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FAIR PRESENTATION OF THE RISK IN THE TWENTY-FIRST CENTURY

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ABSTRACT

Singapore continues to apply a version of the Marine Insurance Act 1906 in its original format, without the changes implemented by the Insurance Act 2015. Among the core duties contained within that original codification was the duty on the insured to disclose material facts prior to the conclusion of the contract. That has been reshaped by the courts and Parliament as a duty to make a fair presentation of the risk. The purpose of this paper is to show that this judicial development of the key duty has continued not because of, but despite, those statutory reforms. Significant changes have been driven by judicial re-interpretation of long-standing elements, such as materiality and inducement and are as important for the development of the duty as the relatively modest interventions introduced by the 2015 Act. The radical shift in the remedies for breach provided for in the 2015 Act quickens this process of judicial development. This matters. English law continues to provide persuasive authority for many other jurisdictions, including Singapore, for issues such as inducement and materiality. The brutal, simple vision of pre-contractual disclosure under the Marine Insurance Act 1906 is subsiding, to be replaced by a more nuanced and 'open textured' model of commercial contracting.

Keywords: marine insurance, fair presentation, misrepresentation, materiality, inducement, law reform.

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MIA 1906: Marine Insurance Act 1906
IA 2015: Insurance Act 2015
Arnould: Mark Templeman KC et al, *Arnould: Law of Marine Insurance and Average* (21st edn, Sweet & Maxwell 2024).
Good Faith & Insurance Contracts: Peter MacDonald Eggers KC & Sir Simon Pickens, *Good Faith & Insurance Contracts* (4th edn, Informa 2018).

1 Introduction

The duty to make a 'fair presentation of the risk' prior to contracting is likely the defining obligation of marine insurance law. It stands in direct contrast to the general position in common law contract that contracting parties need not share market-sensitive information prior to contracting.[1] Its creation in the eighteenth century became intertwined with broader notions of utmost good faith.[2] This was emblematic of English law's vision of the insurance relationship as one in which the situationally vulnerable underwriter needed protection from the better-informed insured. This model helped shape English marine insurance law – and that of many Commonwealth countries – into a system with strict rules and potentially draconian remedies. This grew into a doctrine where there was, at least on some accounts, little room for subtlety or proportionality. Insurers were trusted to exercise these rights appropriately.

The focus of this paper is the gradual drift across the centuries to a version of the duty of fair presentation that is increasingly nuanced and sophisticated. Whilst marine insurance law has both consumer and commercial aspects, this paper is concerned with the position in commercial markets. This increasing complexity comes, undoubtedly, at the cost of increased uncertainty of outcome, at least in legal terms. It must always be remembered that insurers were not expected to rely in all cases on their strict legal rights. We are seeing change that brings some of this uncertainty into law, from where it resided in the inherent discretion found in the claims team to settle disputes 'in the shadow of the law'.[3] It is not that the outcomes are less predictable than before; it is that the law is reflecting that nuance. In this, the law is becoming more important in settling insurance disputes.

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1 Compare, for example, the much more limited empathy for the position of the other party in *Smith v Hughes* (1870-71) LR 6 QB 597.

2 See generally, Howard Bennett, 'The Three Ages of Utmost Good Faith' in Charles Mitchell and Stephen Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing, 2020).

3 This principle dates to Robert Mnookin & Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950.

Some of this change has come through statutory intervention, such as the United Kingdom's IA 2015.[4] That may provide an example for other jurisdictions to follow.[5] Perhaps not. But an important part of this narrative of restating key principles derives from judicial willingness to regard these duties as subject to caveat and inherent limits. These limits fall within principles, such as materiality and inducement, that apply across a wider grouping of countries- including Singapore. As with any process of judicial reform, the rate and direction of travel is not homogeneous. But the nature of the new regime for remedies means that English courts will increasingly be under pressure to find a commercially justified outcome rather than a wholly predictable one.

In doing so, the law is edging away from the strictures of the Victorian era codification of marine insurance law and back to positions closer to Lord Mansfield's vision of good faith conduct in commerce. In modern terminology, this is a return to a fully 'coopetitive' pre-contractual relationship, neither fully competitive nor fully cooperative in nature.[6] In doing so, it faces the defining feature of modern commercial contract law: the need to balance certainty and predictability of the law with the search for commercially justifiable outcomes.

2 Choice of law, statutory change and codification

2.1 Choice of law in marine insurance markets

Before commencing my analysis of marine insurance law, it is useful to centre this within shipping law more generally. It is an area of private law, but one which has not been subject to the processes of harmonisation so familiar to other areas of maritime practice. There is no international Convention, which forms the basis of many carriage[7] and some sales[8] relationships. There is no standardised private code as might be found in a banking

[4] This paper is concerned only with the law of England & Wales.

[5] See, eg, *Report on Reforming Insurance Law in Singapore* (Singapore Academy of Law, Law Reform Committee, 2020). There is no current indication that the recommendations of this Report – to implement rules akin to the IA 2015 – will be acted upon.

[6] The nature of 'coopetitive' relationships is the focus of papers within economic and management studies literature. See, for example, Murat Akpinar & Zsuzsanna Vincze, 'The dynamics of coopetition: A stakeholder view of the German automotive industry' (2016) 57 Industrial Marketing Management 53, on the relationship between Porsche and Volkswagen (VW).

[7] For example, as found in the Hague, Hague-Visby, Hamburg and Rotterdam Rules.

[8] Primarily, under the Convention for the International Sale of Goods (1980), but invariably excluded in most commodity sales. See, eg, MG Bridge, *The International Sale of Goods* (5th edn, OUP 2023) [1.02]–[1.03].

relationship, under the UCP.[9] It is fundamentally an area where choice of law dominates. This makes the choices made by lawmakers particularly significant. They are competing for support of insurers, brokers and insureds. The balance between the demands of legal certainty and the adaptability of the law in resolving difficult cases is therefore of fundamental importance.

Recent data suggest that there are two major sources of marine insurance law, each of which is based in a cluster of legal systems.[10] English law, and the associated standard form clauses generated by the International Underwriting Association and others,[11] remains a core source. There are variants of this, found within the wider common law world, and especially in current and former Commonwealth countries. In what may be a surprise to some, China based its original marine insurance code on English law.[12] Many of these jurisdictions have yet to adopt the statutory reforms undertaken by the United Kingdom by way of the IA 2015. Singapore sits within this bracket.[13] The other major system is the Nordic Hull Plan, normally provided on the basis of a Scandinavian legal system, such as Norway.[14]

Within the wider UK-influenced model, we can identify two standard positions: reformed and unreformed marine insurance law. English law provides the reformed model, but some sectors operate on the basis of English law that tend to 'contract out' of these changes and revert to something close to the unreformed version.[15] Conversely, there are systems such as Singapore that have a statutory regime that reflects the unreformed Victorian codification of the original MIA 1906, but in which parties sometimes 'contract in' to the changes provided by the IA 2015.[16] It is possible for parties to adopt other variations and combinations.

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9 For example, the UCP 600, published by the International Chamber of Commerce.

10 See *IUMI's 2024 analysis of the global marine insurance market* (IUMI 2024): <https://iumi.com/> accessed 6 November 2025.

11 At <https://iua.co.uk/> accessed 6 November 2025.

12 See Jia Wang, 'Reflection on Legal Transplantation Theories: A Socio-legal Historical Study of the Formulation and Revolution of Chinese Marine Insurance Law' (2025) 21 Int JLC 80, 85-90 on the shift to English law and practice from an initial plan to use Soviet law, following the Cultural Revolution. On the current process of reform, see Rui Zheng, 'Marine Insurance Law Reform in China Experiences from the UK' in Shengnan Jia & Lijun Liz Zhao, *Commercial and Maritime Law in China and Europe* (Informa Law from Routledge, 2022).

13 Above (n 5).

14 <https://nordicplan.org/the-plan/> accessed 6 November 2025.

15 Not all P&I Clubs operate on the basis of English law, but those who do routinely exclude the operation of the IA 2015.

16 *PT Adidaya Energy Mandiri v MS First Capital Insurance Ltd* [2022] SGHC(I) 14, [2022] 2 Lloyd's Rep 381, contained a Singapore choice of law (and jurisdiction) clause but added: '[I]t is expressly agreed and declared

However, for the sake of simplicity, this paper proceeds on the basis of parties choosing one model or the other.

2.2 The MIA 1906, the IA 2015 and the duty of fair presentation

The entry into force of the IA 2015 did not radically change the insured's pre-contractual duty to disclose material circumstances prior to contracting. The changes that were implemented generally represent an updating of the rules rather than anything revolutionary. Indeed, if anything, this paper argues that it provided a more faithful codification of the common law rules than that achieved by the MIA 1906. The limited nature of these statutory changes is the focus of this Part 2.

This sense of continuity is confirmed by the leading commentator in the field:

> In large measure, the duty of disclosure, which forms part of the duty of fair presentation is the same as that provided for by the common law and under the 1906 Act. The test of materiality is the same, the requirement of inducement remains, and the exceptions to the duty of disclosure are broadly the same.[17]

This is significant for those jurisdictions that look to English law as a source of authority, whether binding or persuasive.[18] Rather than creating a clean break from English law for those countries, authority will continue to build on the nature of inducement, materiality, waiver and so on. That is the focus of Part 3 of this paper. The overall picture is one of change at both the common law and statutory levels, but one where the level of divergence between the reformed and unreformed systems is limited to identifiable areas, and particularly the remedy for breach.

The changes to commercial marine insurance law are significant, but they generally represent a recodification of the common law position. The changes to the remedy for breach are much

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that all of the terms, conditions, warranties and other matters contained within the Marine Insurance Act 1906 (as amended by the Insurance Act 2015) shall still be applicable to this Policy'.

[17] P MacDonald Eggers KC, 'Pre-contractual Duties: The Fair Presentation of the Risk – An English Law Approach' in J Burling & K Lazarus, *Research Handbook on International Insurance Law and* Regulation (2nd edn, Edward Elgar Publishing 2023) 84.

[18] On the relationship between English law and the law of Singapore, see Hwee Ying Yeo, 'Of Shifting Winds-Insured's Pre-Contractual Duty of Good Faith in Singapore' (2018) 30 S Ac LJ 345, 347 citing Andrew Phang, 'Cementing the foundations: The Singapore Application of English Law Act 1993' (1993) 28 UBC LR 205.

more significant. There are six areas that deserve particular attention in the change from the MIA 1906 to the IA 2015.

2.2.1 *From 'utmost good faith' to 'fair presentation'*

Under the unreformed MIA 1906, there was a plethora of statutory duties which claimed to control pre-contractual information flows, and potentially beyond. Under s 17, there was an expectation of a contract made within a mutual framework 'of the utmost good faith'. The potential was there for this relationship norm to extend to contractual performance[19] and perhaps dispute settlement.[20] Any substantive duty under this provision would have real teeth, as a failure to satisfy s 17 would render the contract voidable. Indeed, it was the severity of the remedy that made fashioning any suitable substantive duties so difficult.[21]

To s 17 can be added the specific duties on the assured and its agents that follow in the statute. Section 18, the most significant provision, required the insured to make a disclosure of all material circumstances prior to contracting. Again, the sole remedy for non-compliance was avoidance of the contract. Section 19 extended this, in circumstances where insurance is obtained via a broker acting for the assured, in requiring that broker to disclose to the insurer every material circumstance known to the broker. Section 19 is commonly assumed to render the contract voidable.[22] This is by way of implication, as there is no remedy expressly provided for in the provision.

The above duties are 'insurance law' specific. Section 20, by contrast, broadly maps onto the common law requirements of misrepresentation. There are some differences between misrepresentation as codified in s 20 and the common law, but these are relatively minor.[23]

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19 This was suggested in *Overseas Commodities v Style* [1985] 1 Lloyd's Rep 546, 559 (McNair J), although this must be read in light of later case law.

20 The House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469, [4], refused to recognise any such duty of disclosure at claims: 'there is no duty on the insured to make a full disclosure of his own case to the other side in a litigation' (Lord Clyde).

21 Ibid, [51].

22 For example, Arnould [16-30] assumes that the rule codified in s 19 is a separate duty that vitiates the contract, and not a provision that deems knowledge to the insured for disclosure under the s 18 duty. This reflects the approach in *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136 (CA), 1145 (Staughton LJ).

23 Compare s 20(5) and the common law rule in *Smith v Land & House Property Corp* (1884) 28 ChD 7 (CA).

The shape of the law following the statutory reforms under the IA 2015 is much less complex. The remedy of avoidance for non-compliance with the doctrine of utmost good faith has been removed. The intent of the Law Commissions was for it to revert to an interpretative provision. Its precise status is subject to confirmation.[24]

The wider duties of disclosure and misrepresentation have been consolidated into the single duty to make a fair presentation of the risk. The definition of materiality is carried over from the 1906 Act, as those circumstances that would 'influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk' remains in place.[25] Section 3 of the IA 2015 provides the general framework for this duty, with further explanatory material found within ss 4-9 and Sched 1 of the statute. There is more detail generally in the IA 2015 version of fair presentation, and fewer gaps for the courts to fill. As MacDonald Eggers noted, this generally maps onto the prior position.[26] It is generally a recodification rather than a wide-ranging reform, at least in respect of the duties. There are, nonetheless, some differences simply by virtue of being a single duty. There is no longer a standard duty not to misrepresent and an anomalous duty to make disclosure of material information, but a single duty with a single remedy for breach. That makes placing it within the private law canon, and especially, within the law of remedies, more difficult. The duty is pre-contractual but combines a negative duty not to misrepresent with a positive duty to disclose within a single broadly positive duty: to make a fair presentation of the risk.

Underpinning both the unreformed and reformed versions of pre-contractual negotiation in insurance law is a strong policy reliance on the transaction cost savings these rules are assumed to generate. The presentation of key information by the insured is said to reduce the need for the insurer to conduct an (entirely) independent investigation of the risk. Indeed, the market visualisation of insurance as a contract, which is 'remarkable' for its speed and informality, is said to require these rules.[27] This is somewhat of a reversal of cause and effect. It might also be said that insurance has developed as a rapid and relatively informal contract because the legal framework imposing these duties on the insured allows the market to

[24] Barış Soyer & Andrew Tettenborn, 'Mapping (Utmost) Good Faith in Insurance Law – Future Conditional?' (2016) 132 LQR 618.

[25] IA 2015, ss 3(3)–(4) & 7(3), mirroring MIA 1906, s 18(1)–(2) & s 20(2).

[26] Above (n 17).

[27] See MacDonald Eggers (n 17), 76–77, describing insurance contracts as 'remarkable'.

operate in this way. Other markets for aleatory contracts have developed without a statutory regime mandating the sharing of private information. It should not be forgotten that the duties of disclosure represent an inversion of how commercial contract law operates in almost every other market.

2.2.2 *Manner of presentation*

Section 3(3)(b) of IA 2015 introduced a significant change for the practice of insurance brokers and reflects a twenty-first century issue. The bundle of information prepared for the insurer as part of the fair presentation of the risk must be presented 'in a manner which would be reasonably clear and accessible to a prudent insurer'. This imposes a further duty on the insured but was intended to ensure that the transaction costs savings from fair presentation are actually generated. The provision of material circumstances in a format which would not be usable by an underwriter would comply with the requirement of the 1906 Act, but without removing the need for the insurer to expend substantial analytical effort to discern their significance. Insureds would be protected from any allegation of non-compliance with the statutory requirements – an enviable position – without allowing the insurance contract to be made in its conventional, informal and rapid manner.

This is a significant reform. There is no equivalent duty in the 1906 Act. It does not, however, reflect a desire to vary prior practice, but to maintain it in light of changing technologies. That is, the 1906 Act is dated and Victorian in nature. The English and Scottish Law Commissions noted the potential for insureds to 'over disclose' under the 1906 Act, by providing access to vast unfiltered datasets, which would contain 'all material information' but also a large amount of irrelevant information.[28] The addition of s 3(3)(b) prevents that practice from disrupting the market. Other jurisdictions would be wise to consider similar amendments to their marine insurance code.

[28] Law Commissions (Law Com No 353; Scot Law Com No 238, 2014), *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* para 5.3: 'With so much information available, there is now a need both to define the limits of the duty and to prevent policyholders from "dumping" huge quantities of undigested information on the insurer'.

2.2.3 *Inducement*

Alongside maintaining the requirement of materiality as a fundamental restriction on the twin elements of disclosure and misrepresentation, the IA 2015 codified the need for the breach to have induced the insurer to enter into the contract. Under s 8, a remedy exists:

> only if the insurer shows that, but for the breach, the insurer—
>
> (a) would not have entered into the contract of insurance at all, or
>
> (b) would have done so only on different terms.

This is a conventional account of the requirement of inducement, but has been somewhat overtaken by events. A further 'hard case', that of *Niramax v Zurich Insurance*,[29] established that a simple 'but for' test might not be sufficient. Strictly speaking, a full review of this case would fit most properly within section 3 below, as a judicial development independent of the IA 2015. As such, it may influence legal systems beyond English law. However, it is included here to cast light on the nature of the IA 2015.

In *Niramax*, the insured had operated a waste management compound. This is one of a series of cases concerning this industry, which is prone to extensive fire risks.[30] It had failed to disclose information that would be material in most markets, including the imposition on it of 'special terms', including a 25 per cent 'self-insurance' mandate by a previous insurer. However, evidence showed that this insurer operated a simplistic model of risk assessment, considering only: (1) the amount insured, (2) the type of trade and (3) the loss record. The junior underwriter who processed the application for insurance incorrectly classified the type of risk insured and applied a lower pricing factor than that which should have been applied. The insurer argued that the non-disclosure had induced the insurer to contract on these contractual terms. This required some slightly convoluted reasoning. The insurer argued that if the full risk profile had been disclosed, then the junior underwriter would have passed the file to the senior underwriter. The evidence showed that he would have underwritten the risk

[29] [2021] EWCA Civ 590, [2021] 1 CLC 935.

[30] For example, *Dalamd Ltd v Butterworth Spengler Commercial Ltd* [2018] EWHC 2558 (Comm), [2019] Lloyd's Rep IR 295.

on the three factors provided, but would not have made the same error as to the nature of the type of trade. This would have resulted in a higher premium. On that basis, inducement was said to be established. The Court of Appeal disagreed, stating that whilst it was usually sufficient in simple cases to test inducement on a 'but for' basis, the law required the non-disclosure to have been an effective cause of the change on contractual terms, and not merely a 'but for' cause.[31]

It will be recalled that the IA 2015 has codified the generally applied approach of requiring only a 'but for' factual causation test, rather than the stricter legal causation test shown in *Niramax*. This shows the difficulty of codification in general, in that issues will inevitably arise after Parliament has acted. If anything, it shows the need for a more iterative approach to statutory codification. It ought not to be a process carried out once a century, as has happened with marine insurance law.[32]

2.2.4 *Underwriter put 'on notice'*

The unreformed MIA 1906 required some subtle reading to appreciate its intended effect. The basic duty on the insured under s 18(1) is a stark one- requiring disclosure of 'every material circumstance known to the assured'. The duty is then narrowed by a series of rules in s 18(3), one of which excludes from the s 18(1) duty information that is 'waived by the insurer'. The relationship between these two provisions, and especially where the insured makes an incomplete presentation of the risk, is complex. One question of commercial significance is whether the underwriter ought to respond to an incomplete presentation by asking further questions to resolve areas of uncertainty.[33]

Case law interpreting the 1906 Act sought to limit the universality of section 18. This emerged not from the leading authority – such as the decision of the House of Lords in *Pan Atlantic*[34]

[31] Above (n 29) [35].

[32] There are several reviews of the 1906 Act around its centenary, see, eg, Howard Bennett, 'The Marine Insurance Act 1906: Reflections on a Centenary' (2006) 18 S Ac LJ 669. On the wider development of marine insurance law over this period, see Lord Jonathan Mance, 'The 1906 Act, Common Law and Contract Clauses – All In Harmony?' [2011] LMCLQ 346.

[33] *WISE Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 Lloyd's Rep 483.

[34] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL).

– but from the practice of the lower courts and the practitioner textbooks. As Clarke J in *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp* stated:[35]

> … a minute disclosure of every material circumstance is not required. The assured complies with the duty if he discloses sufficient to call the attention of the underwriter to the relevant facts and matters in such a way that, if the latter desires further information, he can ask for it.

This was not some radical judicial intervention. Almost identical wording is found in the appellate courts prior to the enactment of the MIA 1906 but was not included in the statute.[36] Lord Esher, then Master of the Rolls, applied an identical approach in *Asfar & Co v Blundell*:[37]

> It is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters, in such a manner that they can see that if they require further information they ought to ask for it.

Asfar was decided after the first draft of the Marine Insurance Bill in 1894, but sufficiently far in advance of its enactment that it could have been amended to better fit the judicial position. It was not. The decision was not cited in Chalmers & Owen's digest on the MIA 1906 in relation to non-disclosure. It is treated as a case solely on the nature of loss.[38]

The wording of the IA 2015, if anything, reflects a correction of the somewhat limited nature of the codification undertaken by Chalmers. His vision of clear, simple rules[39] led, at times, to over-simplification. This more nuanced version of disclosure is not evident on the face of the 1906 Act and is discernible only by reading the prior and subsequent case law. But a key

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35 [2010] EWHC 2578 (Comm), [2011] 1 Lloyd's Rep 589, [135], citing *Arnould* (17th edn, Sweet & Maxwell 2008) [16-209].

36 See, for example, the written evidence of the Commercial Bar to the Special Public Bill Committee on the Insurance Bill [HL], 55: 'It was never the case that the duty of disclosure as set out in s 18 was intended to be read as unlimited or that insurers were entitled to be entirely passive', archived at <https://www.parliament.uk/globalassets/documents/HoL-Legislation-Office/Special-Public-Bill-Committees/Insurance-Bill/Evidence/SPBC-Written-Evidence-Volume-1.pdf> accessed November 2025. This argument was deployed against the need for reform, as the courts 'managed' the 1906 Act.

37 [1896] 1 QB 123 (CA), 129.

38 Sir Mackenzie Chalmers & Douglas Owen, *The Marine Insurance Act 1906* (3rd edn, Clowes Ltd 1907) 80.

39 Robert B Ferguson 'Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes' (1977) 4 J of Law and Society 18.

purpose of the Victorian codification was the avoidance of the unnecessary use of common law rules, where a statutory rule could make clear the standard required.[40] The IA 2015 is a return to the position described authoritatively in the 1880s and 1980s. Whilst the 1906 Act could (and was) read as having that effect, it was by no means obvious from the text.

2.2.5 *Knowledge of the Insured*

The MIA 1906 is relatively brief in its identification of the limits of the actual and constructive knowledge of the insured. Section 18(1) provides that 'the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him'. The application of this across a wide range of different types of insurance and markets was complex. The law on the attribution of corporate knowledge relies on the law of agency and is deeply contextual in nature:[41]

> whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question.

By contrast, the IA 2015 provides for a range of insurance-specific rules to determine what the insured is taken to know. In one sense, this is entirely consistent with the wider common law model: it is the identification of a specific contextual approach. The same might be said of the model for knowledge of the insurer, considered below. For corporate insureds, and this will represent much of marine insurance, s 4(3) focuses on two groups of people who are taken to hold corporate knowledge:

> An insured who is not an individual knows only what is known to one or more of the individuals who are—
>
> (a) part of the insured's senior management, or
>
> (b) responsible for the insured's insurance.

[40] Chalmers & Owen (n 38), vii: 'The object of that Bill was to reproduce as exactly as possible the existing law, without making any attempt to amend it'.

[41] *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1, [9].

Each of these classes of person is given specific statutory interpretations in s 4(8). Those responsible for the insurance will normally include an insurance broker, and this replaces s 19 of the MIA 1906. The corporate mind of the insured is found in its 'senior management' and that is defined as 'those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised'.[42]

In addition to the knowledge held by those persons, insureds are taken to know 'what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means)'.

The operation of s 4 of the IA 2015 was considered by the Court of Appeal in *The Win Win*.[43] The underwriter complained of a lack of fair presentation of the risk. It suggested that allegations of criminality against the sole employee of the corporate entity managing the vessel were material and within the knowledge of the insured. The Court of Appeal confirmed the finding of the High Court[44] in denying that the insured corporation was aware of the issue. The nature of the insured company, as a 'special purpose vehicle' (SPV),[45] was significant, as it had no internal management. Only the nominee director of the insured knew of the allegations, and he had no active role in managing the vessel. He was a mere functionary and followed instructions from the ship-owning family which was the beneficial owner of the vessel. On this basis, the 'senior management' of the corporation fell outside its immediate directorship and within the wider corporate group. They were entirely unaware of the allegations at the time the insurance was agreed.

The formulation under the IA 2015 allows the court to favour substance over form. It is unlikely that the same result could be reached under the common law rules of attribution as applied by the MIA 1906. Arnould suggests that under the 1906 Act, the actual knowledge of the insured would be determined by those within the corporate structure, and that deemed

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42 IA 2015, s 4(8).

43 *Delos Shipholding SA v Allianz Global Corporate and Specialty SE (The Win Win)* [2025] EWCA Civ 1019, [2025] Bus LR 2216, [94]–[99].

44 [2024] EWHC 719 (Comm), [2024] 1 Lloyd's Rep 489.

45 For a particularly useful introduction, see <https://www.cscglobal.com/service/entity-solutions/spv-management/guide-to-special-purpose-vehicles-spvs/> accessed 6 November 2025.

knowledge would serve as the basis for including knowledge from outside the corporate entity.[46]

In *The Win Win*,[47] the limited nature of the director's role meant that the court did not consider questioning him as to the risk to be run to be part of the 'reasonable search' that an insured must undertake. He was not sufficiently involved in any decision-making to have any real appreciation of the risk, other than the specific issues related to his own moral hazard. That was too remote an issue to be within the standard search required.

Whilst the precise limits of section 4 might need some judicial finessing, an insurance-specific set of rules is inherently superior to reliance on general corporate law. *The Win Win* is a clear example of the comparative analytical advantage of the IA 2015 over the common law rules on attribution. It is more certain, properly context-specific, and focused on the commercial reality of marine insurance markets. Ship ownership might often involve the use of SPVs with multiple corporate entities, and with all the decision-making made within the lead organisation rather than the subsidiary units.

2.2.6 *Knowledge of the Insurer*

The duty to disclose material information does not extend to information known to the insurer. This is true under the MIA 1906[48] and the IA 2015.[49] The 1906 Act did not provide any clear guidance on how to identify the knowledge of an insurer. By contrast, s 5 of the IA 2015 contains specific insurance rules for the knowledge of an insurer and means that courts do not need to rely on general rules of agency and attribution. Whilst the precise limits of any such insurance-specific rule might be contested, the design of a specific rule for insurance appears to be superior to reliance on the common law.

If the 'mind' of the corporate insured is its senior management, the equivalent for the insurer for fair presentation is its underwriting team: those 'who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms'.[50] However, the insurer may

[46] See Arnould [16-05]–[16-06], discussing *PCW Syndicates* (above, n 22).
[47] Above (n 43).
[48] MIA 1906, s 18(3).
[49] IA 2015, s 3(5)(b)–(d).
[50] IA, s 5(1).

also be fixed with the knowledge held within the wider corporate network, whether as human knowledge or on file. Thus, knowledge within a claims team (for example) may be treated as known by the insurer where that employee or agent ought reasonably to have passed on the relevant information'.[51] Information held on file is treated as within the knowledge of the insurer where it is 'held by the insurer and is readily available' to the underwriting team.[52]

The court in *George on High Ltd v Alan Boswell Insurance Brokers*[53] reviewed s 5 as part of its consideration of the rectification of an insurance policy which named the wrong corporate entity as the insured. It was not, directly, a fair presentation case. There, the claims team was outsourced but had dealt with the 'correct' corporate entity as the insured in processing claims on four separate occasions. Whilst there was no formal system for communicating with the underwriting team, the High Court treated the underwriting team as fixed with this knowledge:

> Those decisions by [the underwriter] not to pass information on or create systems to do so do not, however, mean that as a matter of law [the underwriter] does not know facts that have been told to its staff or agents.[54]

This is, generally, a pragmatic and commercially sensible approach to the issue of insurer knowledge. Jurisdictions beyond the United Kingdom that rely on an unreformed version of the 1906 Act would be well advised to undertake a similar reform.

2.3 The MIA 1906, the IA 2015 and remedies for breach

The most significant change under the IA 2015 was the removal of avoidance as the sole remedy for a failure to meet the standards required by utmost good faith. It was the only remedy stated in the MIA 1906 within ss 17-20, and applied to utmost good faith in general terms, non-disclosure and misrepresentation.[55] The duty of disclosure in s 18 was said to be unitary in nature, such that breach was identical whether innocent, negligent or fraudulent in

[51] Ibid, s 5(2)(a).
[52] Ibid, s 5(2)(b).
[53] [2023] EWHC 1963 (Comm), [2024] Lloyd's Rep IR 391.
[54] Ibid, [62].
[55] Under ss 17–20 MIA 1906 respectively.

character.[56] Although the duty on brokers under s 19 had no specific remedy for breach, it was presumed to represent a similar vitiating factor.[57]

The claimed advantage of this remedy- that it was certain- should not be overstated. Any remedy which is viewed by the judges as generating potentially unjust outcomes is likely to lead to some reticence to find that there has been a breach or to find some other workaround.[58] The leading practitioner text recognises that the codified rules went far beyond what was required to ensure good faith at placement. These rules were 'overkill' in this regard.[59] This is sometimes overlooked by those who favour clear, simple rules. Overly strict rules in the law of consideration gave rise to promissory estoppel.[60]

The clearest statement of judicial disquiet in respect of the 1906 Act is found in *Kausar v Eagle Star Insurance Co Ltd*:[61]

> Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for. Of course there are occasions where a dishonest insured meets his just deserts if his insurance is avoided; and the insurer is justly relieved of liability. I do not say that non-disclosure operates only in cases of dishonesty. But I do consider that there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases.

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[56] *HIH Insurance and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] Lloyd's Rep IR 230 at [64]-[67].

[57] Above (n 22).

[58] See Lord Sales 'Default Rules in the Common Law: Substantive Rules and Precedent', at <https://supremecourt.uk/speeches/presentation-at-international-workshop-on-default-rules-in-private-law>, accessed 6 November 2025, in considering the shape of default rules in constraining judges in their decision-making.

[59] *Good Faith and Insurance Contracts* [3.08]: 'Particularly in the context of pre-contractual disclosure, many rules have been developed in the name of "good faith" and yet are not in fact necessary for the maintenance of good faith simpliciter. It is a form of "overkill". This overkill was set in stone by the common law and eventually by statute'.

[60] The inability of the House of Lords in *Foakes v Beer* (1884) 9 App Cas 605 to reconsider the 'part payment of a debt' rule retained a clear, simple rule, but at the cost of later uncertainty.

[61] [2000] Lloyd's Rep IR 154 (CA), 132-33 (Staughton LJ).

This is not an isolated comment, and those who favour keeping the single remedy of avoidance found in the MIA 1906 need to be cognisant of these views.[62] There are similar issues across commercial contract law more widely. The development of the innominate term[63] and similar statutory restrictions on the right to terminate a sales contract[64] show a general drift towards commercially justifiable remedies. As the Law Commission argued in its reforms of commercial sales law: 'A court faced with a claim to reject which it considers thoroughly unreasonable may come to the conclusion that there was no breach of contract at all …'[65] The development of a pragmatic system of remedies is therefore not only in the interests of the breaching party, but also of the innocent party seeking a remedy.

The system of remedies for breach under the IA 2015 distinguishes between what is, in essence, fraudulent and non-fraudulent breach. The Law Commission specifically avoided the word 'fraudulent',[66] although the test is identical to the common law definition of fraudulent misrepresentation: that the statement was knowingly or recklessly false.[67]

For breaches of the duty of fair presentation that are deliberately or recklessly false, the remedy is avoidance, as it would be under the 1906 Act. No premium need be returned. This mirrors the 1906 Act in effect.

For non-fraudulent breach, the court is presented with a suite of options and must determine which apply. They generally build out from the concept of inducement, and ask, in essence, how significant the inducement was. The first possibility is that had the insured made a fair presentation of the risk, no contract would have been agreed on any terms. If so, then the insurer may avoid the contract and the premium is returned. This, again, mirrors the approach under the 1906 Act.

If, however, a contract would have been agreed, but on different terms, then an innovative remedy will apply. For a difference in the premium agreed, the indemnity paid is reduced to

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62 See the comments of Longmore LJ in *North Star Shipping Ltd v Sphere Drake Insurance plc (The North Star)* [2006] EWCA Civ 378, [2006] 2 Lloyd's Rep 183, [53]-[54].

63 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA).

64 Sale of Goods Act 1979, s 15A.

65 Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987) para 4.1.

66 Above (n 28) para 11.37.

67 *Derry v Peek* (1889) 14 App Cas 337.

reflect the percentage of the true premium paid. If the premium would have been £150,000 and only £100,000 was paid as a consequence of the lack of fair presentation, then the claim is reduced to two-thirds of the contractual figure. If some other contractual change would have been made, such as the inclusion of a warranty, the contract will be enforced as if that warranty had been inserted.

There is a significant difference of opinion between the author and the leading practitioner in the field as to how these innovative remedies should be assessed. The author's stated view is that the court should seek, as with inducement, to assess what the parties would have actually settled on, after a full exchange of information. Peter MacDonald Eggers disagrees and asserts that the result should be what the insurer would have wanted, and not what it would have achieved in a commercial negotiation. This, as with other issues under the IA 2015, awaits final determination by the courts.

2.4 Lessons for the wider common law system

What is notable about the introduction of the IA 2015 is that it was implemented across commercial insurance law, including in marine insurance. Other jurisdictions, and notably Australia, implemented significant reforms to insurance law much earlier than the United Kingdom, but left much of the duty of fair presentation in marine insurance law untouched. The Australian Marine Insurance Act 1909 maintains (for commercial risks) the broad duty to disclose all material circumstances and the remedy of avoidance and so on.[68] The significant changes introduced by the Insurance Contracts Act 1984 were not implemented, even in some limited form, in marine markets. For those countries that have some lingering use of the United Kingdom version of the MIA 1906, the question is whether the perceived simplicity of the statute is of value in the modern world. What follows are some thoughts on the IA 2015 as it approaches its tenth anniversary.[69]

The underlying assumption behind the United Kingdom's model for a single commercial insurance law was that sophisticated insureds could contract out of the changes introduced

[68] See MIA 1909 (Aus), ss 23-26, equivalent to MIA 1906 (UK), ss 18-20, available at <https://www.legislation.gov.au/C1909A00011/latest/text> accessed 6 November 2025.

[69] It received Royal Assent on 12 February 2015 and entered into force on 12 August 2016.

by the IA 2015 and select their own duties and remedies to suit their market. This is commercial law in its usual guise as a default rule, subject to party autonomy. Sections 17 and 18 of the IA 2015 provided a specific mechanism for contracting out of the default rules provided. For commercial markets, this required clarity of contractual drafting and sufficient notice of the changes made. These expectations of clarity and notice scale according to the sophistication of the parties involved.

The relatively limited number of cases litigated does not show frequent use of 'contracting out'. We can readily find contractual provisions that do so in the P&I market and standard form clauses drafted by trade organisations to support this. Within the P&I club realm, the broad discretion granted to the managing committee to pay marginal claims perhaps made the changes in the IA 2015 unnecessary.[70] But high-value commercial markets in the marine world do not appear to be routinely contracting out of the IA 2015 in its totality. The return to an explicit model of 'fair presentation', with expectations on the insurer to be an active participant in risk assessment, and the withdrawal of disproportionate remedies, has not led to a flight from the statutory defaults. English law has lost some market share, but this is better explained by capital flows within China than by some loss of faith in English law. Moreover, the more nuanced position under the Nordic Hull Plan appears to be in rude health. The development of a commercially pragmatic model in terms of duty and remedy, with specialist rules for determining corporate knowledge in insurance markets, is a step forward. This does not mean that the IA 2015 is perfect. Far from it. Law almost never is. It is better than that which came before. And that ought to be the goal.

For those who wish to retain the perceived certainties of the 1906 Act, part 3 that follows considers the ongoing changes in the interpretation of issues core to both the MIA 1906 and IA 2015. This provides a salutary lesson. Even the 1906 Act has parts that require nuance and thought, and not least because the remedy it provides is potentially unjust. Clear simple rules only remain clear and simple where judges do not feel obliged to provide some gloss on them. In reflecting on this, I draw on the wonderful paper by Carol Rose, on the nature of property law:

[70] For example, Rule 22 of the 2025/2026 London P&I Club Rules.

> We find that, over time, the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing, to the point that the various claimants under real estate contracts, mortgages, or recorded deeds don't know quite what their rights and obligations really are.[71]

As she notes, over time those accretions to the rule tend to themselves solidify and become crystalline. Marine insurance is less obviously constrained by the rules of Equity than is property law. But many recent cases on commercial insurance raise questions of estoppel by conduct, by convention and by acquiescence. Legal certainty is best achieved by having a set of rules that allows hard cases an escape valve from the standard outcome. The 1906 Act did not capture enough of this nuance, even though it was present in the eighteenth-century case law,[72] for it to be an entirely effective basis for modern dispute settlement.

A careful study of the IA 2015 shows it to be balanced and restrained for the most part. It was the product of a reform process that was highly sensitive to the needs of the market. The remedial regime is perhaps an exception to this, but was a reaction to judicial views from Staughton LJ and others that avoidance for innocent non-disclosure was not always appropriate.[73] There is, it must be recalled, no option under English insurance law to provide a monetary alternative to avoidance, as would be available under the Misrepresentation Act 1967 for the vast majority of commercial contracts.[74] Those who favour the simplicity of avoidance for all cases must have greater faith than I do in the operation of market forces to restrain insurers from seeking a short-term advantage by avoiding an expensive claim on technical grounds. We can see this tension between clear, simple rules and justifiable outcomes most clearly in the continued development of the concepts of 'materiality' and 'inducement' and judicial development of the duty of fair presentation over the past 25 years.

3 Judicial Change and Reversion

If part 2 was concerned with the legislative reform of the duty of fair presentation, then part 3 is concerned with the judicial reshaping of the doctrine. This is a process which is equally

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71 Carol M Rose, 'Crystals and Mud in Property Law' (1987-1988) 40 Stan L Rev 577, 578-79.
72 As noted above, in the failure to codify the original version of the 'fair presentation' rule.
73 Above (n 61).
74 Under the Misrepresentation Act 1967, s 2(2).

strategic and subtle. Insurers decide which disputes to litigate and which to settle as part of a long-term positioning of the law to favour their interests. This is entirely legitimate, but is a natural part of the development of the common law.

The focus of this section is the way in which relatively simple concepts of materiality and inducement have become increasingly nuanced. For the most part, these authorities would apply to disputes under the MIA 1906 and IA 2015. We are no longer concerned with areas that were subject to deliberate statutory change.[75] The gradual accretion of caveats and exceptions in these areas is due to a series of factually challenging cases. Faced with remedial inflexibility, the court felt obliged to make subtle changes to the duty of fair presentation in order to meet the assumed policy objectives of the law. The overall message is simple: things do not stay the same even if the statute is left untouched. Change finds a way.

3.1 The reactive nature of inducement

One area of judicial change that has become embedded in English law is the recognition that inducement is a 'reactive' rather than a simple process. Put briefly, the law does not simply ask what the underwriter would have done if presented with the additional, undisclosed material (or a corrected version of the misrepresented circumstances). Rather, the court considers what wider information would have been revealed by a further dialogue between insured and underwriter, in which the presentation is made fair. Crucially, this might reveal further information which would lower the risk to be insured alongside that which might increase it.

This shift in judicial practice came as a result of a 'hard' case, rather than by way of legislation or academic pressure. As Rix LJ noted, '[t]he facts of this appeal might have been set by a committee of law professors with the express design of giving rise to points of interest and difficulty'.[76] But they were not. The issue in *Drake Insurance plc v Provident Insurance plc*[77] was one of inducement. The insured had failed to disclose a driving conviction. The combined

[75] The codification of inducement as a 'but for' test was not a deliberate attempt at law reform, but a situation where the common law moved on shortly after the statutory rule was enacted. This happened with some provisions of the 1906 Act.

[76] *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834, [2004] QB 601, [1].

[77] Ibid.

effect of that and an earlier loss was to place the insured in a higher risk bracket and increase the premium payable. That would suffice for inducement. However, if the information as to the conviction had been disclosed, and the effect on the premium stated, then the assured would have challenged the risk status of the previous loss.[78] It was wrongly recorded as the fault of the insured when it was in fact a 'no fault' claim. If the insurer had known the true facts, with both the driving conviction and the no-fault claim accurately stated on the record, then the insured would have received the standard premium rate. There would be no inducement. In what was an *obiter* passage, Rix LJ stated:

> When account has to be taken of a non−disclosure, the issue moves from the world of actual fact into the world of hypothesis. The non−disclosure is the actual fact, and the hypothesis is what effect disclosure would or might have had on a prudent underwriter (the issue of materiality) and what effect disclosure would have had on the actual insurer (the issue of inducement). I do not at present see why the hypothetical world is one in which the insured is assumed to have made the disclosure but not assumed to have provided true information about the settlement of the earlier accident as a no fault accident.[79]

This sense that the assessment of inducement reflects both material information and accompanying mitigating data has been supported in later case law. *The Nancy* provides a useful marine insurance example.[80] In this case, the undisclosed material concerned a series of port state inspections which identified issues with the vessel's fire prevention and mitigation system. Most vessels of any age will have a track record of port state inspections and are likely to have some adverse findings.[81] These are generally publicly available, although some effort might be needed to collate them.

Whilst the inspection record might well have been material and inducing in isolation there was exculpatory material that lessened its likely effect on the perceived risk. As the court noted there was reliable evidence that 'the deficiencies in question had been rectified, that some were not serious in nature, and some were not factually justified'.[82] In what is a further

[78] Indeed, the insured did so when this was made clear to him.
[79] Above (n 75) [74].
[80] *Sea Glory Maritime Co v Al Sagr Ins Co (The Nancy)* [2013] EWHC 2116 (Comm), [2014] 1 Lloyd's Rep 14.
[81] Ibid, [35].
[82] Ibid, [163].

obiter passage, the High Court recognised that the assessment of inducement would have to consider both the missing inspection record and the further exculpatory material:

> On the facts, I find that had the [insured] disclosed these detentions, when informed that the Class surveyor had checked the deficiencies and confirmed that they were rectified, the [insurer] would have proceeded to renew cover on the same terms. I find therefore that the [insurer] was not induced to agree the policy by reason of any non-disclosure concerning the vessel's detention history.[83]

It is central to the argument in this paper that this drift towards a more nuanced and sophisticated vision of fair presentation is as much driven by 'hard cases' in the courts as it is by statutory reform led by the Law Commission. These have an influential effect on marine insurance law beyond the United Kingdom, and onto those jurisdictions that rely on the original MIA 1906.

3.2 The relationship between materiality, inducement and proportional remedies

The nature of materiality was not changed by the adoption of the IA 2015. The continuity from the 1906 Act was confirmed in the first few authorities in the British courts.[84] In *Berkshire Assets (West London) v Axa Insurance UK plc*, it was held:[85]

> [Counsel for the underwriters] submitted that a number of important principles relevant to material circumstances are well established by authority and that there is no reason to suppose that the 2015 Act has resulted in any change to them. I agree. In proposing the legislation which became the 2015 Act the Law Commission stated that the concepts of 'material circumstance' and 'prudent insurer' were intentionally taken from the existing statute and that they would expect the existing case law to continue to be used to interpret them.

This does not mean that the breadth of materiality has remained static. Whilst the *Berkshire Assets* case referenced the 1906 Act case law as indicative of the position under the IA 2015,

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[83] Ibid, [169].

[84] The first case of *Young v Royal & Sun Alliance plc* [2019] CSOH 32, [2019] Lloyd's Rep IR 482, was decided in the Court of Session (Outer House) and applied a conventional approach in deciding whether specific questions on a proposal form had waived further disclosure.

[85] [2021] EWHC 2689 (Comm), [2022] Lloyd's Rep IR 275, [28] (Lionel Persey QC).

it nonetheless extended the application of those rules. This is a purely judicial broadening of the nature of moral hazard within insurance law and not related to the statutory reformulation of the rule.

Previous cases had treated allegations of serious criminality, and especially those related to dishonesty, as material, even if unproven.[86] The Court of Appeal had noted the potential injustice of this as an outcome and looked to the Law Commission to review the law in this area.[87] An innocent insured might nonetheless be left effectively uninsurable simply because of false allegations made against it. The ultimate truth or falsity of the allegations was irrelevant. The making of the allegations by a credible source was itself a material circumstance. The Law Commission did not make any concrete changes to the area, and the materiality of such allegations is assessed on the same criteria as before. Moreover, the changes to the remedy have made little difference in such a case, where insurers might well decline cover until the allegations are resolved, either way.[88]

The *Berkshire Assets* case concerned a lesser type of allegation. Michael Sherwood, one of several directors of the insured, a property development company, had previously worked as a leading figure at Goldman Sachs.[89] He had been charged with offences under Malaysian financial services law, but these were not disclosed to the insurer. The suggestion from the authorities was that the Goldman Sachs subsidiary involved had failed to 'make proper disclosure of information about the underlying transactions' to the relevant authorities.[90] There was no suggestion of personal impropriety on behalf of Mr Sherwood. Those proceedings were then formally discontinued after a settlement between Goldman Sachs and the Malaysian government of around US$4 billion.

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86 The court in *Berkshire Assets* reviewed *March Cabaret Club v London Assurance* [1975] 1 Lloyd's Rep 169; *Reynolds v Phoenix Assurance Co* [1978] 1 Lloyd's Rep 440; *Inversiones Manria SA v Sphere Drake Insurance Co (The Dora)* [1989] 1 Lloyd's Rep 69; *Brotherton v Aseguradora Colseguros (No 2)* [2003] EWCA Civ 705, [2003] 1 Lloyd's Rep IR 746; *North Star Shipping v Sphere Drake Insurance* [2005] 2 Lloyd's Rep 76.

87 Above (n 62).

88 Even where the information was not disclosed other than deliberately or recklessly, judicial statements in the pre-IA 2015 case law suggests that Sched 1, para 4 is likely to apply: 'If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid'.

89 Michael Sherwood was co-chief CEO of Goldman Sachs International from 2005–2016.

90 Above (n 85), [20].

As to whether these allegations were material, the judge noted a division in the arguments made to him by counsel: 'Is "moral hazard" materiality limited to "something … which indicates a propensity to act dishonestly on the part of the assured" or does it "include a wide range of adverse factors, including dishonesty, incompetence and carelessness"?'[91]

The judge was prepared to accept that factors could be material even where there was no suggestion of personal dishonesty. This is an extension of the common law of materiality, and indicative of the position across any jurisdiction drawing upon the MIA 1906. I would suggest that this is an undue widening of the concept of materiality. Insurers can ask specific questions of directors if they have wider moral hazard concerns, beyond issues of dishonesty. This is a significant element in my overall contention that the significant changes to the duty of fair presentation have largely occurred through judicial rather than legislative processes.

I turn now to the second issue raised in the *Berkshire Assets* case, and one which is equally contentious. In that case, the court held that it was legitimate for it in assessing materiality, to consider factors that the insured would have raised by way of explanation, and not only the undisclosed information.[92] This would make materiality a 'reactive' process and not only concerned with the prudent insurer's immediate reaction to the lack of a fair presentation of the risk. In *Berkshire Assets*, the nature of the criminal proceedings in Malaysia was said by the insured to be political in nature and part of a wider strategy to obtain a favourable settlement for the Malaysian government.[93] The account given by the prosecutor differs considerably,[94] and key figures were successfully prosecuted outside of Malaysia.[95]

The potential for materiality to be a 'reactive' assessment rather than a static one is of commercial significance. This is a development of earlier uncertainties in the precise parameters of the law, and independent of the statutory changes in the IA 2015. Under the test of materiality applied under both the MIA 1906 and IA 2015, the prudent underwriter's assessment of the risk is key. There is a live question as to whether materiality depends on

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91 Ibid, [34].
92 Ibid, [40].
93 Ibid, [20].
94 Tommy Thomas, *My Story: Justice in the Wilderness* (SIRDC 2021).
95 See <https://www.justice.gov/archives/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion> accessed 6 November 2025.

the information not disclosed being objectively related to the risk to be run (or to some other aspect of the insurer's potential liability)[96] or merely related to the actual insurer's or prudent insurer's assessment of the terms.

There is authority that supports both views. The stated policy justification for the duty of fair presentation's extension beyond the law of misrepresentation is that it enables the premium to be calculated.[97] There are, however, cases of misrepresentation that suggest that there is no need for the false statement to be related to the risk. To take an extreme example used by MacDonald Eggers & Pickens, a representation that the contract to be agreed was likely to become bulk business rather than a one-off trade was considered material and therefore actionable.[98]

Does the same model apply *mutatis mutandis* to materiality and non-disclosure? Whilst the issue is yet to be resolved satisfactorily, the leading practitioner guide suggests that the better answer is that the information should be material to the risk in some objective manner: 'it would be rendering the duty of disclosure unacceptably wide if the facts to be disclosed need have no connection with the risk'.[99] As discussed in more detail below, I will assume for the purposes of this paper that this is the most credible explanation of the current position in law. I would also endorse it for the reason given.

My contribution is in establishing that these issues will arise more frequently under the IA 2015. This is not because the test of materiality has been changed by the IA 2015, but because the court will be presented with a more nuanced counterfactual as to what would have happened if the duty to make a fair presentation had been met. That evidence will be before the court in relation to the assessment of the appropriate remedy. It may well bleed into the assessment of inducement and materiality. This is best seen through the recent litigation in *The Win Win*.[100]

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96 For example, the ability to recover in subrogation.
97 *Good Faith & Insurance Contracts* [3.35].
98 *The Dora* (n 86) 90–1.
99 *Good Faith and Insurance Contracts* [14.72].
100 Above (n 43).

The non-disclosed circumstance, as noted above, was the allegation of criminality against the nominee director of the corporate entity operating the vessel insured. Allegations of serious criminality are routinely treated as material. However, the limited role of the nominee director in operating the insured vessel meant that Dias J at first instance was prepared to accept that had the information come to light during pre-contractual negotiations, the insurer would have asked for the replacement of the director in question, and the insured would have complied. This section of the first instance judgment appears to be concerned with the application of the Sched 1 remedies to the facts, but can be viewed as influencing the assessment of inducement or materiality also.

This needs a little unpicking. If the prudent insurer would have been persuaded that the non-disclosed information was, in fact, controlled for entirely by further mitigating information, or promises as to future conduct, then presumably the issue would no longer be material. This flows from the presumed need for material information to be relevant to the risk to be run. If the actual underwriter would have been persuaded that the non-disclosed information was, in fact, explained entirely by further mitigating information, or promises as to future conduct, then inducement would no longer be found. This is the reactive nature of inducement. If the insured can establish either, then this would prevent the insurer from being able to claim a remedy.[101]

There is a narrow distinction between 'no breach of duty' and 'breach but no remedy'. We see similar conceptual issues in areas such as the law of contract and tort, where the absence of a breach of duty and the absence of harm can overlap as factors in determining the outcome.[102] Similarly, the law of remoteness in contract damages is concerned both with the width of the promise made and the measure of the compensation awarded.

It must be noted that the Court of Appeal was less persuaded by this argument. It is best read as a strict application of the IA 2015 in terms of materiality, inducement and remedy. Recall that the issue was that a nominee director, Bairactaris, faced an accusation of criminality.

[101] I recognise that the burden of proving inducement and materiality lies on the underwriter. This is a separate issue: to establish that mitigating circumstances would reverse the *prima facie* position.

[102] The role of the doctrine of remoteness in private law of contract and tort can be characterised as either providing limits on the duty itself, or on the recoverability of a remedy for breach.

Although strictly *obiter*, the approach of the Court of Appeal does help establish the battle lines for future litigation:[103]

> In the present case the [first instance] judge had found that the insurers would have entered into the contract, but only after imposing a condition that Mr Bairactaris should resign as a director. Accordingly the policy had to be treated as if it contained such a condition. As Mr Bairactaris had not in fact resigned as a director, the insurers were entitled to reject the claim and that was the end of the matter. It was irrelevant that, as the judge had found, if such a condition had been imposed, Mr Bairactaris would in fact have resigned.

The Court of Appeal was seeking the simplest mechanism for operating the Sched 1 remedies. It did not support Dias J's approach of assuming that the insured would have varied its conduct:[104]

> [Counsel's] only answer to this point was to draw a distinction between a term such as a warranty which would have to be complied with during the performance of the contract and a term which would be imposed prior to the inception of the risk, submitting that in the latter case it would be open to the insured to prove that it would have complied with such a term. I did not find that distinction compelling and can see no basis for it in the terms of the Act.

It is the precise effect of this final quotation that is of immediate interest. It shapes the relationship between materiality, inducement and the remedy granted. In the section that follows, which is a reimagining of the facts of *The Nancy*,[105] I look to test the 'reactive' nature of materiality, inducement and the remedies for breach on the basis of three alternative changes to the position of the insured:

- The conventional meaning of a 'reactive' test: the insured would have provided at placement further mitigatory information alongside the non-disclosed circumstance.

[103] Above (n 43), [89] (Males LJ).
[104] Ibid, [112].
[105] Above (n 80).

- The extended 'reactive' test, as in *The Win Win* at first instance:[106] the insured would have immediately made some risk related change of conduct, such as the replacement of the nominee director.
- The unexplored middle ground: the insured would have given a promise pre-contract to change its conduct during the life of the policy. A practical example might be the promise in *Agapitos* v *Agnew* to arrange a survey of the vessel.

3.3 The hard case: *The Nancy* reimagined

The facts of *The Nancy* are an excellent basis on which to consider how an insured might mitigate the failure to make a full disclosure of risk-related information. Let us assume that the insured had not disclosed an equivalent record of port state inspections. These are, at least initially, material to the risk. They represent a history of identified issues with the fire mitigation and prevention system. However, the insured might have added to the disclosure of this information by providing three alternative responses. Each of these might engage the 'moving parts' of the fair presentation doctrine – materiality, inducement, and proportional remedies.

3.3.1 Non-Disclosed Information, Supplemented by Additional Explanation

As in *The Nancy* itself, the insured might have provided a detailed account of the PSC inspection record, to show that issues, where genuine, were resolved professionally and to the satisfaction of a surveyor. Assume that this would provide an overall impression of a well-managed vessel, where issues are resolved as soon as they are identified. We might see this effect in each of the working elements of the fair presentation duty.

This might make an issue that was initially material of so little relevance to the risk that it is no longer material: this would be 'reactive' materiality. Cases such as *Berkshire Assets* presume that this is legitimate, but it is certainly not well established in English law.[107] It aligns with the majority position that the non-disclosed information must be relevant to the risk to

[106] Above (n 44).
[107] See above, text to n 92.

be material.[108] The benchmark for materiality remains the test laid down in *Pan Atlantic*:[109] that the prudent insurer would consider the information in its assessment of the risk. It need not have any decisive effect on the terms of the final contract. For an issue to be no longer material, the mitigating evidence would have to be extremely strong. This will be a difficult standard to meet.

From the approach of the court in *The Nancy*[110] itself, we could assume that the additional information would be relevant to an assessment of inducement.[111] The concept of reactive inducement is much more thoroughly established than 'reactive' materiality. The threshold for success is much lower than that for materiality. It would be enough to establish that the actual insurer would no longer be influenced in its commercial decision by the issue. Finally, it would be relevant to an assessment of the appropriate remedy under Sched 1 of the IA 2015. It is possible that the insurer would have declined the risk entirely if it only had access to the PSC inspection record, but would have only increased the premium by 15 per cent if accompanied by the full explanation. Assuming the breach is neither deliberate nor reckless, this significantly changes the remedy awarded.[112]

In each of our three areas of analysis, it seems that a counter-factual that permits changes to the fair presentation, by way of additional information, is always at least a potential route to mitigating the full effects of the rule. Only its use in respect of the appropriate remedy is changed by the IA 2015.

3.3.2 Non-Disclosed Information and a Change of Management

I move now to an option at the other end of the scale, and one that reflects *The Win Win*.[113] Assume that the insured does not have a set of mitigating data to offset the impression of the PSC inspection record. Instead, it suggests that alongside disclosing this concerning record it would have agreed to a request from the underwriter to immediately replace the ship management company responsible for fire safety and appoint one approved by the insurer.

[108] See above, text to n 99.
[109] Above (n 34).
[110] Above (n 80).
[111] Above (n 83).
[112] IA 2015, Sched 1.
[113] Above (n 43).

This is, it is submitted, irrelevant to the issues of materiality and inducement. If the insured had already changed its fire safety model or committed to doing so, but had not disclosed this change of affairs, then that would be different. The counterfactual model in play allows for a hypothetical discussion and the release of further data as part of that. That is the reactive ideal. But the insured cannot argue that the governance nature of insurance (whereby insurers reveal ways to reduce risk) overrides the duty of fair presentation. This is the approach favoured by the Law Commission and the Court of Appeal in *The Win Win*. The court does not consider potential changes of behaviour by the insured during the period of insurance in respect of inducement and materiality.

The question then arises as to whether such potential shifts in risk conduct are relevant to the assessment of the proportionate remedy under the IA 2015. The new remedies for non-fraudulent failure to make a fair presentation specifically ask what differences in contract terms, including premium, would have been agreed had there been a fair presentation. They do not specifically allow for other variations in conduct. The approach of the Court of Appeal here, reliant on the Law Commission discussion of the remedies, supports the view that the insured's behaviour during the contract is not subject to counterfactual amendment. If a warranty would have been agreed, you cannot rewrite the facts to make the insured comply with the warranty. But the Court of Appeal did not seem to appreciate that we already have within the common law and the statute the use of counterfactuals for what would have been said during negotiation. There are two possible grounds for distinguishing these situations, and it is not yet clear which applies. If we take the approach of Dias J at first instance,[114] the court is entitled to imagine counterfactuals prior to the start of the contract. The Law Commissions' advice was not to permit variation of conduct during the life of the contract. But Dias J was assuming a change pre-contract and not during the contract. The Court of Appeal decision is correct to say that the statute does not specifically permit such a change. But equally, neither the statute nor the Law Commission prohibits such an approach. The Court of Appeal approach can be interpreted as in favour only of a change in the contract, or in the information flowing between the parties, rather than some wider change on behaviour. We consider this dichotomy more fully in our final scenario.

[114] Above (n 44).

3.3.3 Non-Disclosed Information and a Non-Contractual Statement of Intent

We move now to what I identify as the 'hard case' following *The Win Win*. Rather than a change to the contract, or a change to the risk-related information provided, assume instead that the insured provides a statement of intent: it expects to undertake a survey of the vessel to check its fire safety system within 30 days of the contract being agreed. This is not expressed as a contractual term, merely a representation of intent. What does this do to the duty of fair presentation?

In respect of materiality, it is possible that this would convert an issue that would be material to the risk into one that would not be marginal. However, the test stated in *Pan Atlantic* is that the fact needs only to be considered by the underwriter, and need not generate a change in the premium or terms offered.[115] It may be possible in theory for exculpatory evidence to remove an issue from within the core definition of materiality, but it is unlikely. More likely is that further evidence would have put the insurer in a position such that it could have asked further questions. The relationship between 'reactive materiality' and insurers being given information to be on notice is untested. The commercially sensible answer is to allow the insured access to either justification for a failure to make a full presentation of the risk, but not in conjunction. Otherwise, the insured could argue that the hypothetical insurer would have been in a position to ask further questions, but the insurer in the real world did not actually have that opportunity to act prudently.

The issue is less complex with respect to inducement. We apply the 'but for' test stated in the IA 2015. It does not matter whether the further information is cast as a contractual promise or some other form of information. The question remains: would this insurer have offered terms different to those agreed to in the real world?

I conclude this consideration of a reimagined version of *The Nancy* with an assessment of the remedies under Sched 1. This is the unsolved issue that remains after the Court of Appeal in *The Win Win*. Both materiality and inducement (as above) permit the consideration of the potential effect of additional mitigating pre-contractual information alongside omitted information. *The Win Win* tells us that we cannot imagine changes in behaviour, only changes

[115] Above (n 34).

to the contract, whether before or after the contract. This final version is a hybrid: a non-contractual statement related to future conduct.

The logical outcome is to treat such information as within the legitimate data for assessing proportionate remedies. It is not a change to the insured's behaviour during the period of risk. It is a statement of intent, made pre-contractually. The effect of this statement on the insurer, assessed counterfactually, then determines its effect on the remedy. If the insurer would have required a contractual promise to this effect, then we apply *The Win Win* and do not assume any change in conduct. If the insured had actually carried out its stated intention, then the contract would be satisfied. The insurer is put in the position as if a fair presentation had been made. We are reflecting the reality of the risk run.

If, alternatively, the mere statement of intent would have been enough for the contract to proceed without amendment, or with only a change to the premium, then the contract is enforced according to the remainder of the Sched 1 remedies. We refocus our consideration not on what the insured might have done differently, but what the insured might have said during negotiations. This is a temporally limited counterfactual model and one that is workable. It is not the most limited version of the Sched 1 remedies, but it is workable and consistent with the underlying common law position on inducement and materiality. Whether the English courts will adopt this approach or maintain the more 'legal certainty' oriented position proposed in *The Win Win* in *obiter* comments must await further litigation.

4 Return to type? The gradual evolution of fair presentation

There is, in some of the sentiment expressed by modern practitioners, a wistful longing for how things used to be. An imagined past of clear, simple rules with straightforward remedies and a sense that legal certainty mattered more than anything else. This neo-formalist nostalgia often ignores the fact that those same certainty preferring judges felt required to place guardrails around some of the less commercially justifiable outcomes that strict draconian rules generated. The rules, as codified, have been described as 'overkill',[116] as far stricter and far-reaching than the commercial context required.

[116] Above (n 59).

If we return to the fundamental nature of commercial contract law, it is generally to provide a framework that mirrors what the majority of parties would have agreed to if negotiated pre-contract. That is the 'majoritarian default rule'. It is not meant to provide complete protection for either party, or for a comprehensive solution, but a basic framework from which parties can negotiate. Whilst this can be contested, the orthodox account is that both parties to an insurance contract would prefer the insured to make a fair presentation of the risk, to avoid the cost of the insurer having to undertake its own initial search for information. This is assumed to reflect information asymmetry – we presume that the insured knows its risk better than the insurer- and adopt a least cost avoider model.

What this does not mean is that an insurer would get everything from the duty of fair presentation, and a complete defence to any claim if any piece of relevant information is missing. In particular, the strictness of the remedy is genuinely challenging to justify as a 'majoritarian default'. It is the kind of broadly protective rule (the 'minoritarian default') that we might see used in a consumer sphere, where one party is in need of special protection. That is no longer the case in modern insurance markets, if it ever was. Marine insurance law would best fulfil its brief as an offshoot of commercial contract law by providing commercially pragmatic rules and, especially, remedies. Parties are free to contract around these defaults. They are not mandatory in nature.

What is fundamental in the battle for the heart of fair presentation in the twenty-first century is a proper appreciation of the position of insured and underwriter. If we reflect on the origins of the doctrine, both parties were viewed as subject to systemic vulnerability. Lord Mansfield in the 1770s built marine insurance law around 'co-opetitive'[117] behaviours under the label 'utmost good faith'. Lord Esher in the 1880s envisaged a model in which the underwriter was an active listener in the search for an efficient method of risk assessment. Modern judges and leading texts since the 1980s have recaptured this vision of the insurer acting reactively to generate and consider new information. The Law Commission built a new statutory model around this to place the parties, in the absence of fraud, in the position that they would have

[117] Patrycja Klimas, Karina Sachpazidu, & Sylwia Stańczyk 'The Attributes of Coopetitive Relationships: What Do We Know and Not Know About Them?' (2023) 41 Eur Man J 883.

reached had the presentation of the risk operated properly. From this commercially justifiable position, parties can then negotiate for stricter (or looser) terms as they wish.

The superiority of this position under the IA 2015 is that it will typically generate an outcome that an underwriter could enforce. The law provides a credible solution. It may not be the ideal answer, but it should fall within the bounds of reasonable outcomes for the issue. The broad rules and draconian remedies of the MIA often failed to do so. The law then passed the buck to market pressure to determine the extent to which insurers would rely on their strict legal rights. The gains obtained by legal certainty were then lost to the necessity to undertake a commercial decision. Legal certainty should not be confused with outcome certainty in such cases. Pushing complicated decisions to the claims team to decide on commercial grounds is the law avoiding its responsibility to provide a coherent framework for dispute resolution. Lest this be misunderstood, this is not a claim that the law should be fair. It is that law cannot claim to be cost-effective where it does not generate a 'majoritarian default': the rule that most parties (and not just most insurers) would prefer, in the absence of an existing common law or statutory rule.

In light of this analysis, the gradual development of the duty of fair presentation can be fairly seen as one undertaken by Parliament and the courts alike. The statutory reforms are, for the most part, pragmatic and neutral in effect. The remedies regime is more complex and needs some judicial honing, but is vastly superior to the unsophisticated model that existed prior to the IA 2015. The common law developments are of equal importance, and the gradual shift towards a reactive model for both inducement and materiality is a welcome return to the 'co-opetitive' spirit of the original conception of utmost good faith.[118] Insurers are getting access to private data, presented in a timely and accessible fashion. No other comparable commercial market operates on this basis. The exceptional duties and remedies that enable a market in this form ought to be no more remarkable than the commercial context requires. The gradual drift of precedent in this area reflects this realisation: that certainty is not the sole goal of commercial insurance contract law. Outcomes need to be commercially justifiable.

[118] As in *Carter v Boehm* (1766) 3 Burr 1905.