provision has not yet been implemented and it is suggested here that it does not provide a practical solution in either Australia or the UK.

4.4. Conclusion

It is submitted here that it is not necessary to look to other jurisdictions for a suitable remedy scheme for breach of the duty of utmost good faith and non-disclosure. A suitable regime lies within the UK. It is just that the overall paradigm must be adjusted which the present author will resurrect below.

¹⁴⁴ *Ibid.*

¹⁴⁵ See *ibid.*, 311-312.

As mentioned earlier,¹⁴⁶ the notion of good faith in s.17 of the MIA 1906 is no other than the notion of justice and fairness as in the concept of good faith (*bonae fidei*) and it is much broader than non-disclosure and misrepresentation. To allow the courts to do justice in each particular case, the remedies available for breach of the duty of (utmost) good faith must be flexible. However, the stipulation of the remedy of avoidance in this section renders its effect contradictory to the original purpose of the concept. If reform is needed anywhere, it is necessary to delete the last part of s.17 dealing with the remedy of avoidance.

The duty of disclosure is part of the broader duty of good faith. Strangely enough, in this context, the existing remedy of avoidance would be justifiable if the scope of the duty of disclosure had not been misunderstood. From what Lord Mansfield intended, the remedy of avoidance only applies to 'non-disclosure' which is deliberately made. The severity of remedy in such a case is justifiable on the basis of the moral blameworthiness of the party, although such culpability might not be strictly considered as *fraud*. But, of course, to be entitled to such a remedy, the inducement needs to be proved. Therefore, it is submitted no change needs to be made to the remedy of avoidance in s.18(1) of the MIA 1906 but a change must be made instead to the language of s.18(1) and (2) as far as the scope of the duty of disclosure is concerned.

Having said that, in most cases, the remedy of avoidance cannot be suitable for the *assured* if he suffered grave loss from non-disclosure by the insurer. In such a case, the concept of good faith which lies upon the broad notion of fairness and justice should be able to generate the remedy of damages by its own dictate and, strictly speaking, there appears to be no need to base a remedy upon tort, although doing so does not seem to present any practical problems.

The proposed solution appears to be preferable to the proposals of the ALRC as it does not engage the courts in some *artificial* questions of proof. It also does not require a major review of the MIA. Small insertion to the existing

¹⁴⁶ See Chapter 2 above, 66-73.

provisions is enough. The need to provide a flexible remedy system for the broader duty of utmost good faith set out in s.17 of the MIA 1906 will be even more justifiable when the potential breach of such duty at the post-contractual stage is taken into account. This subject will be dealt with in next chapter.

Chapter 5: Post-contractual duty of disclosure

The analysis in previous chapters has been focused on the duty of disclosure which, according to s.18 of the MIA 1906, is a pre-contractual duty that ends once marine insurance contract is concluded. However, the broader duty of utmost good faith set out in s.17 does not seem to end at the same time since no time restriction is indicated in this provision as it reads:

“17. Insurance is uberrimae fidei

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

Judicial recognition of the post-contractual dimension of the duty of utmost good faith can be traced back to that of Hirst J. in *The Litsion Pride* (1985).¹ As one can see from s.17 above, the provision is broad and does not give any hints to the contents of the duty. This at least casts some doubt on what the parties need to do during the post-contractual stage. Indeed, the problems attached to the duty of utmost good faith at this stage range from its scope to the remedy for its breach. In this chapter, the problems surrounding this concept will be examined and some solutions to these problems will be advanced and explored.

The chapter will be separated into four sections. The first will outline the general principles of post-contractual utmost good faith as formulated by the courts and will criticise the vagueness of these principles. Such confusion is partly due to the unique characteristic of the issue of post-contractual duty itself. As observed by Naidoo and Oughton, “[t]he juristic basis of the doctrine can determine both its application and the appropriate remedy...However, the remedy adopted has been used to determine...the juristic basis.”² For this reason,

¹ “In my judgment the authorities...that the obligation of utmost good faith in general continues after the execution of the insurance contract are very powerful.” *Black King Shipping Corporation and Wayang (Panama) S.A. v. Mark Randal Massie (The “Litsion Pride”)* [1985] 1 Lloyd’s Rep. 437, 511.

² Naidoo, A., and Oughton, D., “The Confused Post-Formation Duty of Good Faith in Insurance Law: From Refinement to Fragmentation to Elimination?” [2005] JBL 346, 346-347.

application of the doctrine and the remedy that should be applied are inextricably intertwined and the question of remedy will not be separately discussed. Then, in the second section, the application of the general principles to the specific circumstances will be carefully examined. Whilst the duty of utmost good faith is said to be reciprocal, as shall be seen, the balance of authorities seems to indicate that, like its pre-contractual counterpart, the duty operates heavily on the assured. So far as the scope of the duty is concerned, the insurer's burdens will be addressed rather briefly. Then, in the third section, attention will be given to whether clarity of the concept of post-contractual utmost good faith can be achieved by perceiving it as an implied term of the contract as advanced by the Australian Law Reform Commission (ALRC).³ Finally, in the conclusion, the suggestion will be given on the appropriate juristic basis, scope and the remedy for post-contractual duty of utmost good faith.

5.1. Mapping the landscape of the general principles of post-contractual utmost good faith

Both academic commentators and the judiciary appear to have reached a consensus that the scope of s.17 is highly problematic.⁴ There appear to be two ways to understand this section. First, it might be understood as an introductory provision to ss.18-20 and thus it only applies pre-contractually. Literally though, s.17 does not contain such limitation. There appears to be no reason why it should not apply post-contractually.⁵ The House of Lords in *The Star Sea* (2001) now have *hesitatingly* approved the latter interpretation.⁶ This seems to be in line with

³ The Australian Law Reform Commission suggests that the duty of utmost good faith should extend throughout the contractual relationship and that the duty should be based on the implied term of the contract. See the Australian Law Reform Commission, 'Reform of the *Marine Insurance Act 1909*' (Report No.91, 2001) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch10.html#Heading1>> accessed 9 July 2005.

⁴ Soyer, B., "Continuing duty of good faith in insurance contracts: still alive?" [2003] LMCLQ 39, 41-42 See also *Manifest Shipping Co.Ltd v. Uni-Polaris Insurance Co.Ltd and La Reunion Europeene (The "Star Sea")* [2001] UKHL/1; [2001] 1 Lloyd's Rep. 389.

⁵ *Ibid.*, 41.

⁶ "One solution is to impose the limit upon the period of the relationship between the parties...so that it would apply to pre-contractual negotiations...but that solution now appears to be *past praying for*." *The Star Sea* [2001] 1 Lloyd's Rep. 389, 392, [6] (per Lord Clyde) (emphasis added).

the view of the draftsman of the MIA 1906, Sir McKenzie Chalmers, who put as an explanatory note to s.17 in his book,⁷

“Note: The general principle is stated in this section because the special sections which follow are not exhaustive.”⁸

One may doubt, however, whether Chalmers had post-contractual utmost good faith in mind while he was drafting the Act. Soyer observes that the book came out *after* the Act.⁹ He explains that, by adding that note, the draftsman was just following the intention of Parliament on how they wanted s.17 to apply. As Soyer says,

“Parliament was possibly influenced by the shift in judicial review and *intended to alter the common law position* with this provision. Perhaps...Chalmers acknowledged this point...”¹⁰

The reference here to a change in judicial attitude is made to *Boulton v. Houlder Brothers & Co.* (1904),¹¹ a case which Chalmers also cited in his book to support the above explanation of s.17.¹² With respect, it is likely that the above note was added due to a misconception on the part of Chalmers himself.

The *Houlder* case (1904) concerned the “order for ship’s paper”, which is the “pre-defence discovery procedure unique to actions on marine insurance policies”.¹³ In this case, Matthew L.J. mentioned,

⁷ Chalmers, M.D., and Owen, D., *The Marine Insurance Act 1906* (Williams Clowes & Sons, London 1907).

⁸ *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 399, [48] (quoted by Lord Hobhouse).

⁹ Soyer, n.4 above, 41-42.

¹⁰ *Ibid.*, 42 (emphasis added).

¹¹ *Ibid.*, footnote 19 *Boulton and Others v. Houlder Brothers & Co. and Others* [1904] 1 K.B. 784.

¹² Foxton, D., “The post-contractual duties of good faith in marine insurance policies: The search for elusive principle” (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 30 June 2005) [19].

¹³ On ‘order for ship’s papers’ see Bennett, H.N., “Mapping the Doctrine of Utmost Good Faith in insurance contract law” [1999] LMCLQ 165, 199.

“...the underwriters shall be treated with good faith, *not merely* in reference to the inception of the risk, *but in the step taken to carry out the contract*...effect is given to it by means of the order for discovery of ship’s papers...”¹⁴

While the rationale behind the devising of the order for ship’s papers might be akin to the concept of utmost good faith, i.e. to provide the insurer with information,¹⁵ it is submitted that the order should be viewed as merely a procedural matter. This is clear from the passage of Lord Denning M.R. in *The Sageorge* (1974),¹⁶ approved by the House of Lords in *The Star Sea* (2001),¹⁷

“The order itself is in a form which is appended to the Rules of Court...the claimant has to produce not only his own documents but also those of many other people...or else show that he has made reasonable endeavours to find them, and has failed...Under the old practice...the action was automatically stayed until the order was complied with. Under the rules now, it is in the discretion of the Judge whether to order a stay...”¹⁸

Unlike the consequence of the breach of the duty of utmost good faith, non-compliance with the order resulted only in a stay of proceedings but did not lead to the avoidance of the contract.¹⁹ Nevertheless, there is no need to mention this order further as it has not been in use since the Civil Procedures Rule 1998.²⁰ (However, one cannot help feeling curious whether the use of the order was the *only* post-contractual dimension of utmost good faith envisaged by Chalmers.)

Apart from the use of the order for ship’s papers, Hirst J. in *The Litsion Pride* (1985) was able to identify two other instances as examples of post-contractual utmost good faith. These are cases concerning ‘held covered

¹⁴ *Houlder* [1904] 1 K.B. 784, 791-792 (emphasis added).

¹⁵ “...the courts may have had a doctrine of utmost good faith in mind in developing the order for ship’s papers...” Bennett, n.13 above, 200.

¹⁶ *Probatina Shipping Co.Ltd v. Sun Alliance Office Ltd. (The “Sageorge”)* [1974] 1 Lloyd’s Rep. 369.

¹⁷ *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 402, [58]-[60].

¹⁸ *The Sageorge* [1974] 1 Lloyd’s Rep. 369, 371-372.

¹⁹ *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 402, [59].

²⁰ Bennett, n.13 above, 199.

clauses'²¹ and 'fraudulent claims'.²² An analysis of the former will be made below. As for the latter, it is rather clear that this is not part of the duty of utmost good faith. As Foxton succinctly concludes, the issue of claims "can rightly be regarded as both conceptually and historically distinct from the broader concept of *uberrimae fidei* in insurance contracts..."²³ Support for this seems to come from the examination of previous authorities conducted by Lord Hobhouse in *The Star Sea* (2001) where he found that avoidance had not been regarded as a consequence in fraudulent claim cases.²⁴ The position was affirmed by Mance L.J. (as he then was) in *The Aegeon* (2002)²⁵ and he came to re-affirm it yet again in *Axa General Insurance Limited v. Clara Gottlieb, Joseph Meyer Gottlieb* (2005),²⁶ where he said "[t]he rule relating to fraudulent insurance claims is accordingly a special common law rule."²⁷

Also, in the *Gottlieb* (2005) case, his Lordship took the opportunity to proceed to clarify the issue of remedy in fraudulent claims cases which had been unclear due to the reference to the term 'forfeiture'.²⁸ Essentially he held that the insurer can reject "the whole of the claim to which the fraud relates, with the effect that the consideration of any interim payments made on that claim fails and they are recoverable".²⁹ Thus, the basis of the remedy is far from avoidance. So far as marine insurance is concerned, in any event, fraudulent claims are quite rare

²¹ See *The Litsion Pride* [1985] 1 Lloyd's Rep. 437, 511. In general, "held covered clauses" is used to "offer protection to an assured, within the limits and subject to the conditions of the clause, by giving the assured the option of obtaining cover beyond that agreed in the policy." Thomas, R., "Held Covered Clauses in Marine Insurance" in Thomas, R.D. (ed.), *Modern Law of Marine Insurance Volume 2* (LLP, London 2002) 1, [1.1].

²² "A fraudulent claim exists when the insured claims, knowing that he has suffered no loss, or only a lesser loss than that which he claims..." *Agapitos and Others v. Agnew (The "Aegeon")* [2002] EWCA Civ. 247; [2002] 2 Lloyd's Rep. 42, 49, [30] (per Mance L.J.).

²³ Foxton, n.12 above, [2].

²⁴ *The Star Sea* [2001] 1 Lloyd's Rep. 389, 403, [63] cited *Goulstone v. Royal Insurance Company* (1858) 1 F.&F. 276; [1930] 175 ER 275; *Britton v. Royal Insurance Company* (1866) 4 F.&F. 905; [1930] 176 ER 843.

²⁵ *The Aegeon* [2002] 2 Lloyd's Rep. 42, 53, [45].

²⁶ *Axa General Insurance Limited v. Clara Gottlieb, Joseph Meyer Gottlieb* [2005] EWCA Civ. 112.

²⁷ *Gottlieb* [2005] EWCA Civ. 112, [31].

²⁸ "...in the context of fraudulent claims...a question has arisen whether the forfeiture extends (a) only to the fraudulent claim itself, (b) only to all prospective benefit from the time of the fraudulent claim or (c) to all benefit under the policy." Eggers, P.M., "Remedies for the failure to observe the utmost good faith" [2003] LMCLQ 249, 272.

²⁹ *Gottlieb* [2005] EWCA Civ. 112, [32].

in practice. As Longmore L.J. observed in *The Mercandian Continent* (2001),³⁰ fraudulent claim are “alien in a field, such as marine insurance...”³¹ This is so because the instances which involve fraudulent claims are, for example, when the assured deliberately destroys his property and then submits a claim to the insurer to recover such loss. In marine insurance, however, to be able to claim from the insurer, mostly the assured has to show to the insurer that the loss occurred unexpectedly,³² i.e. the loss was caused by ‘maritime perils’.³³ Similarly, fraudulent claims may involve exaggerated claims but, mostly, the policy in marine insurance is ‘valued’, i.e. the value of the subject-matter is declared in advance.³⁴

Thus, among the authorities relied on by Hirst J. in *The Litsion Pride* (1985), we seem to be left with ‘held covered’ clauses as an instance which *may* support the post-contractual dimension of utmost good faith. Indeed, it is submitted that, if the doctrine of utmost good faith as enshrined in s.17 is actually the same as the doctrine of good faith (*bonae fidei*), one might expect the concept to be flexible, and that it may take different roles in different context- from pre-contractual to post-contractual, or even to contractual interpretation. However, with the present rigid concept of utmost good faith (*uberrimae fidei*) coupled with the fixed remedy of avoidance, the post-contractual dimension of such concept is doubtful. It is open to question to the extent that the remedy of avoidance, which seems to be stern enough in the pre-contractual stage, becomes increasingly severe in the post-contractual stage. It is unlikely in the extreme that a concept which is deemed to support *fairness* becomes one which, in itself, is unjust. Such

³⁰ *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] EWCA Civ. 1275; [2001] 2 Lloyd's Rep. 563.

³¹ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

³² Merkin, R., ‘Fraudulent Insurance Claims and Post-Contract Disclosure: Recent Developments in England’

<http://www.nzila.org/conferences/docs/auckland/Prof_Merkin_Fraudulent_Claims.pdf> accessed 7 October 2004.

³³ ‘Maritime perils’ is defined in s.3 of the Marine Insurance Act 1906 as “...the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.”

³⁴ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

severity is clearly recognised by Lord Hobhouse in *The Star Sea* (2001), where he mentioned:

“Where a fully enforceable contract has been entered into insuring the assured, say, for a period of a year, the premium has been paid, a claim for a loss covered by the insurance has arisen and been paid, but later, towards the end of the period, the assured fails in some respect fully to discharge his duty of complete good faith, the insurer is able not only to treat himself as discharged from further liability but can also undo all that has perfectly gone before.”³⁵

In pre-contractual non-disclosure, one might see the justification for the remedy of retrospective avoidance in that the innocent party was misled into the contract and hence he proceeded upon the wrong basis. As Lord Mansfield mentioned, “the risk run is really different from the risk understood and intended to be run...”³⁶ The same justification cannot be applied to the post-contractual stage. Even so, the House of Lords did not deny the application of s.17 post-contractually. Instead, it moved closer towards the concept of good faith (*bonae fidei*) by accepting the elasticity of the doctrine of utmost good faith. As mentioned by Lord Clyde,

“The substance of the obligation...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.*”³⁷

But, from the language of the House of Lords in *The Star Sea* (2001), it was not entirely clear what amounts to the breach of the duty of utmost good faith post-contractually. Yeo assumes such duty is limited to the duty to abstain from fraudulent conduct. She explains,

³⁵ *The Star Sea* [2001] 1 Lloyd's Rep. 389, 400, [51].

³⁶ *Carter v. Boehm* (1766) 3 Burr. 1905, 1909.

³⁷ *The Star Sea* [2001] 1 Lloyd's Rep. 389, 392, [7] (emphasis added).

“...the House of Lords has eschewed the strict liability approach to pre-contractual breach...Their Lordships’ decision has indicated instead that the post-contractual duty merely entails honesty and abstention from fraud (at least for the area of claim submission).”³⁸

The phrase in brackets shows that Yeo is uncertain whether the House of Lords intended the limitation to *fraud* to apply to the submission in a claims context or to a wider post-contractual utmost good faith. Similar to Yeo, Soyer concludes that “...the House of Lords...having confirmed the existence of a post-contractual dimension, restricted its scope...when fraudulent conduct is committed during the currency of the policy.”³⁹ This statement appears in the part of his article where he discusses the claims context. To interpret the judgment like this might be correct given the fact that, by the time the judgment of the House of Lords was handed down, it was not so certain whether the fraudulent claim issue was a facet of post-contractual utmost good faith.⁴⁰ In this regard, the approach of Hirst J. in *The Litsion Pride* (1985) to take a claim made *culpably* as amounting to a breach of the post-contractual utmost good faith was then firmly rejected.⁴¹ Such limitation to fraudulent conduct was what the counsel in *The Mercandian Continent* (2001) had borne in mind.⁴²

With respect to the House of Lords in *The Star Sea* (2001), as shall be seen from the analysis below, the present author does not think that the limitation of a post-contractual duty of utmost good faith to the abstention from fraud is suitable in all circumstances. The concept of good faith should be flexible enough to be applied in different degrees in different contexts. Like in the pre-contractual

³⁸ Yeo, H. Y., “Post-Contractual Good Faith-Change in Judicial Attitude?” (2003) 66 MLR 425, 427 (emphasis added).

³⁹ Soyer, n.4 above, 58.

⁴⁰ “...the s.17 duty has repeatedly been held to be owing in the context of claims...” *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 407, [81] (per Lord Scott of Foscote).

⁴¹ “It must be right, I think...to hold that the duty in the claims sphere extends to culpable misrepresentation or non-disclosure.” *The Litsion Pride* [1985] 1 Lloyd’s Rep. 437, 513. It does not seem so clear what the term ‘culpable’ means. Leggatt L.J. in the Court of Appeal in *The Star Sea* proclaimed that “[t]he other duties for which he contends are not to conceal or fail to disclose culpably...we endorse them only with the substitution of *fraudulently* for *culpably*.” *Manifest Shipping & Co.Ltd v. Uni-Polaris Insurance Co.Ltd and La Reunion Europeene* [1997] 1 Lloyd’s Rep. 360, 372 (italics adapted from the original text).

⁴² *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 572, [24].

phase, we have the duty of disclosure, which is only *one* aspect of the duty of good faith. It applies also in case of innocent non-disclosure. But, the courts in the future may recognise other facets of the pre-contractual duty of good faith in insurance law and the duties as such do not have to share the same contents and characteristics with the duty of disclosure. The same logic should be applied to the post-contractual duty of utmost good faith. With respect, the House of Lords failed to realise this point. Partly, it might be, as Naidoo and Oughton observe, because of the general attitude of the courts to recognise the post-contractual duty of utmost good faith as “singular, arising out of particular occasions”.⁴³ Closely linked to this observation, the present author is of the view that the courts do not have clear ideas of what ‘utmost good faith’ really is and, as mentioned in Chapter 2, like some academic commentators, they view ‘utmost good faith’ as nothing more than the duty of disclosure and the duty not to misrepresent. As such, when this understanding is transposed to the post-contractual phase, as shall be seen below, they thus direct their minds to the circumstances when the revelation of information appears to be needed. Without understanding it, they lose sight of the fact that ‘good faith’ can go far wider. Thus, if one realises this underpinning concept, one should readily understand that it should be more sensible to view the duty arising on each occasion separately but that, with the common purpose to maintain fairness among the parties, every duty is under the same broad umbrella of ‘good faith’. As such, one should also be more ready to probe other facets under this broad duty.

Turning to the *Mercandian Continent* (2001), there, it was argued, “...in the light of *The Star Sea*, the only application of s.17 was to cases of dishonesty...”⁴⁴ This case did not arise in the claims context but it arose in liability insurance. In this case, the assured concocted a letter to (purportedly) help the insurer who took over his claim on the issue of jurisdiction against a third party. When the insurer found out, it sought to avoid the insurance so that it would not have to meet the claims by the third party.⁴⁵ The counsel for the

⁴³ Naidoo and Oughton, n.2 above, 352.

⁴⁴ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 572, [24].

⁴⁵ See *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 566-567.

underwriter went so far as to suggest that "...pursuant to s.17, underwriters can avoid the contract for bad faith, however trivial the act of bad faith may be and however unimportant the consequences to insurers."⁴⁶ Of course, some weight can be attached to this submission, especially if one considers the public policy consideration that fraud should not be condoned. Reiterating the remark of the House of Lords in *The Star Sea* (2001) towards the severe remedy attached to s.17, however, Lord Justice Longmore decided to further limit the scope of the application of this provision.⁴⁷ His Lordship considered that, in the pre-contractual situation, to be entitled to avoid the contract, materiality and inducement must be met. Similar requirements should thus apply in a post-contractual context.⁴⁸ This suggests that Lord Justice Longmore did not see the post-contractual utmost good faith to be much different in substance from the duty of disclosure. As argued earlier, such an attitude is too narrow and does not reflect the real meaning attached to the concept of 'good faith'.

Of course, the language of s.17 is wide, but it does not contain any details and thus conceptually it is not wrong for his Lordship to try to tailor the contents of the post-contractual duty. However, with the current view to see the duty as *singular* one, Lord Justice Longmore thus created central tests of materiality and inducement, which might not fit every occasion, nor in some instances be required. While his Lordship accepted that post-contractual utmost good faith is 'general' in nature,⁴⁹ rejecting the notion of 'good faith occasions' advanced by Aikens J. at first instance,⁵⁰ even by his own revision, the duty does not attach to all instances where information is required.⁵¹ Even among those instances where the post-contractual utmost good faith is held to attach, the way the information comes to

⁴⁶ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 570, [9].

⁴⁷ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 572, [25] cited the passage of Lord Hobhouse in *The Star Sea* [2001] 1 Lloyd's Rep. 389, 402-403, [61].

⁴⁸ See generally *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 573.

⁴⁹ "...I would...accept...submission that the duty is a continuing one." *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 576, [40].

⁵⁰ Aikens J. found that post-contractual duty of utmost good faith only attached to particular instances when the contract is renewed or varied or when the assured submitted the claims. *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")* [2000] 2 Lloyd's Rep. 357, 377-378, [75].

⁵¹ See generally *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571-572, [22].

be used in each instance is not always the same. As Clarke describes, the application of a post-contractual duty of utmost good faith depends on “the phase of the relationship”.⁵² So, why not consider the contents of the duty on a phase by phase basis?

Drawing inspiration, perhaps, from the contractual argument in the case,⁵³ which Lord Justice Longmore sought to reject earlier,⁵⁴ he hinted that the priority should be given by the courts to the consideration of a contractual defence when it is raised together with a non-contractual defence (utmost good faith defence).⁵⁵ His Lordship thus started by formulating the inducement requirement. In doing so, he compared the retrospective avoidance with the repudiation (termination) of contract for breach of an innominate term and he thus went on to say:

“The insurer can treat the insured as being in repudiation of what will normally be an innominate term of the contract if there is a serious breach or there is a breach with serious consequences for the insurer. Avoidance ab initio is an even more extreme form of contractual termination...and *for the extreme remedy of avoidance to be available*, there must, in my view, *be at least the same quality of conduct as would justify the insurer in accepting the insured’s conduct as a repudiation of the contract.*”⁵⁶

⁵² Clarke, M.A., *The Law of Insurance Contracts* (4th ed., LLP, London 2002) 882, [27-1A2].

⁵³ In this case, the contract contained the following clause: “In the event of any occurrence which may result in a claim...the assured shall give prompt written notice...and shall keep underwriters fully advised...” The counsels for the underwriters argued that the fraud conducted by the assured was in breach of this clause which entitled the underwriter to reject the claim. *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 566-567, [2] and [6].

⁵⁴ He held the clause to have an ‘innominate’ character. In general contract law, if the contractual clause is classified as an innominate term, if the breach of it is so serious, the innocent party has a right to terminate the contract. Beale, H.G., et al (eds), *Chitty on Contracts Volume 1 General Principles* (29th ed., Sweet & Maxwell, London 2004) 723-724, [12-034] See also *Hong Kong Fir Shipping Company, Ltd v. Kawasaki Kisen Kaisha, Ltd.* [1961] 2 Lloyd’s Rep. 478. In insurance law, however, the breach of innominate term, if serious, only entitles the innocent party to reject the claim. See *Alfred McAlpine Plc v. BAI (Run-Off) Ltd.* [2000] 1 Lloyd’s Rep. 437 This variant of innominate term, however, was recently rejected by the Court of Appeal in *Friends Provident Life & Pension Ltd v. Sirius International Insurance* [2005] EWCA Civ. 601.

⁵⁵ “...a contract has been made, it is somewhat perverse to apply to it principles of good faith which are traditionally applicable mainly in pre-contractual situations...I shall...consider the contractual defence first.” *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 567-568, [9].

⁵⁶ *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 572, [25] (emphasis added).

Immediately, this formulation attracts strong criticism from Hird. She asks why avoidance of the contract from inception should be equated with termination of contract with prospective consequence from the date of the breach, arguing,

“...it is not clear why an insurer whose remedy for breach of contract is prospective ought ever to be given the opportunity to avoid retrospectively...*the contract ought only to be undone retrospectively when he can prove he would not have entered into it at all had he known the true facts.*”⁵⁷

In light of the general attitude of the courts, including of his Lordship, to view ‘utmost good faith’ very narrowly and with the current language of s.17, Longmore L.J. did not seem to have other options to choose apart from trying to limit the application of this provision so as to circumvent the harsh remedy of avoidance attach to it.⁵⁸ Indeed, here, s.17 deserves closer analysis. As Foxton correctly observes, the language of this provision is “...[as] apt to describe the conditions in which the contract has come into existence as it is to impose post-contractual duties on the parties...”⁵⁹ Thus, it seems to be conceptually correct to accept that the doctrine of utmost good faith has a post-contractual dimension. However, “...the remedy of avoidance would suggest that the section was aimed at defects in consent...”⁶⁰ This hinted at the unusual nature of the remedy in s.17.

As argued in Chapters 2 and 4 above, Lord Mansfield referred to avoidance in the context of pre-contractual non-disclosure. He recognised the duty of disclosure as part of the broader duty of good faith but he was silent upon the remedy for breach of the latter. The concept of good faith is to take justice and fairness between the parties to the contract into account and thus the fixed remedy attached to s.17 is contrary to this underlying concept. It is out of context here.

⁵⁷ Hird, N., “The saga of the continuing duty of utmost good faith-the sequel” [2002] JBL 327, 331 (emphasis added).

⁵⁸ Soyer, n.4 above, 62.

⁵⁹ Foxton, n.12 above, [17].

⁶⁰ *Ibid.*

Perhaps we should revert back to the inducement requirement propounded by Longmore L.J. At first sight, he seems to suggest that, in order to consider whether the innocent party is entitled to the remedy of avoidance, an assessment of the seriousness of the fraudulent conduct of other party is needed. This is because, in general contract law, to be able to terminate the contract for breach of an innominate term, the consequence of the breach must be serious.⁶¹ However, the actual utilisation of such an inducement requirement is rather dubious. As Eggers et al maintain, "...unless entirely trivial...fraudulent behaviour must almost by necessity indicate that the parties are no longer able to regard each other with the trust required by the duty of utmost good faith."⁶² Here, they cite the passage of Hoffman L.J. (as he then was) in *Orakpo v. Barclay Insce* (1995),⁶³ albeit expressed in a claims context predating the judgment in the *Gottlieb* case (2005), that "[a]ny fraud in making the claims goes to the root of the contract..."⁶⁴ This also appears to be the view of Longmore L.J. himself, writing extra-judicially.⁶⁵

Of course, one should not lose sight of the fact that inducement cannot stand alone without a materiality requirement. Concerning this, after rejecting the submission of counsel that the limitation of s.17 can be achieved also by these means Rix J. (as he then was) identified in *Royal Boskalis v. Mountain* (1997),⁶⁶ Longmore L.J., nevertheless, sought to borrow the materiality test from this case even though there the case concerned non-fraudulent claims context⁶⁷ and it predated the judgment of the House of Lords in *The Star Sea* (2001). Longmore L.J. thus formulated the following materiality test:

⁶¹ Beale et al, n.54 above, 723-724, [12-034].

⁶² Eggers, P.M., et al, *Good Faith and Insurance Contracts* (2nd ed., LLP, London 2004) 249, [10.59].

⁶³ *Orakpo v. Barclays Insurance Services and Another* [1995] 1 LRLR 443.

⁶⁴ *Orakpo* [1995] 1 LRLR 443, 451 (emphasis added).

⁶⁵ "...most (if not all) fraud directed at the insurer will justifiably be treated as repudiatory conduct..." Longmore, A. (Sir), "Good Faith and breach of warranty: are we moving forwards or backwards?" [2004] LMCLQ 158, 167.

⁶⁶ *Royal Boskalis N.V and Others v. Mountain and Others* [1997] 1 LRLR 523.

⁶⁷ Rix J. considered the difficulty attached to the expansion of the duty of the assured at the claims context to encompass non-fraudulent claims, especially the need to tailor the suitable test of materiality and inducement. See *The Royal Boskalis* [1997] 1 LRLR 523, 597.

“...the conduct of the assured which is relied on by underwriter *must be causally relevant to underwriters’ ultimate liability*, or at least, *to some defence of the underwriters before it can be permitted to avoid the policy.*”⁶⁸

In a post-contractual situation, however, the interaction between materiality and inducement is not at all clear. “...[A] material fraudulent breach of good faith, once the contract has been made, will usually entitle the insurers to terminate the contract...”⁶⁹ Logically, materiality is considered first, and, if the breach passes the materiality test, then, the courts turn to look at the inducement. As such, the dual requirements propounded by Longmore L.J. can perhaps be deduced to this: to be entitled to avoid the contract, the insurer must prove that the assured’s post-contractual fraudulent conduct affects his ultimate liability or defence. But, this test is not suitable in all instances. At least, Longmore L.J. surely did not bear the reciprocal nature of utmost good faith in mind. As Eggers et al argue, resort to the concept of ‘liability’ renders the utilisation of this test fairly limited. In their view, “when the insurer’s conduct is being assessed, there is little question of the assured’s *liability* under the policy being the relevant criterion for materiality...”⁷⁰ So, in which situations will this test be applicable?

5.2. The application of the general principles to specific circumstances

Before proceeding to examine some specific applications of the general principles, the scope of the post-contractual duty of utmost good faith will be briefly explored. Some caution needs to be borne in mind as not every aspect of it is subject to the general principles. The duty at the post-contractual phase may be broadly separated into two aspects: the insurer’s duty and the assured’s duty. The former can be further divided into two duties. First, it is related to the insurer’s right to avoid the contract, i.e. whether such right needs to be exercised in good

⁶⁸ *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 574 (emphasis added).

⁶⁹ *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 575.

⁷⁰ Eggers et al, n.62 above, 249, [10.58] (emphasis added).

faith.⁷¹ This aspect of the duty was mentioned by the Court of Appeal in the case of *Drake Insurance v. Provident Insurance* (2003),⁷² analysed in the previous chapter. Attractive as it is, it is still subject to the conflicting decision of the Court of Appeal in *Brotherton & Anr v. Aseguradora Colseguros S.A & Anr* (2003)⁷³ But, if, as suggested, the courts are equipped with discretion to impose an appropriate remedy, one may doubt whether such duty is needed. As already considered in Chapter 4, the scope of good faith is not the same as Longmore L.J. set out in *The Mercandian Continent* (2001).

The second aspect of the insurer's duty is in relation to claims.⁷⁴ This mainly occurs in liability insurance or reinsurance.⁷⁵ For example, in *Gan v. Tai Ping (Nos 2 & 3)* (2001),⁷⁶ the policy in that case contained a clause to the effect that the reinsured cannot settle or compromise the claim without the reinsurer's approval.⁷⁷ Mance L.J. (as he then was) mentioned in this case that "...any withholding of approval by reinsurers *should take place in good faith* after consideration of and on the basis of the facts giving rise to the particular claim..."⁷⁸ More importantly, however, his Lordship further stated that "[t]he qualification that I have identified does not arise from any principles or considerations *special to the law of insurance*. It arises from the nature and purpose of the relevant contractual provisions."⁷⁹ With respect, how can one distinguish between good faith that arises out of contractual provisions and that which arises from the application of s.17? Above all, the language of this particular section surely can encompass such a duty in the claims sphere. But, of course, to subject the contents of the duty to the materiality and inducement requirements set out by Longmore L.J. does not seem to be sensible either. In the more recent judgment of the Court of Appeal in *Eagle Star Insurance Company*

⁷¹ See generally Naidoo and Oughton, n.2 above, 358-363.

⁷² *Drake Insurance Plc v. Provident Insurance Plc* [2003] EWCA Civ. 1834; [2004] 1 Lloyd's Rep. 268.

⁷³ See *Brotherton & Anr v. Aseguradora Colseguros S.A & Anr*. [2003] EWCA Civ. 705, [27].

⁷⁴ Naidoo and Oughton, n.2 above, 363-364.

⁷⁵ *Ibid.*

⁷⁶ *Gan Insurance Company Ltd v. Tai Ping Insurance Company Ltd (No.2 and 3)* [2001] EWCA Civ. 1047; [2001] 1 Lloyd's Rep. I.R. 667.

⁷⁷ *Gan* [2001] 1 Lloyd's Rep. I.R. 667, 683, [3].

⁷⁸ *Gan* [2001] 1 Lloyd's Rep. I.R. 667, 697, [67] (emphasis added).

⁷⁹ *Gan* [2001] 1 Lloyd's Rep. I.R. 667, 697, [68] (emphasis added).

Limited v. J.N. Cresswell & Others (2004),⁸⁰ Rix L.J. followed the same line of opinion. The policy in this case contained a clause to the effect that the reinsured must inform the reinsurer of the loss or claim within 7 days. Then, the reinsurer will have a right to control “the negotiations or settlements of any claims under this policy”.⁸¹ It was mentioned by Rix L.J. that “...while exercising or refusing to exercise control, the reinsurers *act in bad faith, capriciously or arbitrarily*, then there is the implied term...to protect the reinsured.”⁸² The decision in the *Gan* case (2001) was cited as an authority.⁸³ These led Naidoo and Oughton to suggest that “all instances of the insurer’s duty will be developed consistently to rest on an implied term basis.”⁸⁴ The question is: what precluded these instances from resting upon s.17? Nothing in the language of this provision suggests that the insurer’s duty in such circumstances cannot fall into its scope, except perhaps the special qualifications attached to it by the judgment of Longmore L.J., which are *outside* the language of the Act. There might be a ground to argue, also, that such special qualifications are confined to the narrow duty of ‘disclosure’ at the post-contractual phase.

Apart from the two instances above, one should not forget that in the instances where the *assured’s* post-contractual duty of utmost good faith has been held to exist, logically the reciprocal duty may be found there as well. Despite the fact that utmost good faith is recognised as a ‘general’ one, its application depends on the phase of the relationship.⁸⁵ The instances where the assured’s duty of utmost good faith has been recognised were excellently explored and compiled by Longmore L.J. in *The Mercandian Continent* (2001).⁸⁶ With the exception of fraudulent claims, these instances are variation of risk, renewal, the use of “held covered” clauses, the insurer asking for information during the policy, and other situations where good faith may be implied. The last situation will not concern us

⁸⁰ *Eagle Star Insurance Company Limited v. J.N. Cresswell & Others* [2004] EWCA Civ. 602.

⁸¹ *Eagle Star* [2004] EWCA Civ. 602, [1].

⁸² *Eagle Star* [2004] EWCA Civ. 602, [54] (emphasis added).

⁸³ See *Eagle Star* [2004] EWCA Civ. 602, [54].

⁸⁴ Naidoo and Oughton, n.2 above, 371.

⁸⁵ Above, 159.

⁸⁶ *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 571-572, [22].

here as it is about liability insurance when the claim is taken over by the insurer.⁸⁷ In addition, renewal of contract will not be mentioned as it is very clear that it belongs to the pre-contractual phase.⁸⁸ The other instances will be analysed starting with the instance where post-contractual utmost good faith is most likely to attach and moving towards the instances where the requirement of such duty is more doubtful.

(a) Insurer asking for information during the policy

This is the situation where there is a term in the contract to the effect that the assured must inform the insurer of some information during the currency of the policy. In such a case, the assured needs to inform the insurer with utmost good faith.⁸⁹ However, in *The Mercandian Continent* (2001), Longmore L.J. seemed to treat utmost good faith issue as a 'fallback position' supplemental to the contractual defence.⁹⁰ In theory, at least, it is always possible for the insurer to raise a good faith defence alongside the traditional breach of contract defence.⁹¹ However, one may doubt the justification of the duty of utmost good faith in this context where the insurer is well-protected by the contract. In the pre-contractual context, the rationale for the duty of disclosure is quite clear since the insurer in such a case can be *induced* into the contract. The same cannot be said for the post-contractual duty. For example, in *McAlpine v. BAI (Run-Off)* (2000),⁹² the contractual clause there clearly stipulates:

"In the event of any occurrence which may give rise to a claim under this Policy, the insured shall, as soon as possible, give notice thereof to the Company, in writing, with full details..."⁹³

⁸⁷ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 572, [22].

⁸⁸ "The renewal of an insurance policy...is a matter of law regarded as the creation of a fresh agreement." Soyer, n.4 above, 67.

⁸⁹ *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

⁹⁰ Above, 161. "Longmore LJ's approach also reflects the sedulous efforts of judges in denying insurers yet another liability-avoidance defence which would further strengthen their already-fortified position." Yeo, n.38 above, 440.

⁹¹ Soyer, n.4 above, 60.

⁹² *McAlpine* [2000] 1 Lloyd's Rep. 437.

⁹³ *McAlpine* [2000] 1 Lloyd's Rep. 437, 440, [13].

By agreeing with this term, the assured also indicates that he acknowledges his obligation under the clause and, in case of breach, the insurer can resort to the usual contractual route. Indeed, a similar clause can be found in *The Mercandian Continent* itself.⁹⁴ There, it was quite strange that Longmore L.J. did not proceed to rule out the requirement of utmost good faith in such context since he bore in mind the following remark of Lord Hobhouse in *The Star Sea* (2001):

“The potential is also there for the parties, if they so choose, to provide by their contract for remedies or consequences which would act retrospectively.”⁹⁵

Thus, apart from stipulating the duty in the contract, the parties can even indicate the consequence of the breach of such contractual duty. This even raises more questions to the justification of the doctrine of utmost good faith here.

Indeed, such a duty was rejected in the case of *Hussain v. Brown (No.2)* (1996).⁹⁶ As quoted by Soyer, the contractual clause in this case provided that:

“The Assured shall as soon as possible give notice in writing to the Underwriters of any alteration likely to increase the risk or any damage to the insured or Underwriter’s liability and shall pay such reasonable premium, if any, as may be required by the Underwriters.”⁹⁷

In this case, as Soyer records, the judge did not find the duty of utmost good faith to exist alongside the contractual duty to notify. “It was decided that a contractual obligation on the assured to notify any circumstance which might increase the risk superseded the continuing duty of utmost good faith.”⁹⁸ It is submitted that the judgment in this case is in accordance with usual logic that the insurer should not benefit from double-protection.

⁹⁴ *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 566, [2].

⁹⁵ *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 403, [61].

⁹⁶ *Hussain v. Brown (No.2)* (unreported judgment, 1996).

⁹⁷ Soyer, n.4 above, 60.

⁹⁸ *Ibid.*

Nevertheless, in the *McAlpine* case (2000), their Lordships did not reject the possibility of the duty of utmost good faith attaching to the duty to notify.⁹⁹ Still, one can doubt where in such a context s.17 can actually operate. Indeed, this is subject to judicial determination of the legal status of such a clause. This question is inextricably linked with the application of the utmost good faith doctrine because, under the inducement test propounded by Longmore L.J.,¹⁰⁰ if the insurer can terminate the contract in case of breach, he is also likely to successfully raise the utmost good faith defence. As Soyer maintains,

“...s.17 would not find application in many instances at post-contractual stage...Breach of the contractual clauses, which are said to attract the post-contractual duty...would not in most cases give a right of repudiation...since the judicial tendency is to classify clauses of this nature as innominate terms.”¹⁰¹

Certainly, Soyer has in his mind here the analysis of Waller L.J. in the *McAlpine* case (2000) which was approved by Longmore L.J. in *The Mercandian Continent* (2001).¹⁰² There, the clause was held to have an ‘innominate’ character whereby the remedy to the innocent party depends on the gravity of the breach. In general contract law, the right to terminate exists if the breach is sufficiently serious. In contrast, if the consequence is fairly trivial, the innocent party only has a right to claim contractual damages.¹⁰³ However, in the *McAlpine* case (2000), Waller L.J. sought to divert from the traditional innominate term. He held that breach of such a clause, if serious, will entitle the innocent party, i.e. the insurer, to reject the claims.¹⁰⁴ The reason given was that his Lordship viewed each claim as leading to separate obligations.¹⁰⁵ Thus he said,

⁹⁹ Their Lordship rejected the utmost good faith defence on the ground that the insurer did not establish fraudulent conduct on the part of the assured. See *McAlpine* [2000] 1 Lloyd’s Rep. 437, 441, [21]-[22].

¹⁰⁰ Above, 159.

¹⁰¹ Soyer, n.4 above, 62.

¹⁰² See *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 569, [14]-[16].

¹⁰³ Beale et al, n.54 above, 723-724, [12-034].

¹⁰⁴ *McAlpine* [2000] 1 Lloyd’s Rep. 437, 443, [26].

¹⁰⁵ His Lordship was of the view that each claim is ‘severable’. The concept of severable obligation may be seen in the sales contract where the payment and delivery are agreed to be done in instalments. See Soyer, B., “Classification of Terms in Marine Insurance Contracts in the

“The very fact that [the contractual clause]...aimed at imposing obligations in relation to individual claims...ought logically to allow for the possibility of a *repudiatory* breach leading simply to a rejection of a claim.”¹⁰⁶

As such, the breach of the notification clause might be “so serious as to give a right to reject the claim albeit it was not...a repudiation of the *whole* contract.”¹⁰⁷ Thus, the quality of conduct amounting to the breach of a notification clause does not entitle the insurer to terminate the contract, so it does not meet the inducement requirement propounded by Longmore L.J.¹⁰⁸

Such a departure from traditional innominate term principles raised some doubts for the Court of Appeal in the more recent case of *Friends Provident Life & Pensions Ltd v. Sirius International Insurance* (2005).¹⁰⁹ Although the conclusion regarding the legal status of the clause might not be the same as that in the *McAlpine* case (2000), this case distanced the breach of notification clause even further from the operation of utmost good faith in s.17. Mance L.J. viewed the insurance contract as an unseverable one. In his reasoning,

“The present insurance is a composite contract. The primary *quid pro quo* for insurers' obligation to pay claims under the insurance is *the premium*, which is *incapable of being severally allocated to any particular risk or claim*.”¹¹⁰

Viewing a clause in question to be an ‘ancillary’ one, he thus resorted to the more traditional contractual principle by holding that the breach of such an ancillary

Context of Contemporary Developments” (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 1 July 2005) 16. The learned editors of *Chitty on Contracts* explain this kind of obligation by using the term ‘divisible obligations’ which refers to the contract that “is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance.” Beale et al, n.54 above, 1250, [21-027].

¹⁰⁶ *McAlpine* [2000] 1 Lloyd’s Rep. 437, 443, [26] (italics adapted from the original text).

¹⁰⁷ *McAlpine* [2000] 1 Lloyd’s Rep. 437, 443, [26] (emphasis added).

¹⁰⁸ See *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 575, [35].

¹⁰⁹ *Friends* [2005] EWCA Civ. 601.

¹¹⁰ *Friends* [2005] EWCA Civ. 601, [31] (emphasis added).

provision only attracts the remedy of contractual damages.¹¹¹ In the word of his Lordship, “I see no basis for a new doctrine of partial repudiatory breach...”¹¹² To reach such a conclusion, his Lordship was also inclined to think that the insurers can protect themselves by contractual means and thus he implored the insurers to alleviate the remedy for breach of notification clauses.¹¹³

The precise legal status of the notification clause is a question which is ultimately left for the House of Lords.¹¹⁴ Suffice it to say that, on either analysis, the quality of the conduct of the assured in breach of the notification clause cannot justify the insurer in terminating the contract as a whole. As such, although conceptually the duty of utmost good faith may exist, it does seem to be useless. In light of the existing contractual clause which can be enforced by general contract law, it is suggested that the duty of utmost good faith appears redundant in this context.

(b) Variation of risk

This is the situation when the assured or the insurer seeks to alter the risk as originally agreed in the policy.¹¹⁵ In such situation, the assured only has a duty to disclose those facts which are material to the variation if such alteration will render the insurer to bear more risk.¹¹⁶ However, the remedy for failure to disclose material facts in such circumstances is not at all clear. Longmore L.J. mentioned that there appears to be no authority to suggest that non-disclosure in such a case can lead to the avoidance of the contract.¹¹⁷ But, in one authority which his Lordship did acknowledge, namely *Lishman v. Northern Marine*

¹¹¹ *Friends* [2005] EWCA Civ.601, [31].

¹¹² *Friends* [2005] EWCA Civ. 601, [30].

¹¹³ See generally *Friends* [2005] EWCA Civ. 601, [32].

¹¹⁴ Soyer, n.105 above, 19.

¹¹⁵ See *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

¹¹⁶ *Lishman and Another v. The Northern Marine Insurance Company* (1875) L.R. 10 C.P. 179; *Iron Trades Mutual Insurance Co.Ltd and Others v. Compania de Seguros Imperio* [1991] 1 Re.L.R. 213; *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

¹¹⁷ See *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 571, [22].

Insurance Co (1875),¹¹⁸ Blackburn J. (as he then was) suggested that, in such a case, the insurance contract can be *avoided*. He said,

“Suppose the policy were actually executed, and *the parties agree to add a memorandum afterwards*, altering the terms: *if the alteration were such as to make the contract more burdensome to the underwriters*, and a fact known at that time to the assured were concealed which was material to the alteration, I should say *the policy would be vitiated*.”¹¹⁹

It is apparent from the view of his Lordship that non-disclosure at the alteration stage can lead to the avoidance of the whole policy, *not only* the memorandum. This case pre-dated the judgment of the House of Lords in *The Star Sea* (2001) and thus it did not appear that Blackburn J. suggested the limitation of non-disclosure to be to fraud. Such consequence is a dire one and it is faced with an argument from some academic commentators, especially Soyer, who resort to the contractual analysis. The following reason is advanced to suggest that the altered part should be separately considered and, in case of non-disclosure, only that part should be avoided:

“In general contract law, an agreement to vary an existing contract has been regarded as a fresh agreement which needs to be supported by *additional consideration...in order to enforce such an agreement the assured must be able to prove the existence of consideration coming from him, i.e. payment of an additional premium...*”¹²⁰

Consequently, Soyer suggests that the duty of disclosure at the variation stage should be subject to ss.18-20.¹²¹ It is not entirely clear that all contractual

¹¹⁸ *Lishman* (1875) L.R. 10 C.P. 179.

¹¹⁹ *Lishman* (1875) L.R. 10 C.P. 179, 182 (emphasis added).

¹²⁰ Soyer, n.4 above, 66 (italics adapted from the original text). “In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some *consideration*. The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements...consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value)...” Beale et al, n.54 above, 215-217, [3-001]-[3-004] (italics adapted from the original text).

¹²¹ *Ibid*

variation can actually be treated as creating a new contract. If not, a further point is there is no reason why s.17 cannot be applicable to the variation. One perhaps needs to take into account the remark of Morrison J. in *Groupama Insurance Company Ltd v. Overseas Partners Re Ltd, Aon Limited* (2003),¹²² a reinsurance case where originally only 50 per cent of the risk was accepted, but, later on, there was a negotiation to increase the accepted risk to 75 per cent.¹²³ His Lordship expressed, albeit did not decide, that:

“The difference between a new contract and a variation is not easy to define since in one sense every variation could be said to lead to a new contract and in the end it may just be a matter of form. Here, the only term of the contract that was altered was the % share, all the other terms remained the same and in form at least the change was closer to a variation than a new contract.”¹²⁴

Thus, his Lordship seems to be of the view that the minor alteration might not create a new contract. But, the basis of this view is not entirely clear.

Soyer further draws some support from the passage of Lord Hobhouse in *The Star Sea* (2001) where his Lordship mentioned:

“A coherent scheme can be achieved by distinguishing lack of good faith which is material to the making of the contract itself (*or some variation of it*) and a lack of good faith during the performance of the contract...The former derives from requirements of the law which pre-exist the contract...”¹²⁵

One cannot read merely one paragraph without putting it in context. Is the above equation only limited to the duty of disclosure? In other words, the above view indicates only that in making a contract as well as in contractual variation, the assured needs only to disclose the facts which are material at each stage. The

¹²² *Groupama Insurance Company Ltd v. Overseas Partners Re Ltd, Aon Limited* [2003] EWHC 34.

¹²³ *Groupama* [2003] EWHC 34, [12].

¹²⁴ *Groupama* [2003] EWHC 34, [30].

¹²⁵ *The Star Sea* [2001] 1 Lloyd's Rep. 389, 400 (emphasis added).

above passage is short of clarity on remedy and, at the same time, the legal status of the altered part is not clearly expressed. Indeed, the passage of Blackburn J.¹²⁶ was also quoted in the House of Lords, and, as Mandaraka-Sheppard observes, it was “cited with approval...”¹²⁷ With respect, the author thinks that the passage of Blackburn J. could only support what Lord Hobhouse proclaimed earlier in that same paragraph that “[w]here the contract is being varied, facts must be disclosed which are material to the *additional* risk being accepted at the variation.”¹²⁸ It is neither the evidence for the remedy nor the legal status of the altered part.

So, how should one view such part? This is a crucial question to be probed. If the variation amounts to a fresh agreement, then, it will be subject to ss.18-20 and no question of remedy arises. If it is to the contrary, then, it is subject to s.17 and since the House of Lords limited the duty at the post-contractual stage to the abstention from fraud, such scope seems to be inconsistent with previous authorities.

The present author is inclined to think that contractual variation is not always the same as a new contract. Certainly, the learned editors of *Chitty on Contracts* do not consider them to be the same. As they explain,

“Factual difficulties can no doubt arise in distinguishing between: (1) a rescission followed by a new agreement; and (2) a mere variation. But in principle the distinction is clear: *in the first of these situations, the original contract is brought to an end and replaced by a new one in respect of which the requirement of consideration is satisfied,* while in the second the original contract continues...”¹²⁹

¹²⁶ Above, 170.

¹²⁷ Mandaraka-Sheppard, A., “The Overarching Duty of Good Faith in Insurance Contracts: Where Does the Buck Stop?” (2001) 8 *International Maritime Law* 327, 330.

¹²⁸ *The Star Sea* [2001] 1 Lloyd’s Rep. 389, 401, [54] (italics following Lord Hobhouse).

¹²⁹ Beale et al, n.54 above, 254, [3-071] (emphasis added) cited *Compagnie Noga D’Importation et D’Exportation SA v. Abacha (No.4)* [2003] EWCA Civ. 1100.

True, consideration is required in the latter case as well.¹³⁰ Thus, the consideration point alone may not determine the legal status of the altered part. Indeed, what is relevant is whether the parties agreed to terminate the original contract as well. One will find that such an agreement can be impliedly made by replacing the old terms with the new terms.¹³¹ To this extent, the distinction between a new agreement and a variation is not clear cut as the line between them lies on how original contract has been altered.¹³² If the change seems to be trivial, i.e. “do[es] not go to the very root of the contract”,¹³³ it is just a mere variation. To this extent, the view of Morrison J. in the *Groupama* case (2003) was in accordance with this understanding.¹³⁴ The mere change to the percentage in that case was just a mere variation.

Thus, what we have gleaned from this analysis seems to be: if the change is crucial, for example, an alteration made to the subject-matter insured, then, the original contract is impliedly rescinded and thus such alteration constitutes a new contract which attracts the operation of ss.18-20 and the remedy suggested therein.¹³⁵ If the change is trivial, for example just to the percentage of the cover, then, the scope of the duty is thus confined to the abstention from fraud in accordance with the judgment of the House of Lords in *The Star Sea* (2001). This *may be* appropriate. Since the change is only to some minor points, the scope of the information needed is thus so confined and it is not difficult for the assured to know what may or may not affect such alteration. It is unlike when the contract is firstly negotiated where the insurer at that time has to decide whether the contract will be accepted, and if it is so agreed, what terms and conditions and what rate of premiums shall be imposed. Thus, the assured hardly knows what the (prudent) insurer would take into account. The same cannot be said for alteration. As such,

¹³⁰ “The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of existing rights...” *Ibid.*, 1298, [22-035].

¹³¹ *Ibid.*, 1295, [22-028].

¹³² *Ibid.*, 1298, [22-034].

¹³³ *Ibid.* (italics adapted from the original text).

¹³⁴ Above, 171.

¹³⁵ See generally Chapter 3 above.

non-disclosure by the assured at the alteration stage can only be seen as *fraud* since the assured is likely to know what must be disclosed in such circumstance.

But, the problem seems to appear in relation to the dual requirements in *The Mercandian Continent* (2001). Of course, any fraud at this stage likely affects the ultimate liability of the insurer in the sense that he would not have agreed with the alteration if the fraud had not occurred. Longmore L.J. did not consider this point because in his view, although without proper analysis, all contractual variation led to the creation of a new contract.¹³⁶ Thus, one may wonder whether the dual tests propounded by his Lordship are *ever* intended to be applied to the insurance contractual variation.¹³⁷ Since such requirements are the qualifications given to s.17 in general, one would expect them to be applicable to such alteration under the contractual analysis adopted here.

But, the consequence of this does not seem to be satisfactory as one would achieve the illogical result that a fraudulent non-disclosure which led to the trivial change of the contract can result in the avoidance of contract as a whole, which is gravely disproportionate. This is clearly against the underlying policy to maintain fairness and, as argued in Chapter 4, the fixed remedy of avoidance attached to s.17 hardly reflects the real spirit of the doctrine of good faith. Again, it is hinted that the last part of this provision is crying out for reform.

Thus, if sufficient discretion is given to the courts, judges may impose the remedy by taking into account *what* was altered by the breach. For example, if the breach induced the insurer to accept the risk more than he would have, the courts may choose to impose the liability upon the insurer to the extent of the original terms before the variation. This will reflect more the notion of 'good faith' which Lord Mansfield envisaged but the modern authorities have never realised.

¹³⁶ See *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563 and 571, [22] and [27] respectively.

¹³⁷ "According to the Court of Appeal in *The Mercandian Continent*, we may assume that the section 17 duty is confined to cases where there is an express contractual obligation to provide information". Birds, J., and Hird, N.J., *Birds' Modern Insurance Law* (6th ed., Sweet & Maxwell, London 2004) 129.

(c) “Held covered” clauses

A held covered clause is a clause which is *not* unique to marine insurance but most of its usage can be found in this type of insurance contract where it has a specific function.¹³⁸ It provides the assured with a choice whether he wishes to obtain further cover beyond that originally stated in the policy. If he wishes such cover, he must give a notice to the insurer within a reasonable time. The insurer might demand additional premium for this extended cover.¹³⁹ The concept of utmost good faith became relevant in this context when it was mentioned in two authorities referred to by Hirst J. in *The Litsion Pride* (1985),¹⁴⁰ which will be briefly described at the outset of this discussion.

Starting with the *Style* case (1958), it concerned a delivery of canned pork. The marks on the cans did not comply with those stated in the policy. However, there was a held covered clause to the effect that:

“...*Held covered at a premium to be arranged in case of change of voyage or of any omission or error in the description of the interest vessel or voyage...*

Note: - *It is necessary for the assured when they became aware of an event which is “held covered” under this policy to give prompt notice to underwriters and the right to such cover is dependent upon compliance with this obligation.*”¹⁴¹

Unlike the instance when the assured has a duty under a contract to supply information, the held covered clause stipulates simply that the assured must give ‘prompt notice’ but what the assured must give *with* such notice is far from clear. Perhaps, it is at this point that the concept of utmost good faith becomes relevant since it will ensure that the insurer has enough information to assess the premium of extended cover. It was likely that McNair J. (as he then was) had this reasoning

¹³⁸ Thomas, n.21 above, 1, [1.1].

¹³⁹ *Ibid.*, 5-6, [1.11].

¹⁴⁰ *The Litsion Pride* [1985] 1 Lloyd’s Rep. 437, 511-512 cited *Overseas Commodities, Ltd v. Style* [1958] 1 Lloyd’s Rep. 546; *Liberian Agency Inc v. Mosse* [1977] 2 Lloyd’s Rep. 560.

¹⁴¹ *Style* [1958] 1 Lloyd’s Rep. 546, 554 (emphasis added).

in his mind when he found that the underwriter had asked the assured for the reason why the mark on the cans was wrong and the assured forwarded to him only the explanation from the manufacturers which was the one “giving the most favourable explanation”.¹⁴² His Lordship thus proceeded to say,

*“To obtain the protection of the “held covered” clause, the assured must act with the utmost good faith towards the underwriters, this being an obligation which rests upon them throughout the currency of the policy.”*¹⁴³

His Lordship did not mention ‘avoidance’. Neither s.17 nor any subsequent section of the Act was referred to. It is hard to extract any principles from his passage except the last part which suggests that, in his view, the held covered clause is an instance where post-contractual utmost good faith is required. The identical clause became the subject of scrutiny again in the *Liberian* case (1977). Equally unhelpful, Donaldson J., in referring to the *Style* case (1958), regarded utmost good faith as “a condition precedent to the application of the clause”.¹⁴⁴ One may doubt why their Lordships did not resort to the language of the Act which is the easiest way for judges in places where they can do so.

The held covered clause was mentioned again, although it did not arise in the factual context of the case, in *The Mercandian Continent* (2001). There, without any proper analysis, by equating the use of it with contractual variation, Longmore L.J. regarded it as an instance which attracts a ‘pre-contractual’ duty of utmost good faith.¹⁴⁵ Some academic commentators such as Thomas found that an analysis along this line is possible. He suggests that the held covered clause should be viewed as another contract independent from the original contract agreed in the policy. As he explains,

¹⁴² *Style* [1958] 1 Lloyd’s Rep. 546, 559.

¹⁴³ *Style* [1958] 1 Lloyd’s Rep. 546, 559 (emphasis added).

¹⁴⁴ *Liberian* [1977] 2 Lloyd’s Rep. 560, 567.

¹⁴⁵ See *The Mercandian Continent* [2001] 2 Lloyd’s Rep. 563, 571 and 573, [22] and [27] respectively.

“Whereas most of the contractual terms create bilateral obligations, the h/c clause is different for initially it creates a unilateral obligation requiring the underwriter to provide the specified additional cover if demanded by the assured...Initially only the underwriter is under a binding obligation. It does not become an obligation requiring performance until notice is given...But once notice is given, both parties are subject to immediate obligations. The underwriter is obliged to provide the promised additional cover...The assured is obliged to agree any specified conditions precedent, usually relating to additional premium and amended terms of cover.”¹⁴⁶

The same line of analysis is adopted by Soyer who further explains that the clause stays as an offer from the insurer until the moment the notice is given. By giving notice and agreeing to pay more premiums and accepting new terms, “the assured is both accepting and giving consideration for a unilateral offer”.¹⁴⁷ A similar understanding is shared by Merkin although a different analysis is adopted to reach the same route.¹⁴⁸ In this line of opinion, the duty of utmost good faith in relation to the held covered clause is thus subject to ss.18-20 of the Act.¹⁴⁹

In light of no other formal analysis of the held covered clause by case laws, and also by taking into account the theoretical understanding provided by the modern commentators, it might be possible to conclude that the weight of authorities suggests that the held covered clause has its own distinct characteristic which does not attach to the original insurance contract. At least, this seems to be the state of law post-*The Mercandian Continent* (2001).¹⁵⁰

¹⁴⁶ Thomas, n.21 above, 53-54, [1.145]-[1.146].

¹⁴⁷ Soyer, n.4 above, 64.

¹⁴⁸ “...held covered clause in question required a decision on the part of the insurer to extend cover, and in that respect they can be regarded as fresh instances...” Merkin, n.32 above. It is hard to see how this view can be reconciled with the explanation of Thomas as the unilateral contract provided by the insurer is standing from the first place. The duty of good faith as to the notice given does not seem to be directly relevant to the decision of the insurer to extend the cover although it might be related to the additional premium to be charged.

¹⁴⁹ See generally *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, 573, [27] See also Thomas, n.21 above, 50, [1.136]-[1.137].

¹⁵⁰ Rose explains “held covered” clause in his book that “[t]his is in effect a variation of the contract, usually supported by new consideration...it is well established that a duty of disclosure applies.” Rose, F.D., *Marine Insurance Law and Practice* (LLP, London 2004) 92, [5.77] (emphasis added). See also Eggers et al, n.62 above, 237-241, [10.15]-[10.28]; Naidoo and Oughton, n.2 above, 371.

To rest the duty of utmost good faith in the context of the “held covered” clause upon the pre-contractual phase under the realm of s.18 is not free from doubts, however. First, given the current provision of s.18(2) as it stands, and the fact that the held covered clause is inserted from the inception of an insurance contract, Thomas, by analogy, suggests the materiality test to be “...if it would influence the judgment of a prudent insurer in fixing the additional premium and/or determining the conditions on which the additional cover is to be provided.”¹⁵¹ With respect, it is unclear to the present author why the concept of materiality is needed here. The held covered clause usually defines the risk to be extended by the operation of the clause and therefore the facts which may be relevant to the setting of the premium are those facts related to the defined risks. What need is there to bring in the wide duty of disclosure, especially the prudent insurer test attached to it? It is submitted that the language of the clause already determines the scope of the duty of disclosure. Secondly, one might ask how the insurer can be *induced* into the held covered clause since he was a person who offered it in the first place in the form of unilateral contract. Thomas cannot *confidently* answer this. He says the insurer may be benefited from the presumption of inducement.¹⁵² It is respectfully submitted that the operation of s.18 in this context is questionable.

But, one should not lose sight of the fact that the general duty of utmost good faith in s.17 is applicable to pre-contractual instances, as well as post-contractual instances, and there is no reason why the duty of disclosure under the held covered clause cannot be independently subject to the operation of this broad provision. Here, the duty must be re-formulated. The author thinks that, since in the context of the held covered clause, the extended risk is apparently defined and hints at the scope of the duty of disclosure, the breach of it can be deduced to be those deliberate concealments of the facts relevant to the risk. Concerning the inducement requirement, perhaps by analogy with the pre-contractual context, the actual insurer may prove that, without such non-disclosure, he would not have

¹⁵¹ Thomas, n.21 above, 51, [1.137].

¹⁵² *Ibid.*, 51, [1.139].

charged the premiums at the rate he did. This formulation is indeed in line with the potential reform of s.18 suggested in Chapter 3.

Before this section ends, one should note that, in practice, there is another kind of held covered clause in which the amended terms of cover and the additional premiums are agreed from the inception of the policy.¹⁵³ This type of clause seems to fall into the realm of s.17 post-contractual duty. However, one may doubt whether the doctrine of utmost good faith is ever needed here. Since additional premiums and conditions were agreed in the first place, there appears to be no rationale for application of the duty.

Overall, from this examination of the instances where the post-contractual duty of utmost good faith may attach, one may reach the following conclusions. First, despite the fact that the duty to provide information under the express contractual clauses is held to be an instance where post-contractual utmost good faith is required, it is submitted that there appears to be no ground for such a duty to exist. Any breach or failure to provide information can be dealt with sufficiently by the general contract law regime. Secondly, contractual variation may attract the application of the post-contractual duty of utmost good faith but it is truly against usual logic that the breach of utmost good faith in relation to minor changes to contractual provisions can lead to retrospective avoidance of the contract. However, it is the result flowing from the current language of s.17. As mentioned earlier in Chapter 4, the proposed reform to the last part of s.17 concerning remedy will yield further benefits in the sense that the post-contractual duty of utmost good faith can be expanded to certain instances where it is really needed. In a sense, what is happening now in the UK is that the post-contractual phase is applied to situations where such duty is not strictly needed, but, in some circumstances where such duty is required, there are no authorities to that effect. Partly, this might be due to the fact that the attitude towards the post-contractual

¹⁵³ Soyer gives an example of Clause 2 of the Institute Time Clauses (1995) which provides: "Should the vessel at the expiration of this insurance to be at sea and in distress or missing, she shall, provided notice be given to the Underwriters prior to expiration of this insurance, be held covered until arrival at the next port in good safety, or if in port and in distress until the Vessel is made safe, at a pro rata monthly premium." Soyer, n.4 above, 68, footnote 132.

duty of utmost good faith has been confined to the disclosure of information at the various stages after the conclusion of the contract while, in fact, 'good faith' can go far wider. Thirdly, post-contractual utmost good faith may apply further to the held covered clause of the type by which additional terms and premiums were agreed from the outset but the existence of such duty, like in the context of the notification clause, is rather unjustifiable.

The present author will suggest below that one should widen the attitude towards 'good faith' and admit that the duty under the ambit of s.17 can take different forms than the duty to disclose the information. However, the remedy of avoidance attached to s.17 might not suit such wider recognition of the scope of the duty. If change is needed anywhere, this should be one of the points to consider. Here, before proceeding to consider the true application of post-contractual utmost good faith, an interval is needed to consider first whether the post-contractual phase of the doctrine of utmost good faith should be rested upon the implied terms basis that has been suggested, especially by the ALRC.

5.3. Post-contractual utmost good faith as an implied term of the contract

In its recommendations, the ALRC was of the view that s.23 of the Marine Insurance Act 1909 (Cth) (the equivalent to s.17 of the MIA 1906) should be amended to clearly indicate that utmost good faith is an implied term of the contract and that it runs throughout the contractual relationship.¹⁵⁴ The benefit of such shift of juristic basis, as explained by Lewins, is the departure from the remedy of avoidance attached to s.17 and the importation of the contractual remedy regime.¹⁵⁵ She further explains,

“Should either party breach the term, the innocent party will be entitled to contractual remedies. One would imagine that the term would be innominate...the effect of the breach will dictate the entitlement of the innocent party. Significantly, this means that an insurer could be

¹⁵⁴ See Clause 19 of the “Draft Marine Insurance Amendment Bill”.

¹⁵⁵ Lewins, K., “Australia Proposes Marine Insurance Reform” [2002] JBL 292, 301.

held liable in damages to an insured for breach of the duty of utmost good faith...”¹⁵⁶

With respect, so far as the pre-contractual phase is concerned, as argued in Chapter 2, good faith is likely to be a ‘rule of law’ associated with the idea of ‘natural law’. It should be possible to impose the remedy of damages by its very nature and thus the resort to the implied term basis can only be seen as unnecessary.¹⁵⁷ Moreover, as explained by the editors of *Chitty on Contracts*,

*“The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties.”*¹⁵⁸

Without the existing contractual terms, it is hard to see what is to be implied. It is true that the term may be implied by statute¹⁵⁹ and this seems to be what the ALRC is trying to do with utmost good faith. It is equally clear that generally, implied terms, even by statute, can be altered by express terms.¹⁶⁰ So far as the pre-contractual duty is concerned, the ALRC proposed a provision which limits the freedom of the parties to stipulate the remedy by the express terms of the contract.¹⁶¹ However, the focus is on the breach of the pre-contractual duty of disclosure by the assured and thus such limitation provision is accordingly applicable only to such a case. What if it is the insurer, by the express term, who excludes or limits the remedy for his own breach of the duty of disclosure? Imagine the situation of an assured which may be a large shipping company. It might desperately seek an insurer with enough capacity to underwrite large risks.

¹⁵⁶ *Ibid.*

¹⁵⁷ See Chapter 4 above, 125.

¹⁵⁸ Beale et al, n.54 above, 774, [13-004] (emphasis added).

¹⁵⁹ For example ss.13-15 of the Sales of Goods Act 1979.

¹⁶⁰ Beale et al, n.54 above, 785, [13-023].

¹⁶¹ Clause 26C of the “Draft Marine Insurance Amendment Bill”.

If such underwriter may be found anywhere, it is likely that an assured will find him in the London Market. In such a case, with the prime concern to protect his business from risk and loss, he might be compelled to agree to the standard form contracts provided by the insurer which may unfairly prejudice his entitlement to the remedy in case of insurer's breach of the duty of utmost good faith. As such, the current formulation of the ALRC's suggestion in relation to the remedy scheme, if adopted in the UK, does not seem to be a workable solution. Perhaps, it might be better to leave with the courts the power to determine the appropriate remedy on the case-by-case basis. It is true that, by the statute, the remedy may be stipulated and, by the same means, the freedom of contract may be excluded in such respect but, this way, again, the remedy which may seem appropriate now might not be so in the future once the circumstance changes. As time goes by, such remedy system might seem too inflexible.

Concerning the post-contractual phase, a similar argument as raised above may also run here. The implied terms may import into the realm of utmost good faith the contractual remedies. Assuming that there is no special provision in the statute to limit the freedom of contract (at least there is no such restriction under the current UK marine insurance legal regime) one has to bear in mind as well the remark of Lord Hobhouse in *The Star Sea* (2001) referred to earlier.¹⁶²

However, the implied term basis is strongly supported by Bennett as follows:

"The heterogeneity of the various duties to which the post-formation doctrine of utmost good faith gives rise requires flexibility in scope, standard and remedies. The unequivocal availability of retrospective avoidance as a remedy for any breach of s.17 denies any possibility of remedial flexibility...The flexibility...requires also a flexible juristic basis for the doctrine...Accordingly, each duty within the post-formation doctrine may be the subject of a separate contractual term implied in law, the precise

¹⁶² Above, 166.

properties of which may be moulded by the courts as appropriate to the duty in question.”¹⁶³

The above view had been advanced before the judgment of the House of Lords in *The Star Sea* (2001) and the subsequent judgment of the Court of Appeal in *The Mercandian Continent* (2001) and it was narrowly expressed in an attempt to circumvent the remedy of avoidance attached to s.17. At that time, one may envisage with great concern that the remedy may apply in the same way as in the pre-contractual stage, i.e. to *completely* innocent conduct. This suggestion, however, is arguable on the basis that, as the law now stands in the UK, the same result as avoidance can exactly be achieved by express contractual means, as Lord Hobhouse envisaged.

Bennett further suggests that s.17 should be read to mean that it is only applicable to the pre-contractual situation. In his reasoning,

“It is true that the wording of s.17 is sufficiently broad to encompass the post-formation duties...the proposition in s.17 that insurance contracts are *based upon* the utmost good faith...indicating that s.17 is concerned with the formation of the contract...”¹⁶⁴

But, if we accept that the doctrine of utmost good faith came from Lord Mansfield in *Carter v. Boehm* (1766), it will be recalled that his Lordship intended ‘good faith’ to underpin every contractual relationship,¹⁶⁵ even those where a pre-contractual duty may not feature so strongly. If this is so, it is very hard to see why s.17 - which echoes the passage of Lord Mansfield - should be different from what his Lordship contemplated. So far as Bennett’s argument goes, the implied term route provides more flexibility for the courts to mould the contents of each facet of utmost good faith, with respect, by the broad language of s.17, the courts can do the same. The courts just need to adapt their attitude by not seeing the post-contractual duty of utmost good faith as a *singular* duty.

¹⁶³ Bennett, n.13 above, 221-222.

¹⁶⁴ *Ibid.*, 219 (italics adapted from the original text).

¹⁶⁵ See *Carter v. Boehm* (1766) 3 Burr. 1905, 1910.

Thus, since the language of s.17 does not bar the courts from establishing the contents of each facet of the post-contractual duty of utmost good faith, and, if one admits, as suggested in Chapter 4, that the last part of this provision concerning the remedy was *wrongly* drafted, there is no reason why such defect should not be corrected. This will be more appropriate than the implied term as it will encourage the wider recognition of the post-contractual duty of utmost good faith. This will be illustrated below.

5.4. Re-shaping the post-contractual doctrine of 'good faith'

While in the UK both courts and academic commentators seem to direct their minds at the assured's duty at the post-contractual phase, one should be reminded that the concept is reciprocal, and it is wider than the duty to reveal information. It should be applied to situations where there is some justification for importing such an 'extra-contractual' concept and not only where the information needs to be revealed post-contractually. One such instance is where the insurer fails to pay out on the assured's claim within a reasonable time. Albeit this facet of good faith duty may not be well-established in the UK, it has been recognised in other jurisdictions.¹⁶⁶ It does not mean a similar situation has never happened in the UK. It did happen, and the current legal regime in this country is shown to be, again, discouraging for the assured. The leading case on this was *Sprung v. Royal Insurance (UK) Ltd.* (1999)¹⁶⁷ where the plant owned by the assured was damaged by vandals. The insurer *unreasonably* kept refusing to pay out of the claims until some years later when it was too late as the assured had no other financial resort to pay for rebuilding the plant and thus he needed to close down his business.¹⁶⁸ The claim for such late payment was rejected.

The general attitude of the courts in the UK was that the insurer has a duty to prevent the assured's loss and, once the loss has occurred, the insurer is in

¹⁶⁶ See generally Lowry, J., and Rawlings, P., "Insurers, Claims and the Boundaries of Good Faith" (2005) 68 MLR 82, 90-106.

¹⁶⁷ *Sprung v. Royal Insurance (UK) Ltd.* [1999] 1 Lloyd's Rep. I.R. 111.

¹⁶⁸ *Sprung* [1999] 1 Lloyd's Rep. I.R. 111, 112-116.

breach of his contractual duty and thus the payment for the loss itself is the damages for the breach of contract.¹⁶⁹ Following the approach of the House of Lords in *The Lips* (1987),¹⁷⁰ albeit a non-insurance case, the courts insisted that “[t]here is no *such thing as a cause of action in damages for late payment of damages*. The only remedy...is the discretionary award of interest pursuant to statute.”¹⁷¹ Although there might be a ground to argue that a distinction is needed between liability insurance on the one hand, the purpose of which is to prevent the loss by the assured, i.e. to prevent the assured from needing to pay his monies to third party,¹⁷² and property insurance on the other hand, where the aim is to “compensate in the event of loss”,¹⁷³ the courts do not seem to recognise this.¹⁷⁴ Recently, the Law Commission and the Scottish Law Commission have identified this as one of the areas where change to the law *may* be needed,¹⁷⁵ yet, whether it will pursue this issue any further is uncertain. Nevertheless, they do not perceive this issue as part of the general duty of good faith. This might not be so surprising since the concept of ‘good faith’ is mostly understood as the combination of the duty of disclosure and the duty not to misrepresent or something alike.

The present author thinks that it is here that the concept of good faith may be applicable to do justice to the assured as the current legal mechanism does not provide him with sufficient compensation. In such a case, the courts should consider both the consequence of such late payment upon the assured and the cause of such delay by the insurer. Obviously, the result cannot be the same for tardiness due to the administrative process and tardiness due to the attempt to put pressure upon the assured. The latter deserves some kind of punishment and the

¹⁶⁹ *Apostolos Konstantine Ventouris v. Trevor Rex Mountain (The “Italia Express No.2”)* [1992] 2 Lloyd’s Rep. 281, 292.

¹⁷⁰ *President of India v. Lips Maritime Corporation (The “Lips”)* [1987] 2 Lloyd’s Rep. 311. This case concerned the late payment of demurrage.

¹⁷¹ *The Lips* [1987] 2 Lloyd’s Rep. 311, 317 (emphasis added).

¹⁷² Campbell, N., “The nature of an insurer’s obligation” [2000] LMCLQ 42, 65.

¹⁷³ *Ibid.*

¹⁷⁴ “...if the claimants are to succeed on this aspect of their claim, they must secure the reversal of *Sprung* and its associated reasoning”. *Normhurst Ltd v. Dornorch Ltd*. [2004] EWHC 567 (Comm), [24].

¹⁷⁵ The Law Commission and The Scottish Law Commission, ‘Insurance Contract Law: A Joint Scoping Paper’ <http://www.lawcom.gov.uk/docs/ins_scoping.pdf> accessed 18 January 2006, 20, [2.63]-[2.64].

courts should have discretion to adjust the amount of damages accordingly. In this context, the author thinks that the remedy for breach of good faith should be *sui generis*.

There are also other instances too where the existence of the doctrine of good faith at a post-contractual stage may be justifiable. Following recognition of the concept of good faith in South African insurance law, Havenga suggests the application of this concept in some insurance contexts.¹⁷⁶ Probably, the same can be used here as a guideline which the UK may follow. Such instances are, for example, when the insurer, in considering the claim, requests some of the assured's information which is irrelevant to the insurer's understanding of the loss.¹⁷⁷ Also, the insurer may find himself to be in the position to warn the assured of the consequence of breach of contractual terms.¹⁷⁸ He may also be under a duty to explain to the assured within a reasonable time his reason for rejecting a claim.¹⁷⁹ If the consent of the insurer is required for the assured to do something, for example, he needs to ask for approval to replace crews en route, then, the insurer must respond within a reasonable time.¹⁸⁰ In this regard, the duty may encompass the consideration of the claim by the insurer.¹⁸¹

The facets of good faith suggested above might not be at all suitable to be rested upon the implied term route as that leads to the application of contractual remedies which do not really take particular circumstances into account. For example, in a case where the insurer unreasonably prolongs the giving of consent to the assured, it may only be fair if the courts can look into the cause of such delay so that the remedy can then be adjusted accordingly. Under the contractual remedial regime, however, the law concentrates upon the 'consequence' of the breach, *not* the cause of it. To this extent, it might not be so appropriate.

¹⁷⁶ Havenga, P., "Good Faith in Insurance Contracts-Some Lessons from Australia" (1996) 8 SA Merc LJ 75.

¹⁷⁷ *Ibid.*, 82-83.

¹⁷⁸ *Ibid.*, 83-84.

¹⁷⁹ *Ibid.*, 85-86.

¹⁸⁰ *Ibid.*, 86.

¹⁸¹ Above, 162-164.

5.5. Conclusion

Conceptually, it appears to be no surprise that the concept of good faith has a *post-contractual* phase. This indeed can be seen from what Lord Mansfield intended. He envisaged 'good faith' to underpin every contractual relationship, even in the context of other transactions where a pre-contractual duty might not be so necessary. However, the wave of litigation in the UK shows that the courts and lawyers here lack understanding of this pivotal concept. For example, the attitude that good faith can have only one facet is simply wrong. But, perhaps, this is tied up with the general attitude in the UK to view utmost good faith and disclosure indifferently. This may also be why materiality and inducement are created. This might not be due only to an attempt to circumvent the harsh remedy in s.17 alone.

With the sole desire to limit the unfair consequence, the courts did not guide us as to the circumstances when such general principles can be used. Upon analysis, one can further ask why such restriction needs to be formulated at all. Post-contractual utmost good faith may govern the duty to supply information under the contractual clause, but the justification of the rule in this context can be questioned. The courts can easily deny the application of utmost good faith in this context. Upon the authorities, it is quite clear that held covered clauses attract a pre-contractual duty and thus the application of general principles is out of context. Such rule may apply to the variation of contract but that may lead to some illogical results.

However, there are certain situations where the doctrine of good faith should be utilised but the recognition of these is subject to a paradigm shift in the sense that good faith needs to be seen as an elastic concept which can be adapted to the specific circumstance. Thus, s.17 should be applied according to its nature. But, to give this particular provision its full force, the author insists, as he did in the previous chapter, that the reform to the last part of s.17 is needed and that the

courts should be given discretion in finding an appropriate remedy for each post-contractual bad faith situation.

- Despite the inclination of some academic commentators to assign the implied term basis to the doctrine of good faith in the post-contractual period, it is submitted that this suggestion is not entirely appropriate. The implied contractual terms can be altered by express contractual terms and thus this may give a disadvantageous position to the weaker party in the contractual negotiation, usually the assured. Thus, the suitable remedy for post-contractual breach of the duty of utmost good faith should be left for the courts to determine by taking into account the full circumstances of each case. This will bring a fairer result.

The benefit of law reform in this context can be clearly seen. It will encourage the courts to discover more aspects of good faith and that will encourage more responsible practice in commerce by both the assured and the insurer. It will also bring the law in line with what Lord Mansfield envisaged.

Chapter 6: Reform

Throughout the previous five chapters, the necessity for the law on the duty of disclosure to be reformed can be readily realised considering the potential prejudice of the current state of law, the rising complexity of litigation in the area, and the voluminous case laws relating to the duty of disclosure in recent years. Sad to say, the effect of such law is not confined to the parties to a marine insurance contract. It has wider implication upon the public. It even has direct impact upon the economy of the country. The law that provides more “assured-friendly” approach can be attractive to the potential customers to place their risks in the market.¹ Unfortunately, marine insurance law in the UK cannot be described as such. Not only being unattractive for the internal would-be assureds, it is not preferable in view of the international would-be assureds either. This can be seen from the continuous growth of the Norwegian Market where more balanced rules appear in the ‘Norwegian Marine Insurance Plan’,² in contrast to the decline of the London Market.

In 1991, the London Market share was 31.2 per cent of the global marine insurance business. This figure dropped to 27 per cent in 1994. In 1997, the figure came down to 21 per cent.³ As at 2005, the London Market remains with the same global market share at 21 per cent.⁴ Such statistics seem to imply that there were some customers who never returned to place their marine risks in London. Instead, they went to other markets with more flexible rules. “MAT [marine, aviation, and transport insurance] was traditionally the largest segment of the London Market, but *its volume has declined in recent years*.”⁵ The gross premium incomes gained from MAT business in 2004 was £5.6 billion, decreased from

¹ Soyer, B., “Marine Warranties: Old Rules for The New Millennium?” in Thomas, R.D. (ed.), *Modern Law of Marine Insurance Volume 2* (LLP, London 2002) 161, 188, [5.50].

² *Ibid.*

³ *Ibid.*, 187-188, [5.48].

⁴ Aon Limited, ‘Marine Insurance Market Review 2005’

<<http://www.aon.com/uk/en/pdfs/marinereport.pdf>> accessed 14 February 2005.

⁵ International Financial Services, London, ‘Insurance City Business Series, November 2005’

<http://www.ifsl.org.uk/uploads/CBS_Insurance_2005.pdf> accessed 7 April 2006, 12 (emphasis added).

£8.0 billion in 2003.⁶ Yet, considering net premium incomes, in comparison with the rest of the world, the UK still dominates the largest share. Even so, in 2004, it occupied only 15.1 per cent and this dropped from 21.1 per cent in 1995.⁷ Thus, within nearly a decade, the decline was far from marginal.

The above statistical data does not only indicate business reality. All the information above has wider implications. Any further decline in market share will inevitably affect the gross premium incomes. Of course, part of these incomes came from foreign customers. The services sold to foreign customers, including insurance, form part of the 'invisible trade'. Incomes from overseas assets and transfers also fall into the same category.⁸ This is in contrast with the incomes from the sales of goods to other countries which fall into the realm of 'visible trade'.⁹ In the UK, the tendency is that it often gains credits from invisible trade but faces debits when it comes to visible trade.¹⁰ Both kind of trade forms the 'current account balance' in the 'balance of payments account'.¹¹ The long-term deficits in the balance of payments account will lead to a country running out of official reserves held in the central bank and it will ultimately need to borrow from other countries.¹² However, long-term surplus is not a good sign either.¹³

In any event, as far as the UK is concerned, in 2004, the *current account* showed £23.6 billion deficits while, in 2005, the figures mounted to £31.9 billion. However, the surplus could still be seen in trade in services category with £18.7 billion in 2005.¹⁴ If international assureds are still deterred from placing their risks in the London Market by the imbalanced and unfair marine insurance law, the UK

⁶ *Ibid.*

⁷ *Ibid.*, 13.

⁸ *Invisible Earnings: The UK's hidden strength*, HM Treasury Occasional Paper No.7 (1996).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ "The *balance of payments* account is a systematic summary of a country's international trade in goods and services and capital transactions with all other countries combined over a specific period of time." Nellis, J.G., and Parker, D., *Principles of Macroeconomics* (FT Prentice Hall, Harlow 2004) 333.

¹² *Ibid.*, 335.

¹³ See *ibid.*

¹⁴ See National Statistics, 'UK Balance of Payments First Release Q4 2005' <<http://www.statistics.gov.uk/pdfdir/bop0306.pdf>> accessed 29 June 2006.

will suffer from continuous reduction in 'invisible earnings' which will then contribute to further deficit in the current account.

From either legal or economic perspective, the need for reform of marine insurance law is unarguable. Yet, the substantive reform is one thing, how such reform can be undertaken is another. While the former is related more to the contents or substance of the law, the latter concerns the methodology and policy. When talking of reform, one is bound to think of 'statutory reform'. However, reform does not always have to be so confined. As Professor Clarke once expressed it, such a change may be undertaken by some non-statutory means, namely "court and market correction".¹⁵ Whilst the decisions of the courts may to some extent improve the state of the law,¹⁶ they may equally raise further concerns regarding the certainty of the law. Judges can have different opinions and thus case laws can be conflicting. Moreover, as far as marine insurance is concerned, the question is also how far the courts can evade the fixed language of the MIA 1906. Whilst this method of reform *may* be possible, it is not preferable. In this regard, market correction appears to be more convincing.

When mentioning non-legislative means of reform, the Sub-Committee of the British Insurance Law Association (BILA) seemed to have in mind the standard contractual agreement, namely the 'Institute Clauses';¹⁷ in reality, such means can go far wider to include 'self-regulatory' means.¹⁸ Although the Law Commission and the Scottish Law Commission *may* ultimately include marine insurance law reform in their current law reform project,¹⁹ the project is still at a very early stage and it may be premature to conclude that statutory reform is the

¹⁵ Hare, J., 'Report of the IWG Meeting in London, November 2003' (CMI Yearbook 2003) <<http://www.comitemaritime.org/year/2003/pdfiles/YBK03-29.pdf>> accessed 14 April 2005, 573, 574.

¹⁶ The example can be seen from the bold approach of the Court of Appeal in *Drake Insurance Plc v. Provident Insurance Plc* [2003] EWCA Civ. 1834; [2004] 1 Lloyd's Rep. 268.

¹⁷ The 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, [29.1].

¹⁸ 'Self-regulatory' means are understood as "the insurer's voluntary agreements not to enforce their strict legal rights...to control the policy terms and conditions..." Park, S., *The Duty of Disclosure in Insurance Contract Law* (Dartmouth Publishing Company, Hants 1996) 249.

¹⁹ Chapter 1 above, 20.

method the UK will choose in relation to ‘non-disclosure’ in marine insurance law. In reality, as will be pointed out, a statutory and a non-statutory methods of reform have their advantages and disadvantages.

The first section of this chapter will start with the short summary of the advantages and disadvantages of each method of reform, starting from non-statutory means and moving to statutory means. Afterwards, in the second section, the substantive reforms suggested in the previous five chapters will be revisited and the author will analyse which method may fit well with his recommendations. In this same section, he will conclude the points he has raised by proposing draft provisions which are readily adaptable if reform is undertaken. The short commentary with explanation of the application and potential pitfalls will be provided to prevent misinterpretation.

6.1. Method of reform

This section will start with a summary of the advantages and disadvantages of the ‘self-regulation’ method, will proceed to analyse the ‘Institute Clauses’ as a tool for reform of marine insurance law, and will ultimately make an evaluation of the statutory method of reform.

6.1.1. ‘Self regulation’ through ‘Statements of Insurance Practice’

Self-regulation by the insurance industry can appear in various forms.²⁰ Here, only one form will be focused upon, that is, ‘Statements of Insurance Practice’ because these instruments “deal with some contractual doctrines”.²¹ In the past, such statements have not been applicable to the marine insurance industry. In principle, however, nothing can bar an organisation such as Lloyd’s from drafting up such a device to govern marine insurance. Currently, there are two statements

²⁰ See Park, n.18 above, 249-269.

²¹ *Ibid.*, 250.

drafted by the Association of British Insurers (ABI), both of which apply only to consumer insurance.²²

Despite general acceptance that insurance companies which become members of the ABI must follow these Statements, the ABI has no mechanism to enforce them. The ABI controls the effectiveness of such Statements through “eyes and ears”.²³ If a complaint is made in respect of non-compliance, the matter will then be investigated by the ABI and it might request the insurance company in question to *strictly* comply with the Statements. The most serious penalty for non-compliance is ‘expulsion’ from the ABI.²⁴ These Statements have no legal status and, apart from such controlling mechanism, are not enforceable.

What will be focused upon in this section is the rationale behind the use of these Statements, and the contents and effects of them. Before doing so, the clauses which are relevant to the duty of disclosure will be set out. Under the heading ‘claims’ in the “Statements of General Insurance Practice”, the clause reads:

“...An insurer will not repudiate liability to indemnify a policyholder:-

- (i) on grounds of non-disclosure of a material fact which a policy holder could not reasonably be expected to have disclosed;
- (ii) on grounds of misrepresentation unless it is a deliberate or negligent misrepresentation of a material fact...”²⁵

²² “The following Statement of normal insurance practice applies to general insurances of policyholders resident in the UK and insured in their private capacity only.” The Association of British Insurers, ‘Statement of General Insurance Practice’

<<http://www.abi.org.uk/Public/Consumer/Codes/StatGenInsPract.pdf>> accessed 7 November 2004. “The following Statement of normal insurance practice applies to policies of long-term insurance effected in the UK in a private capacity by individuals resident in the UK...” The Association of British Insurers, ‘ABI Statement of Long-Term Insurance Practice’ <http://www.abi.org.uk/Display/default.asp?Menu_ID=946&Menu_All=1,946,0&Child_ID=193> accessed 7 November 2004.

²³ Cadogan, I., and Lewis, R., “Do Insurers Know Best? An Empirical Examination of the Extent that Insurers comply with their Statements of Practice and whether they are satisfactory substitute for reform of the law” (1992) 21 *Anglo-American Law Review* 123, 135.

²⁴ *Ibid.*

²⁵ The Association of British Insurers, n.22 above.

The similar clause 3.1 in the “ABI Statement of Long-Term Insurance Practice” provides:

“...An insurer will not unreasonably reject a claim. In particular, an insurer will not reject a claim or invalidate the policy on grounds of non-disclosure or misrepresentation of a fact unless:

- (a) it is a material fact; and
- (b) it is a fact within the knowledge of the proposer; and
- (c) it is a fact which the proposer could reasonably be expected to disclose.

(It should be noted that a fraud or deception will, and reckless or negligent non-disclosure or misrepresentation of material fact may, constitute grounds for rejection of a claim.)”²⁶

The language of the clauses and the overall mechanism of how the Statements are used lead to the following analysis.

(a) Advantages of the Statements of Insurance Practice

The use of Statements seems to provide a comfort for insurers in conducting their business. The origin of both Statements mentioned above can be traced back to 1977, being aftermaths of the negotiations between insurers and the government amidst the climate of law reform.²⁷ During that time, it was uncertain whether insurance contracts would be included in the scope of the draft bill that was to become the Unfair Contract Terms Act 1977. The effect of this statute would be that “the effectiveness of certain clauses [would] be subject to the test of reasonableness.”²⁸ In the view of the insurers at that time, to subject the insurance contractual clauses upon the standard of reasonableness might create uncertainty.²⁹ Behind the scenes, the insurers pressed the government. This resulted in the vague explanation from the Department of Trade and Industry that

²⁶ *Ibid.*

²⁷ Lewis, R., “Insurer’s Agreements not to enforce strict legal rights: Bargaining with government and in the shadow of the law” (1985) 48 MLR 275, 283.

²⁸ *Ibid.*

²⁹ *Ibid.*

there were 'compelling reasons' for not including insurance contracts in the Act.³⁰ The fact is that *convincing* rationales as to why the insurance industry should be treated any different from other commercial fields have never been revealed to wider public. The Statements came to be reviewed yet again in 1986. Such revision was made following the attempt to persuade the government not to implement the draft bill attached to the recommendations of the Law Commission in 1980.³¹

As can be seen, the Statements have been used as negotiating instruments with the government in order to avoid the imposition of compulsory measures upon the insurance market. One benefit of this is the feeling of business certainty among the insurers. They do not have to substantially change their practice and they do not have to be subjected to new law which may have unpredictable effects. Should the new law be unsatisfactory, it will take long time before the industry can be freed from it. As Chalmers once said, the person who makes law and the person who uses law are not entirely the same: "Law is made *by* lawyers; but not *for* lawyers..."³² It will be very difficult for the insurers to step into the unknown.

(b) Disadvantages of the Statements of Insurance Practice

What can be observed from the language of the two Statements referred to above is that both of them left the individual insurer to decide whether the policy should be avoided, or the claim should be rejected, by reference to what 'the proposer could reasonably be expected to disclose', a term which is vague and a requirement which is hard to assess in practice. Even before the courts, if this is used as a criterion, it will involve large amounts of evidence. Indeed, it seems to be a subjective view of each insurer, upon examining the circumstances of each proposer, to form the view of what should be *reasonably* expected. Are there any

³⁰ *Ibid.*

³¹ See Chapter 1 above, 17-18.

³² Chalmers, M.D., "Codification of Mercantile Law" (1903) 19 LQR 10, 14 (italics followed the original text).

mechanisms to evaluate whether the insurer sensibly formed such a view? How can one be entirely confident in the investigation into the insurer's conduct made by the insurer's association? With the vague terminology of '*reasonably expected*', the chance is there for the ABI to be prejudiced towards its members.

As mentioned above,³³ the gravest penalty the insurers can receive for non-compliance with the Statements is expulsion from the ABI. Yet, one needs to distinguish between 'out of ABI' and 'out of trade'. The expulsion does not mean that such company can do no more trade in the market. The only significance is that such insurance firm may gravely lose its reputation and credibility.

Apart from the ABI, the government, especially the Department of Trade and Industry, after agreeing with the insurance industry's self-regulation, has never taken up a policing function in examining the effectiveness of the Statements.³⁴ It might be the intention of the government to give the insurers a certain level of freedom. Otherwise, it may be a sign showing that government does not have enough interest in the operation of the insurance industry. Whatever the case, it means that the use of the Statements has never been properly monitored, either from inside or outside the insurance industry.

With no legal status, and with no effective method of control, there appears to be no point in discussing any further whether a similar Statement should be introduced into the marine insurance context.

6.1.2. Institute Clauses

Compared with the Statements of Insurance Practice, the use of the Institute Clauses appears to be a more attractive mode of reform. Again, this section will begin with the analysis of the advantages of these Clauses followed by the disadvantages.

³³ At 193.

³⁴ Birds, J., "Good Faith in The Reform of Insurance Law" [2004] *The British Insurance Law Association Journal* 2, 4.

(a) Advantages of the Institute Clauses

One certain advantage of the Institute Clauses is that their legal status is clear. The Clauses are incorporated into a marine insurance contract so that they have *contractual* effect. By this, it means that the parties' rights and duties are clearly stipulated in the terms and – in the events of any doubts or breaches – the parties can resort to the courts of law. This is better than the control mechanism instituted by the ABI. Moreover, the courts already showed their willingness to enforce freedom of contract provided that the parties' intention to limit or exclude the duty of disclosure is clearly shown.³⁵ Similarly, by this means, the remedy of avoidance may be excluded for non-fraudulent non-disclosure and a more appropriate and less severe remedy can be put as a substitution.³⁶ The Institute Clauses are widely used in the London Market and thus such exclusion clauses – if put in these standard form contractual clauses – may have rather wide effects given the likely number of users.

This means is also convenient. Since the Clauses are drafted by the International Underwriting Association (IUA), without the need for wider consultation process, the drafting of them can be speedy and they can be easily updated as well in case of any change of circumstances that may arise. The same can be seen in Norway with the frequent update of the Norwegian Marine Insurance Plan (NMIP).³⁷

(b) Disadvantages of the Institute Clauses

Certain disadvantages of these Clauses also stem from their contractual nature. As the name of the IUA indicates, its prime focus is on the interests of the underwriters. Therefore, the possibility of the Clauses striking an appropriate balance between the insurers and the assureds may be doubted. Equally, it does not mean that such fairly balanced Clauses cannot be created. The important point

³⁵ See Introduction, 7.

³⁶ *Ibid.*

³⁷ See Chapter 1 above, 35.

is that the drafting of these should be in consultation and co-operation with the users of them, as in the case with the drafting of the NMIP which is the product of the co-operation between the Central Union for Marine Underwriters (CEFORS) and the Norwegian Shipowner's Association.³⁸ Yet, despite the market's satisfaction, as argued in Chapter 4, the language of the NMIP is not entirely clear and may lead to some potential problems, such as the burden of proof which requires a certain level of certainty before the remedy will be imposed, the proof of which is difficult in practice. Thus, as a matter of contract, the language becomes important.

For the NMIP, the language of the insurance statute in Norway is such that hull insurance can be excluded from the scope of the statute altogether and the NMIP can be freely formulated.³⁹ The same cannot be said with the Institute Clauses, where the drafting must take into account the language of the MIA 1906. For example, the author thinks that it is unlikely that the courts will go so far to allow parties to put in their contract that the assured needs to disclose only what the *average person* in his position considers to be material as this may involve the change to the way in which the question of materiality is proved. This may require the re-drafting of s.18(2).

But, even with some limitations, the standard form contractual clauses may incorporate exclusion clauses which in effect can limit the duty of disclosure in certain ways. However, such exclusion provisions, no matter how they are formulated, can then be re-formulated by individual contract. This will lead to the ultimate consequence that the scope of the duty of disclosure will depend upon the negotiating power of the parties in each case. For example, if the assured operates large fleets which can potentially attract valuable incomes from premium profits, the insurer who sees this potential may be eager to facilitate the conclusion of the insurance contracts by limiting the duty of disclosure by the

³⁸ Stang Lund, H., "Comparative Lessons derivable from The Norwegian Marine Insurance Plan" (Paper presented at the International Colloquium on Marine Insurance Law, University of Wales Swansea, 1 July 2005).

³⁹ See Chapter 1 above, 35.

assured as much as possible, so the whole underwriting process can be accelerated. In contrast, with the small shipping companies, the insurer may be in the advantageous position in contractual negotiation. In such a case, he may even insist on strictly following the law as stated in the Act so that he does not have to spend time and resources in investigating information. This is why the author thinks that the statute may be more beneficial if it can provide a base line which the parties may not be able to contract out of while certain flexibility could also be maintained.

With the existence of unequal contractual bargaining and the potential limitation upon contractual drafting, it cannot be said that the standard form contractual clauses can really *alter* the state of the law. Without such change, the weaker party has nothing to resort to.

6.1.3. Statutory reform

Much has been written on statutory reform. There are many arguments for and against this method of reform, albeit these discussions may be more general and are not specific to marine insurance law. Still, these arguments are equally applicable to the statutory reform of this branch of law. In this chapter, only the main points of debate will be outlined. Unlike other sections, this section will start with the arguments *against* statutory reform.

(a) Disadvantages of statutory reform

The first disadvantage to be mentioned is that, although one of the purposes of putting rules in a statute is to bring “greater certainty in the law, in order to avoid litigation...”⁴⁰ arguably, however, putting rules in the statute can mean rigidity and limitation of judicial imagination.⁴¹ We need not look elsewhere for evidence of this. It is explicit in the current law on ‘non-disclosure’ itself where the courts have no way to depart from the prejudicial standard of ‘prudent insurer’ in

⁴⁰ Arden, D.A., “Time for an English Commercial Code?” [1997] CLJ 516, 521.

⁴¹ Chalmers, n.32 above, 15-16.

determining materiality. Similarly, the sole remedy which is stated in the Act for breach of the utmost good faith and non-disclosure is 'avoidance' which the courts cannot depart from, except perhaps by the parties' agreement. Thus, one may wonder, as time passes by and circumstances change, if the statutory reform is undertaken, will an amended statute eventually lead to inflexibility again?

Statutory reform can also raise some concerns among insurers. The insurers cannot be so certain of how the new law will affect the industry and overall market practice. They might feel more secure with the current practice which has been used for over a century. As such, any statutory reform may face objections from the insurers. As Clarke mentions,

"In the MIA itself the provisions about disclosure (section 18) and about warranties (section 33) are still there for all to see; and until now *they have defied the reformer.*"⁴²

Apart from the likely protest from insurers, the prospect of statutory reform in the hands of Members of Parliament is actually quite desperate. This is because, by nature of marine insurance law, it hardly attracts the interest of politicians. As Clarke describes,

"A Parliament with members who are subject to re-election every few years prefers to spend time and energy on legislation that is attractive to a significant section of the electorate."⁴³

The general public do not engage in marine insurance. The law in this area only affects a small section of populace. Although the effectiveness of this branch of law may have a direct impact upon the economy of the country as it can invite the foreign customers who bring in the invisible earnings, general public are likely unaware of this. Thus, it is not surprising if priority is given to law which affects

⁴² Clarke, M., "Doubts from the Dark Side-The Case Against Code" [2001] JBL 605, 608 (emphasis added).

⁴³ *Ibid.*, 613.

wider general public, such as consumer protection or utility law. Moreover, how many politicians truly understand marine insurance law, either its nature or problems?

But, the above view may prove to be too pessimistic. In the fairly recent past, Parliament turned its attention to a similar area of law which also affects a limited group of people and, as a result, the Carriage of Goods by Sea Act 1992 came to be enacted. Originally, the law relating to bills of lading was stipulated in the Bills of Lading Act 1885. However, s.1 of that statute had stirred the shipping industry since it resulted in some situations where the lawful holder of a bill of lading who had received such bill through its assignment or endorsement could not sue the carrier, for example, if the goods were lost, or arrived in a damaged condition.⁴⁴

With such problems and also other issues relating to the right of the assignee or endorsee of the bill of lading to sue the carrier, the Law Commission together with the Scottish Law Commission suggested a reform in 1991 and Parliament enacted it in 1992. Therefore, whether the law attracts the interest of the public might not be a convincing reason to argue that statutory reform should not be done. However, the Carriage of Goods by Sea Act 1992 is a very short piece of legislation with only six sections. Thus, the politicians may not view it as so much a burden. The same cannot be said for the MIA 1906 and a wholesale revision of this Act *may* deter politicians. However, if the reform can be limited first to the urgent issues, especially non-disclosure and breach of warranty, then the glimmer of hope for statutory reform may be clearer.

Overall, the main disadvantages of statutory reform, one may argue, are that the effective working of the new rules is not guaranteed and this method may lead to the inflexibility of rules in the long run. Moreover, for this means of reform to be successful, it requires political will, which may not be easy to obtain

⁴⁴ The Law Commission and The Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, LAW COM No.196 (1991), 1.

in practice. Statutory reform may also result in uncertainties in respect of the interpretation of the new provisions.

(b) Advantages of statutory reform

The MIA 1906 has been used for a century and its defects, which should have been seen since in the distant past, are crystal clear in this era. Statutory reform is obviously one option which can clear such weaknesses in the Act. As Lord Goff, writing extra-judicially, mentions:

“Codification is sometimes necessary: but it should only be undertaken where the good it may do is perceived to outweigh the harm it must do, and that is, generally speaking, only likely to be the case where *substantial reforms are both necessary and urgent*.”⁴⁵

Considering the current situation in the UK when more international assureds are deterred from London Market and domestic assureds are gravely prejudiced, the call for reform seems to be both urgent and necessary. As far as non-disclosure is concerned, statutory reform seems to be the only means to effectively lay down the suitable scope of the duty of disclosure. The current interpretation of the degree of influence coupled with the prudent insurer test renders the duty of disclosure by the assured to be far too wide. Although such scope may be limited by the exclusion clauses in the contract, without an agreement to exempt the duty altogether, once litigation arises, the evidential prejudice is still there if the statute has not been reformed. Such reform will also be a good chance to resolve other defects which equally deteriorate the market situation and, if any other changes are needed, the law concerning breach of warranty is another area which deserves attention. This is why the reform of it is often raised in conjunction with the reform of the duty of disclosure. As Croly and Merkin conclude,

⁴⁵ Goff, R., “The Search for Principle” (1983) *Proceedings of British Academy* 169, 172-173 (emphasis added).

“There are various areas of English insurance law which have long been in need of reform – two obvious areas are the “all or nothing” approach to utmost good faith...and the rigidity of the law of warranties – and any spare legislative resources should surely be devoted to dealing with those matters.”⁴⁶

Of course, the flood of litigation, especially in relation to utmost good faith and duty of disclosure, signals the fact that the MIA 1906 has never fulfilled the very purpose of the statute in helping the parties to avoid litigation. True, whether each circumstance is material is a question of fact⁴⁷ and many of these cases arose in the context of factual disputes.⁴⁸ However, the amounts of litigation can be greatly reduced if the parties, especially the assureds, can assess for themselves which facts should be disclosed. The law as currently stands does not allow such assessment to happen. Only statutory reform can make this happen by altering the fixed language of the Act.

Yet, the concern, regarding the statutory reform, if any, appears to be the unknown consequences of such change upon the insurance industry. Although one cannot be forbidden from raising such worry, it is submitted that, throughout the law reform process, those who are responsible for the reform project, especially the Law Commission, are usually rather broad-minded. They tend to welcome all criticisms, especially during the state when the consultation paper is published. Of course, the public, particularly the insurers who most likely have such a concern, can express their views on how they think the law should be. If their views on the matter are justifiable, the Law Commission will be willing to take them on board in drafting the law.

But, potential worry does not seem to stop at this point as statutory reform may be faced with arguments on certainty point, especially at the early stage when the revised version is introduced. “The introduction of any new Act of

⁴⁶ Croly, C., and Merkin, R., “Doubts About Insurance Codes” [2001] JBL 587, 604.

⁴⁷ See s.18(4) of the MIA 1906.

⁴⁸ Croly and Merkin, n.46 above, 596.

Pariiament always produces a period of dislocation.”⁴⁹ The present author thinks that much depends as well upon the clarity of the language of new provision. The fear of uncertainty alone may not be a solid reason to opt against statutory reform. We should also not forget the significance of judicial precedent in the common law legal system. If the court in one case lays down the interpretation, judges in subsequent cases tend to follow the same line. Soon, the law will become certain. That is how the common law rules developed in the past. However, of course, one should be aware that such development of rules does take time.

Overall, the most beneficial point of statutory reform appears to be the chance to clear the defects arising from the wording of the statute which other means of reform cannot effectively resolve.

As can be seen from the above summary, either method of reform has its own disadvantages. Which method then should be adopted in relation to the law on duty of disclosure?

6.2. The proposed reform

One criterion for selecting the suitable method of reform which the present author is using in this work is to evaluate which method can respond to all the changes the author has identified in the previous five chapters. As such, before proceeding to further analysis, the points of law to be reformed must be reiterated. There are altogether six points, as follows:

1. The concept of utmost good faith or *uberrimae fidei* should be abolished and replaced by the concept of good faith or *bonae fidei*, the application of which should be extended throughout the contractual relationship.
2. The concept of ‘misrepresentation’ should be abolished.

⁴⁹ *Ibid.*, 589.

3. The scope of the duty of disclosure by the assured should be re-formulated so that he only needs to disclose facts which he realises that the insurer by all means cannot know about but that the insurer will want to know about in considering the risk. The insurer's duty of disclosure should be reformulated along similar lines.

Considering the different purpose of the assured and the insurer in engaging in an insurance contractual relationship, the scope of the duty of disclosure by the insurer should be tailored accordingly.

Therefore, the insurer should only need to disclose facts which he realises that the assured by all means cannot know about but that the assured will want to know about in considering whether the risk should be placed.

4. The requirement of inducement should be retained and it should be expressly recognised.
5. The remedy of avoidance for the breach of the broader duty of good faith should be abolished and the discretion should be granted to the courts in imposing the appropriate remedy in such a case.
6. The remedy of avoidance for the breach of the narrower duty of disclosure by the assured should be retained and damages as an alternative remedy in some appropriate circumstances, especially in the insurer's non-disclosure, should be allowed.

Despite the draconian nature of the remedy of avoidance emphasised throughout this work, as also mentioned above, the changes suggested in points (5) and (6), strictly speaking, can be done without any need for statutory reform. Clear stipulation of other remedies in the standard form contractual clauses would be sufficient to solve the problems relating to remedies for breaches of duty of good faith and non-disclosure. However, as the above analysis in relation to the Institute Clauses also shows, no matter how clear such stipulation might be, the parties may again, by their individual agreement, change the remedies to something else. Ultimately, the question may then fall upon the negotiating

power. Similar to the issue of remedy, statutory reform of the scope of the duty of disclosure in issue (3) may not be *strictly* necessary. It is possible to exclude or limit the scope of the duty of disclosure by contractual clauses. As pointed out above, however, with the exception of the agreement to exclude the duty of disclosure altogether, the rest of the duty will still be subjected to the prejudicial standard of materiality in s.18(2) of the MIA 1906. As far as inducement in issue (4) is concerned, despite the absence of express language in the Act, the courts seek to imply it anyway. Since the House of Lords found inducement to be implied in s.18(2),⁵⁰ it is unlikely that the courts will accept any alterations to this matter by contractual means.

Therefore, we are left with points (1) and (2), reform of which is for the sake of conceptual tidiness and better understanding of the law. Although point (2) may raise some interesting theoretical points, from a practical perspective, this is not so significant and its weight might not be enough to persuade the need for statutory reform. Frankly speaking, people in practice are only interested in whether they receive correct information and whether any relevant information has not been revealed to them. They are not interested in whether the assured conducted non-disclosure and misrepresentation or how these two are different and which provision of the Act applies. Such technicalities do not concern them although these may disturb the minds of some scholars, including the present author.

The actual need for statutory reform lies in point (1) because it involves 'conceptual transition'. Although the term 'good faith' (*bonae fidei*) may be broad and it is not easily defined, this concept is closely associated with the question of morality. Introducing it into the MIA 1906 will provide the courts as well as lawyers with an intellectual basis to guide them on what the general provision lays down and how it should be applied. The rigid concept of 'utmost good faith' just leads to nowhere. Its scope is uncertain and the way it is applied in the UK seems to suggest that due consideration of morality is irrelevant. With lack of

⁵⁰ Chapter 3 above, 93-98.

'moral guilt', the assured can find himself to be in breach of the duty of disclosure. For example, the assured may *negligently* fail to read the report from a ship repairer that one of the fault machines has been temporarily replaced by the second-hand machine because the brand-new one is out of stock. Without knowing the fact, the assured did not disclose it to the insurer even though it is what the assured should know in the ordinary course of his business and it is material because the second-hand machine may have some performance problems which the insurer would want to know about. Under the notion of utmost good faith, the assured would certainly be in breach of the duty of disclosure which entitles the insurer to avoid the contract from the beginning. The same however cannot be said if one recognises the duty of disclosure as part of the concept of good faith (*bonae fidei*).

Morality is a yardstick to determine whether one has been in 'bad faith' or not. The assured in the above illustration, although he was negligent in not reading the report, no bad faith was present in his mind in the process of disclosing the fact. Fraudulent intention is out of context. Similarly, one could not say that the assured *deliberately* concealed the fact. He does not deserve sanction as his conduct was free from moral wrong.

However, bad faith conduct surely is not limited upon deliberate or fraudulent pre-contractual non-disclosure. Like good faith, bad faith itself is wide. Discretion needs to be given to the courts in determining whether the action in question can amount to bad faith conduct and, if so, what remedy should be proportionate to such breach of good faith duty. This will lead to flexibility in the law. To equip the courts with such discretion, clear language of the statute to such effect is needed.

Without such a clear stipulation, the courts may hesitate to apply this duty differently from the established notion of utmost good faith, even if the parties sought to indicate in their insurance contract that they must act towards each other in *good faith*. Otherwise, the parties may try to elaborate the facets of good faith

in their contractual clauses. However, such an endeavour may prove to be too unrealistic as the doubt is whether such lists can be anyway *exhaustive*.

Considering the impossibility for the parties to govern all aspects of good faith duty by contractual means, the same possibility can go for the remedy in point (5) in the sense that, ultimately, the parties may not be able to stipulate the remedy for all breaches of good faith duty. Without statutory reform to s.17, breaches of the aspects of good faith unidentified by contractual clauses will be subjected to the remedy of avoidance which may be disproportionate.

Since statutory reform is necessary for implementing the change suggested in point (1), the same opportunity should be taken to bring the other points into the statute as well. Although the Institute Clauses can bring changes to other points, in the view of the present author, the use of such Clauses in undertaking reform should be classified as only short-term means awaiting the enactment of the statute. This is because once the contract is involved, the concern about the imbalance of negotiating power is inevitable. It is only when the statute can provide the base line which the parties cannot agree otherwise that the real justice can be brought to the weaker negotiating party, usually the assured.

Statutory reform is the only effective way to bring the law on duty of good faith and disclosure closer with the original intention of Lord Mansfield in *Carter v. Boehm* (1766).⁵¹ The striking feature within the UK is that while it is accepted that the law in these areas originated from the view of Lord Mansfield, the law as it has been developed does not seem to follow the passage of his Lordship. He never mentioned the remedy of avoidance for breach of the general duty of good faith. He did not refer to the standard of 'prudent insurer' as the standard for determining materiality. It is not so clear where these misunderstandings started. Nevertheless, these had been followed until they became codified in the MIA 1906 and that they seem to be approved by the application of the Act without even the slightest reform for 100 years.

⁵¹ *Carter v. Boehm* (1766) 3 Burr. 1905.

What this thesis has done throughout is to warn that the problems of the law occur due to the misunderstanding from the past, and, this work tries further to resurrect the law on duty of good faith and disclosure back to the original position and further attempt to re-establish the original rationale therein. It is believed that such a return will better strike a balance between the duty of the assured and the insurer at the pre-contractual stage and also expands the concept of good faith to govern the conduct of the parties further at the post-contractual stage. With such more balanced law, this should in turn encourage the placing of risks in the London Market by both internal and international customers.

This has yielded fruit in the form of draft proposals and commentary to follow which, taken together, may avoid potential dislocation and uncertainty and show how the law may be applied with flexibility.

DRAFT PROPOSALS

Clause 17 Marine Insurance is bonae fidei

“A contract of marine insurance is a contract based upon good faith, which applies throughout the contractual relationship, and, if good faith is not observed by either party, discretion is given to judges in imposing the appropriate remedy for the other party by due consideration to the specific circumstances of the parties in each case and the gravity or consequence of the breach.”

Clause 18 Pre-contractual duty of the parties to disclose

“Subject to the above provision and before the contract is concluded:

- (1) The assured shall disclose the known facts which he considers that the insurer has no means to acquire but that the insurer needs it in assessing the risks. Failure to disclose such fact, if it induced the insurer to a significant extent to enter into the contract on the terms he did, shall lead the contract to be avoided.
- (2) The insurer shall disclose the known facts which he considers that the assured has no means to acquire but that the assured requires in assessing whether the risk should be placed. Failure to disclose such facts, if it induced the assured to a significant extent to enter into the contract on the terms he did, shall give the assured an option to avoid the contract or to claim damages

proportionate to the loss he suffered and take contract as subsisting.”

[(3)-(5) remain the same]

Clause 20 (s.20 repealed and replaced by...)

Mandatory nature of the provisions

“The parties, by their express agreement, should not exclude or limit the duty in s.17 but disclosure in s.18 may be excluded or limited so far as it does not prejudice the other party. No remedies for breach of s.17 or the amount of damages for non-disclosure in s.18(2) can be agreed or ascertained in advance by the parties.”

COMMENTARY TO THE DRAFT PROPOSALS

Clause 17

Marine insurance is no longer a contract of utmost good faith (*uberrimae fidei*). This is replaced by the term ‘good faith’ (*bonae fidei*) which connotes the widest sense of fairness and justice. This is to make it clear that the concept of good faith does not impose any specific duty beyond the standard of moral good sense. No attempt is made to elaborate this term any further as it may lead to the limitation of judicial imagination. Judges should be left to decide upon the case-by-case basis by using common sense and conscience to identify which conduct can amount to *bad faith*. Likewise, the term ‘bad faith’ should have a widest meaning which should not be limited to fraudulent conduct. This clause also makes clear that ‘good faith’ should be applied throughout the contractual period.

Since the duty of good faith can only be defined in a broad sense without the possibility of further detailed elaboration, it follows that it is not possible to stipulate the fixed remedies for breaches of the duty. This leads to the suggestion to abolish the sole remedy of avoidance attached to the original s.17. Instead, discretion is given to judges to use a suitable remedy in each particular case. The guidance on how discretion should be exercised is given to judges to take into account the specific circumstances, the gravity or consequences of the breach. These are just broad guidelines by which judges are free to take other factors into

account. Therefore, suppose the insurer delayed in paying claims which then led to further damages upon the assured, the judge needs to explore further into the factual circumstances before imposing the remedy. What was the reason for such delay – trying to put pressure upon the assured to reduce the claims? Still considering two conflicting reports from the claim investigator? Administrative fault? How long does it take from the launch of claim – 1 year? 5 years? What is the consequence of such late payment – the assured lost profits? The assured has no monies to run further business? The assured needs to put other vessels into mortgages to get some monies in the meantime? The remedy in each case cannot be the same considering the differences that various factors involve.

One potential pitfall may be uncertainty. Judges may have different opinions upon *fairness* and *justice*. However, the courts can do nothing against ‘conscience’ and public opinion and any cases decided against these are prone to criticisms. There is also an appeal mechanism for the cases which seem unsatisfactory for either party. With the flow of legal thought from the Continental legal system and the inclination to adopt the concept of ‘good faith’ into general contract law in the UK, the courts in the future should be more acquainted with applying this concept.

Clause 18

This clause only deals with the duty of disclosure as the abolition of the separate concept of the duty not to misrepresent is recommended. The reason for such a suggestion is that, as explained in Chapter 2,⁵² while *pure* non-disclosure can stand along as a separate breach of the duty of disclosure, every misrepresentation contains some elements of non-disclosure. One simply cannot assert the untrue statement without part of the true statement being concealed. For example, if the assured told the insurer that his ship will sail to New York. If this statement is true, it suggests that the ship will not go to somewhere else. If this statement is untrue, however, it means that the ship will sail to other destination and *not* New

⁵² Chapter 2 above, 51-54.

York. If the duty of disclosure is complied with all the facts are told, it is hard to see how the other party can be misled into the contract. Therefore, it is submitted that having a duty not to misrepresent in s.20 while the duty of disclosure exists in s.18 is redundant. In this context, insurance contracts differ from other contracts where only the duty not to misrepresent exists but the duty of disclosure does not recognise. In such a case, it is submitted, having a duty not to misrepresent there is justifiable. Above all, the duty not to misrepresent, as understood in the modern sense, is out of Lord Mansfield's contemplation in *Carter v. Boehm* (1766). The passage of his Lordship supports the recommendation for the abolition here. There, Lord Mansfield used the term 'representation' simply in a sense of making a statement. Then, he referred to 'concealment' as in contrast to 'representation'. He did not mention 'misrepresentation' in separation from 'concealment' because these two concepts cannot be logically distinguished.

Whilst this clause deals specifically with the duty of disclosure, the opening phrase of this clause is "[s]ubject to the above provision" which refers back to Clause 17. This is to remind that pre-contractual good faith is not limited upon the duty of disclosure, and, pre-contractual bad faith which does not fall within this clause should be subjected to the general provision in Clause 17. For example, the assured ordered the broker to place the risk with X, an underwriter. The negotiation came to almost the last stage and X appointed the surveyor to inspect the vessel to confirm the quotation of premiums. The assured, without prior notification, decided to place the risk with Y, another underwriter. Although the assured should have a freedom to choose whom he would like to contract with, his previous conduct led X to have a reasonable expectation that the insurance contract would be concluded and that was why the surveyor was appointed. In such a case, X should be compensated through the application of general provision in Clause 17.⁵³

⁵³ Compare the explanation of Eggers et al that one facet of the pre-contractual facets of good faith duty is to "do one's best to complete the negotiations". See Eggers, P.M., et al, *Good Faith and Insurance Contracts* (2nd ed., LLP, London 2004) 6, [1.13].

Sub-clause (1) deals with the duty of the assured to disclose. Unlike previous s.18(2), the definition of materiality is abolished as is the external concept of 'prudent insurer' so that there will be no further problems of evidential prejudice. To reflect Lord Mansfield's contemplation of *Carter v. Boehm* (1766) which only intended to punish a person with deliberate attention to conceal, the duty of disclosure by the assured is therefore modified. To this extent, even if the duty not to misrepresent was not suggested to be abolished, the present author would suggest similar modification to the duty. Based upon the notion of good faith, it is certain that Lord Mansfield, if any, did not think of any forms of misrepresentation without the deliberate intention to tell the untrue. However, since the abolition was suggested, there is no need to mention this any further.

Therefore, the assured needs to disclose facts which fall into the following three limbs: (1) the assured knows of it (here the 'constructive knowledge' is abolished) (2) the assured realises that the insurer has no means to know such fact (3) the assured also knows that the insurer wants to know such fact in considering the risk. Of course, this formulation should suffice to cover the duty not to misrepresent if such duty is understood as a concept under the umbrella of the concept of good faith and the reference to morality is made. If the assured realises that the insurer has no means to know that the engine of ship is broken and he knows that the insurer wants to know such facts in order to correctly assess the risk. Instead of telling the insurer as such, he tells the insurer that the engine of the ship is in good condition. By this, one might say either that he misrepresented the true state of the engine or otherwise he undisclosed the true state of the engine. What need is there for the separate concept of misrepresentation? In another situation, suppose the insurer asks the assured of whether the engine is a brand-new one. Without knowing for certain, the assured tells the insurer that the engine is first-hand, which in fact it is *not*. Under the general contract law, the assured may be in breach of the duty not to misrepresent. However, with the suggestion to abolish this duty in insurance contract law, the assured will not be guilty of misrepresentation. In similar vein, he would not be in breach of the duty of

disclosure as suggested either. The reason is that such telling of untrue statement is not done with moral blameworthy.

As can be seen from the above formulated duty of disclosure, the third limb implies that the application of Clause 18 to marine insurance or, in the broadest sense to commercial insurance. Consumer assureds simply cannot know what the insurer may want to know in considering the risk. In contrast, the marine assureds at least know which fact may be important in the commercial sense. In some cases, the commercial assureds also have an insurance department which deals specifically with the placement of risk.

When the insurer alleges non-disclosure, he needs to prove that he had not even slightest means to acquire the fact and the assured realised this point. He also needs to prove further that the assured knew that such fact *may* be important upon the risk assessment. This is question of proof between actual parties to a marine insurance contract. The standard of proof is upon the balance of probability and the courts may accept as evidence, albeit not conclusively, the likely understanding of the business man in the position of the assured. The difficulty lies upon the need to prove how much the assured knew of the insurer's potential to investigate. But, this will encourage the insurer to put more questions to the assured at the pre-contractual stage rather than keeping in his mind that he can easily avoid the contract on grounds of non-disclosure should anything go wrong. Again, the question of proof only rests upon the balance of probabilities. After proving these, the insurer will need to prove inducement, the requirement which is now explicit in Clause 18. No further explanation is required here since it is not suggested that the proof of inducement is any different from the present state of the law.

Considering the *deliberate* non-disclosure and the effect of such undisclosed fact upon the insurer, the remedy of avoidance should thus be retained.

Sub-clause (2) is just a mirror image of sub-clause (1). It is inserted to make clear the extent of the insurer's pre-contractual duty of disclosure. No special explanation is required here. In contrast to the present state of law, the remedy of damages is clearly stipulated in the provision as an alternative choice for the assured. Mostly, the assured does not want to lose his cover and he would not opt for this alternative. However, in some rare cases, the assured may choose for the traditional remedy of avoidance. For example, as an illustration in *Carter v. Boehm* (1766), the insurer underwrote a ship that had already arrived. Upon the ship reaching its destination, the assured could see no need to engage in insurance contract any further. This sub-clause does not provide how damages may be measured, but Clause 18 is subjected to the general provision in Clause 17 and such measure may follow the criteria therein.

Clause 20

As suggested in Chapter 2, there is no need to distinguish between non-disclosure and misrepresentation as the two are overlapped and therefore the author suggests the repeal of the original s.20. Instead, Clause 20 comes to deal with the freedom of contract. On the one hand, it is to clarify the extent to which the parties may contract out of the statute. On the other hand, this provision intends to protect the weaker party in the contractual negotiation, mostly the assured. However, the freedom of contract is still recognised and not all of what has been stated in previous sections is compulsory.

For policy reasons, to promote fairness and justice, and to encourage the courts to exercise discretion, the parties are forbidden from defining or circumscribing the duty of good faith by contractual clauses. However, the freedom of contract is (partly) retained as far as the duty of disclosure is concerned. The parties may exclude such duty altogether or further limit the duty of disclosure. However, the expansion of this duty is not allowed. This is to protect the weaker party in contractual negotiation.

So far as remedies are concerned, since the general duty of good faith is hard to elaborate, it follows logically that the parties should not be allowed to stipulate in their contract for certain the remedy for breach of such duty of good faith. This is to give the courts the freedom to exercise their discretion as explained in relation to Clause 17 above. The parties can always alter the remedy of avoidance in relation to non-disclosure by the assured as no remedy can be more severe than the remedy of avoidance. The same goes for the remedy of avoidance as an option in Clause 18(2). However, the parties cannot agree in advance for amount of damages in case of non-disclosure by the insurer. This is to equip the courts with discretion and to protect the assured.

Conclusion

As can be observed from the draft proposals the author has formulated, the reform suggested has taken into account the reality of contractual negotiation, the original intention of Lord Mansfield, and the proportionality between the breach of the duty and the remedy. 'Good faith', which should be encouraged in every contractual relationship, not only in marine insurance, is also re-established here. Such a more balanced law which is willing to take into account each particular circumstance should be preferable to everyone involved, especially the prospective assureds who may no longer hesitate to place their risks in the London Market. The method for such reform is also identified, with statutory reform being the path recommended. With the flexible approach adopted throughout, these proposals should stand the test of time with no need for re-enactment of the statute in the years to come. These proposals are awaiting implementation. With just slight changes to only one or two aspects of the law, these should not deter the politicians whose time is used mainly to attract the attention of the electorate.

Conclusion

In the year that the Marine Insurance Act 1906 celebrates its centenary, defects are all too visible and the question of statutory reform is undeniable. The cry for reform is particularly loud when it comes to the laws of utmost good faith and the duty of disclosure. This work traced the roots of the problem and pointed out that there has long been a misunderstanding of what Lord Mansfield intended to proclaim in his seminal judgment in *Carter v. Boehm* (1766) and that such misconception was later incorporated in the Act. This thesis has argued that any reform should be made by reference to his Lordship's original intention.

Chapter 1 of this work shows that, in the UK, marine insurance law has largely been ignored. Since the law as so misunderstood indiscriminately governs consumer insurance, more sympathy is given towards the consumers. Similar problems in marine insurance law can be found in Australia but the persons who are involved in law reform process there are somehow more alerted. Yet, by adopting a similar understanding and the same philosophy as in the UK, the recommendations there for reform on non-disclosure in marine insurance are unlikely to be successful because there have been no fundamental changes in 'attitude'.

In South Africa, however, the situation is different from that in both the UK and Australia. There, while the influence of legal thought in the UK is predominant, for historical reasons, insurance law is mainly based upon the traditional Roman-Dutch legal regime. However, the judgment of Joubert J.A. in *Mutual and Federal Ins v. Oudtshoorn Municipality* (1985) seems to pose one significant question to the marine insurance legal regime in the UK and that is: exactly what is 'utmost good faith'?

We have seen in Chapter 2 that the explanation given by the academic commentators in the UK is unclear when it comes to the meaning of 'utmost good faith' and many of them tend to treat it indifferently from the duty of disclosure. Similarly, they are equivocal and hesitate to explain the distinction between the

duty of disclosure and the duty not to misrepresent, two aspects of utmost good faith which are treated as distinct concepts but, in practice, none of them can point out how different they are. What exactly was Lord Mansfield trying to proclaim and how did he intend the law to operate?

In an attempt to answer the above question, the exploration reveals that, in the UK, the original intention and understanding of Lord Mansfield has been largely distorted. He did not envisage the concept of 'utmost good faith' (*uberrimae fidei*), the root of which cannot be traced. Instead, he was greatly influenced by the ideology of natural law which he assimilated through many civil law materials he read, especially the work of Cicero. Natural law focuses on morality and it dictates the concept of 'good faith' (*bonae fidei*) which seeks to provide fairness and justice. Thus, concealment cannot be condoned. By this, no apparent distinction between concealment and misrepresentation is made.

Through the work of Cicero, as seen in Chapter 3, his Lordship proclaimed the rule on non-disclosure. He adopted the explanation of this philosopher in which it was suggested that *concealment* and *not to reveal* are not the same and he did expressly make reference to this in his judgment. Through the scenarios raised in his work, we have learned that concealment must be coupled with the *intention* of one party not to tell the information to the other while he knows that the latter needs such facts. Thus, the innocent non-disclosure in the modern sense is indeed out of context. Such understanding is actually in line with the broad notion of good faith which underpins the duty of disclosure. Such a concept rests upon the wider perception of good morality and thus breach of this concept suggests some elements of 'bad faith'. It is to this much to condemn intention that Lord Mansfield imposed the severe remedy of avoidance in response to it.

But, to say that the person in breach had an intention to conceal, naturally, such person must firstly *realise* what he needs to reveal. In order for him to have such a consideration, he must *know* what the other party cannot himself acquire but wants to know. Thus, the scope of the duty of disclosure and the breach of

such duty must be assessed by taking the factual circumstances of both *actual* parties into account. Here, it is suggested, there appears to be no logical reason to bring in the external concept of 'prudent insurer' since it contains certain unjust features. First, it is impossible task for the assured to know what such hypothetical person wants to know. Secondly, judges also cannot assess the view of such assumed experienced insurer and thus they need to resort to the testimony of expert witnesses. This opens the chance for professional bias. While judges may observe the demeanour of the witnesses, he can hardly observe their moral standards.

The suggestions from the Australian Law Reform Commission (ALRC) on this matter are not directly to the point. It does not make any changes to the prudent insurer standard. In litigation, evidential prejudice is likely to remain. The concept of 'reasonable assured' is just brought in to replace the usual understanding of 'constructive knowledge'. Thus, as this work suggests, the recommendations of the ALRC do not change in attitude. In contrast, they complicate matters because identification of the so-called 'reasonable assured' is hard to ascertain.

Despite the fact that the law on duty of disclosure has been wrongly perceived since sometime after Lord Mansfield, it is submitted that the House of Lords in *Pan Atlantic v. Pine Top* (1994) was right in finding the requirement of 'inducement' to exist. This is unarguable since Lord Mansfield clearly stressed that, by the concealment, the other party is *deceived*. Thus, to be entitled to a remedy, the other party must be able to demonstrate that he was induced to enter into the contract by such non-disclosure.

With the extremely limited scope of the duty of disclosure as it should be coupled with the requirement of inducement as Lord Mansfield propounded it, the author suggests in this work (despite the fact that this might be contrary to the view of most academic commentators) that the remedy of avoidance in relation to

material non-disclosure *is* justifiable and should remain in the Act. No alteration to this is needed. This is the gist of Chapter 4.

Due to the misapprehension of the contents of the duty of disclosure, the remedy of avoidance is misapplied and becomes unduly harsh. Needless to say, the consequence is beyond Lord Mansfield's contemplation. With the lack of understanding of the concept of 'good faith' and the tendency to view it indifferently from non-disclosure, those post-Lord Mansfield authorities unquestionably accepted the remedy of avoidance as the consequence of breach of the broader duty of good faith. They lost sight of the fact that this concept is elastic and therefore the consequence of the breach should take into account many factors such as the gravity of the breach, the cause of the breach, or even the particular circumstances of the parties in breach. Unavoidably, such lack of understanding had been carried along until the time when the Act was enacted and thus it became the last part of s.17. This is a grave mistake which limits judicial discretion to do justice in particular case where there is bad faith conduct. The evident example of this is in the case of non-disclosure by the insurer.

In the circumstances where the breach of the duty of disclosure is caused by the insurer, the Act, which does not contain express language as to the contents of the duty, is also silent upon the remedy for breach. Naturally, the courts need to resort to s.17, which stresses that the duty of utmost good faith must be observed by 'either party'. However, in light of the language of the last part of s.17, the courts thus refused to grant the assured damages despite the fact that the assured suffered from such non-disclosure. True, Lord Mansfield mentioned the insurer's failure to disclose and did not mention remedy to be otherwise, but one can equally argue that his Lordship's mind was focused upon the assured's non-disclosure. Moreover, upon considering the scenario he raised, one can readily understand that he did not contemplate the situation where non-disclosure by the insurer causes great loss to the assured. However, one can readily presume from Lord Mansfield's attitude that he would not wish the assured to be left in the position of not being properly compensated because he heavily relied on the perceived notion of fairness and justice. Therefore, once what Lord Mansfield had

in his mind is understood, one can further realise why he omitted mentioning the consequences of breach of the broader duty of good faith. This is because such breaches can appear in many forms in many situations, and it is hard to stipulate the remedy to be one thing rather than another. Lord Mansfield thus intended to leave this for the courts to determine upon a case-by-case basis. Support for this came from the historical examination of the concept of 'good faith' itself.

The notion of good faith can be traced back to the Roman Empire. There, it was used to supplement the strict form of action. As seen in Chapter 2, this concept gave judges the flexibility to do justice upon particular cases before them. As such, the author suggests that the understanding of Lord Mansfield in relation to the remedy question must also be restored and discretion should be given to the courts to grant an appropriate remedy in each particular case. Their freedom to do so should not be restrained by the language of the Act and thus the repeal of the last part of s.17 is necessary. Such discretion should be granted to judges in the widest manner and this should not be limited upon the question whether the contract should be *avoided* or not. This is much simpler than those remedial regimes suggested in Australia.

In Chapter 5, this work traced the problems attached to the concept of post-contractual utmost good faith. It demonstrated that, conceptually, it is not surprising for the notion of good faith to have its post-contractual phase and this was not beyond the contemplation of Lord Mansfield. He expected this concept to underpin all contractual relationships even those where the pre-contractual phase might not feature so strongly. The complication of the problems lies partly due to the misunderstanding of the courts and lawyers in the UK. They do not understand the concept of 'good faith' and they see it as *one* duty that is static. The House of Lords in *The Star Sea* (2001) seems to move closer to the correct understanding by admitting that good faith can have different degrees depending upon the context and that the post-contractual duty should be confined to the duty to abstain from fraudulent conduct. Upon closer analysis, however, their Lordships

were simply trying to circumvent the harsh consequence of the remedy of avoidance.

In *The Mercandian Continent* (2001), one could see that Lord Justice Longmore followed this consideration and he added the requirements of materiality and inducement. The House of Lords and the Court of Appeal may not be blamed for this since it was their attempt to reduce the grave injustice caused by the effect of the last part of s.17, which was *wrongly* drafted. Since the inducement is tied with the quality of conduct that could justify the termination of the contract, one can thus doubt when exactly s.17 is applied. Upon further analysis, it can be seen that, among the situations in which the post-contractual utmost good faith is said to be required, some are actually pre-contractual situations, while in other circumstances, it is questionable whether the concept of good faith is *ever* required. With the static view of the post-contractual utmost good faith as a *singular* duty coupled with the remedy of avoidance attached to s.17, the courts are deterred from discovering other facets of utmost good faith.

It is submitted that the reform to s.17 will eventually encourage the courts to discover other facets of utmost good faith. With the discretion they should have, judges can mould the appropriate remedy to each specific circumstance. They should not be tied to the implied term basis. Otherwise, their discretion will be confined to the limited ranges of remedies available in general contract law which might not be so suitable, especially since there, the remedies are operated more upon the 'consequence' of the breach but other factors are not taken into account. This will be against the notion of good faith which focuses upon fairness between individuals. This does not include the fact that an implied term may be replaced by an express contractual term.

Thus, ultimately, the present author suggests in Chapter 6 that statutory reform to the MIA 1906 is both desirable and inevitable. This is the means to import the concept of 'good faith' as Lord Mansfield so envisaged into the law. Despite the fact that both the scope of the duty of disclosure and the remedy of

avoidance can be circumscribed by contractual means, the clauses cannot accommodate all the facets of the duty of good faith. At the same time, any reliance upon the contractual method will eventually lead to uncertainty as the contract terms will depend upon the relative bargaining power of the parties in each case. True, freedom of contract should be respected. But, it is also submitted that there should be a bottom line somewhere to protect the weaker party in contractual negotiation, mostly the assured.

Apart from being a chance to restore the understanding of Lord Mansfield, statutory reform will benefit the London Market since prospective assureds generally prefer fair law which is not too demanding upon them. Such reform will increase the potential of the London Market to compete with foreign markets which nowadays offer more 'assured-friendly' law and regulations. Only fair and flexible law can encourage overseas customers which the premiums profits gained from them will enhance 'invisible earnings'. However, the reform may be faced with a great obstruction and that is the absence of political will. Nevertheless, this can be ameliorated if such change is limited to crucial matters, namely non-disclosure and breach of warranty. As far as non-disclosure is concerned, the author put forward the draft proposals set out in Chapter 6 for consideration.

APPENDIX 1

EXCERPT FROM THE RELEVANT PROVISIONS FROM THE MARINE INSURANCE ACT 1906

“Disclosure and Representations”

17. Insurance is uberrimae fidei

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

18. Disclosure by assured

- (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
- (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
- (3) In the absence of inquiry the following circumstances need not be disclosed, namely:-
 - (a) Any circumstance which diminishes the risk;
 - (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
 - (c) Any circumstance as to which information is waived by the insurer.
 - (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.
- (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.
- (5) The term ‘circumstance’ includes any communication made to, or information received by, the assured.

19. Disclosure by agent effecting insurance

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

- (a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which, in the ordinary course of business, ought to be known by, or to have been communicated to, him; and
- (b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20. Representations pending negotiation of contract

- (1) Every material representation made by the assured or his agent to the insurer during the negotiations for contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.
- (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
- (3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.
- (4) A representation as to a matter of fact is true, if it be substantially correct that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.
- (5) A representation as to a matter of expectation or belief is true if it be made in good faith.
- (6) A representation may be withdrawn or corrected before the contract is concluded.
- (7) Whether a particular representation be material or not is, in each case, a question of fact.

21. When contract is deemed to be concluded

A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, [...]

APPENDIX 2¹

EXCERPT OF THE RELEVANT CLAUSES FROM THE APPENDIX C: DRAFT MARINE INSURANCE AMENDMENT BILL (ATTACHED TO THE AUSTRALIAN LAW REFORM COMMISSION REPORT NO.91, REVIEW OF THE *MARINE INSURANCE ACT 1909*)

23 Duty of utmost good faith

- (1) A contract of marine insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
- (2) If reliance by a party to a contract of marine insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
- (3) Subsection (2) does not limit the operation of subsection (1).
- (4) In deciding whether reliance by an insurer on a provision of a contract of marine insurance would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the assured, whether a notification of a kind mentioned in this Act or otherwise.
- (5) The requirement that each party act toward the other party with the utmost good faith extends for the duration of the relationship between the parties set out in the contract of marine insurance except in relation to any claim or other aspect of the relationship which becomes the subject of litigation between the parties, in which case the requirement ceases when the litigation is commenced but only in relation to the claim or other aspect that is the subject of that litigation.

20 Subsection 24(1)

Repeal the subsection, substitute:

- (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every circumstance which is known to the assured, or which a reasonable person in the circumstances could be expected to know, to be material.

¹ The Australian Law Reform Commission, 'Review of the *Marine Insurance Act 1909*' (Report No.91, 28 February 2001) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/91/>> (copyright Commonwealth of Australia reproduced by permission).

26A No other duty of disclosure

- (1) Without otherwise limiting or restricting section 23 of this Act, this Act does not, and a contract of marine insurance may not, impose on an assured a duty of disclosure before the contract is concluded greater than that provided for by this Act.
- (2) A contract of marine insurance may include an express term providing for a duty of disclosure by the assured after the contract has been concluded.

26B Remedies for non-disclosure and misrepresentation

- (1) Subject to any contrary term in the contract, if there is a breach by the assured or its agent of the obligations in sections 24, 25 or 26 the following subsections apply.
- (2) If the breach is fraudulent the insurer is entitled to avoid the contract.
- (3) If the breach is not fraudulent and the insurer proves that the non-disclosure or misrepresentation induced it to enter into the contract:
 - (a) if the insurer proves that it would not have entered into the contract if there had been no breach — the insurer is entitled to avoid the contract but must return the premium to the assured.
 - (b) if the insurer proves that it would have entered into the contract but on different terms — the insurer:
 - (i) is not entitled to avoid the contract; and
 - (ii) is not liable to indemnify the assured for any loss proximately caused by the undisclosed or misrepresented circumstance; and
 - (iii) is entitled to reduce any liability that it may have to the assured to reflect any variation in premium, deductible or excess that the insurer would have required if there had been no breach; and
 - (iv) is entitled to cancel the policy in accordance with section 47A.

26C No greater remedies

A contract of marine insurance may not provide for any remedies for a breach by the assured or its agent of the obligations in sections 24, 25 or 26 more favourable to the insurer than those provided for by section 26B.

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Normhurst Limited, Hills Supplies Limited, City Desk Manufacturing Limited v. Dornoch Limited on its own behalf and on behalf of all members of Syndicates 588, 861 and 1209 subscribing to Policy Number: F990678 and as the representative Underwriter for the following Lloyd's market each for their own share, Wuttembergische Versicherung A.G., Unionamerica Insurance Company Limited, Terra Nova Insurance Company Limited, Wilkinson Rodgers Limited (t/a Wilkinson Rodgers) [2004] EWHC 567 (Comm).

Orakpo v. Barclays Services and Another [1995] 1 LRLR 443.

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Pan Atlantic Insurance Co.Ltd and Another v. Pine Top Insurance Co.Ltd [1994] 2 Lloyd's Rep. 427.

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