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UBI JUS UBI REMEDIUM? INSURER'S DUTY TO DISCLOSE – TIME FOR ANOTHER LOOK?

It has always been acknowledged that the duty of disclosure has suffered from an uneven development. Although the duty of utmost good faith has been recognised as a reciprocal one owed by both parties to an insurance contract, it is only in recent years that the duty as owed to the insured has seen any real development. However, although the *Skandia* litigation did result in a certain degree of clarification, it raised more questions than it answered. This paper will seek to examine some of the uncertainties brought about by the resurrection of this duty. It will further re-examine the issue of damages as a remedy for the breach of the duty, scrutinising in particular the reasons given by the Court of Appeal for rejecting such a remedy.

ONE of the first things that any student or practitioner of the law of insurance learns is that there are a few things that distinguish the contract of insurance from a contract simpliciter.[1] One, of course, is the legislative intervention by way of the imposition of the requirement of insurable interest at the time the contract is entered into. The other special characteristic is that the contract of insurance belongs to a class of contracts described as *uberrimae fidei*, *ie*, of the utmost good faith. As a result of this classification, the potential parties to any contract of insurance are bound to volunteer to each other, before the contract is concluded, information which is material to the contract. This is something which is alien in the general law of contracts, as noted by Lord Atkin in *Bell* v *Lever Brothers Ltd*[2]

> ... Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be

[1] See further Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance" (1984) 47 MLR 505.

[2] [1932] AC 161.

> disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances.[3]

Although, as we shall see in the course of this discourse, this duty of disclosure is reciprocal, the courts have traditionally been concerned more with the duty of disclosure on the part of the insured.

In short, the duty placed on the insured, developed from the seminal case of *Carter* v *Boehm*[4] which boasts of an impeccable pedigree since it is a decision of the great Lord Mansfield, has reached draconian proportions in recent times. The House of Lords has sought to mitigate the harshness of this regime in the recent decision of *Pan Atlantic Insurance Co Ltd* v *Pine Top Insurance Co Ltd*.[5] However, lingering questions remain as to the perceived imbalance between the rights and obligations of both parties to the contract of insurance. The most disturbing issue has to be with regard to the remedies open to the insured in the rare event that the insurer in question is found to have breached his duty of good faith to the insured.

This paper will seek to trace the development of the duty of disclosure in the context of obligations and rights with respect to both the insurer and the insured. It will explore the possible remedies open to the insured in the event that the duty of disclosure owed to him by the insurer has been breached. This paper will also scrutinise the refusal by the courts to recognise the role of damages as a remedy for such a breach.

I. Duty of Disclosure

The logical place to begin with regard to the duty of disclosure is the seminal decision of Lord Mansfield in *Carter* v *Boehm*.[6] The facts of the case are not complicated. A policy against the risk of the capture of an fort, in Sumatra, by a European enemy was taken out. This was effected on behalf of the governor of the fort. The fort was then captured by the French. Consequently a claim was made under the policy. The insurer refused to pay, contending that the insured failed to disclose the fact that the fort had not been designed to withstand attack from anyone other than the natives of Sumatra and that the French were known to have designs on the fort.

3 *Ibid*, at 227.
4 (1766) 3 Burr 1905.
5 [1995] 1 AC 501.
6 *Supra*, note 4.

Lord Mansfield, after due deliberation, ruled that as the fact that the fort was likely to be attacked by the French was known to the insurers, it need not have been disclosed. His Lordship was of the view that if the insurers could avoid liability in this case, the rule against concealment of material facts would be turned into an instrument of fraud as the insurer, knowing of the danger, would have taken the premium in order to gain if the fort was not attacked and would have refused to make payment should the fort be taken. The insurers could not be permitted to draw the Governor into a false bargain that the fort had been insured when he had a plan in his own mind to avoid the policy.

These facts did not have to be disclosed as the underwriter ought himself to have been aware of them. Thus the assured could recover on the policy. The facts were not within the knowledge of the governor alone. The insurer was put on enquiry by the very application for insurance that attack was in issue.

A. *Rationale for Duty*

The importance of this case lies, not in the decision itself but, in the lengthy exposition of the rationale behind, as well as the demands of, the duty of good faith laid on the parties to a contract of insurance. Lord Mansfield pointed out that:

> Insurance is a contract upon speculation. The special facts, upon which the contingency chance is to be computed, lie most commonly in the knowledge of the assured 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 risque, as if it did not exist.
>
> The keeping back of 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 risque run is really different from the risque understood and intended to be run, at the time of the agreement. ...
>
> The policy would equally be void, against the underwriter, if he concealed... 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. ...

> The reason for the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith.[7]

It is therefore clear from the judgment of Lord Mansfield that the basic assumption made by the law is that in an insurance contract it is that the insured who is in possession of facts which would influence the mind of an insurer in computing the risk which he has been asked to undertake. Such information must be disclosed by the insured in order to enable the insurer to assess the risk. A duty is therefore placed on the insured as a basis for the contract to disclose material facts.[8]

An applicant for insurance is thus under a duty to disclose to the insurer, prior to the conclusion of the contract, but only up to this date, all material facts within his knowledge which the latter does not or is not deemed to know. A failure to disclose, however innocent, entitles the insurer to avoid the contract *ab initio*, and upon avoidance it is deemed never to have existed. The insurer must avoid within a reasonable time of becoming aware of the non-disclosure. The duty arises whenever a fresh contract is concluded, including renewal of any contract.

One can see that the rationale behind the duty of disclosure imposed on the insured is based on the nature of insurance. It is necessarily premised upon uncertainty. For the law to allow the insured to induce the insurer into underwriting his risk, while keeping back relevant facts, would mean that the insurer finds himself on risk in a situation where it does not reflect what he understands to be the bargain which he has agreed to. It is perhaps rather odd that later cases, when dealing with cases of non-disclosure by the insured, do not delve into the rationale behind the duty of disclosure. In the days of Lord Mansfield, it is perhaps safe to say that the balance of information lies in the hands of the insured since he is the one who is more familiar with the conditions under which his adventure will proceed, as well as with the risks which the subject matter of the insurance will encounter.[9] However, one cannot but ask if the same is true today where

7 *Ibid*, at 1909-1910

8 See Poh Chu Chai, *Law of Insurance, Vol 1: Principles of Insurance Law* (4th Ed, 1996), at 89; see also *Rozanes* v *Bowen* (1928) 32 Ll LR 98, at 102, where it was pointed out by Scrutton LJ that

> It has been for centuries in England the law in connection with insurance of all sorts ... [that] as the underwriter knows nothing, and the man who comes to him knows everything, it is the duty of the assured ... to make a full disclosure to the underwriters without being asked of all the material circumstances ...

9 The rationale behind the duty of utmost good faith, in the early days, was the imbalance of information regarding the risk between the insured whose knowledge was considerable and the insurer whose knew only what the insured chose to reveal. (see *Greenhill* v *Federal*

the insurance industry has honed the art of estimating the risks involved in any situation to an exact science. The balance of information has surely now tipped in favour of the multi-billion insurance industry. As such, the basic premise behind imposing such oppressive duties on the insured may no longer exist. Perhaps, a more realistic, and perhaps more just, solution would be that the duty has to be shared between the two parties of the contract. It is not suggested that the insured should be relieved of all obligations to disclose facts, but that the insurer has an important role to play in eliciting pertinent facts by asking specific questions on material facts. The insured, of course, is still under a duty of answer these questions in good faith.[10]

By the time Lord Chalmers was given the task of consolidating the law relating to the law of marine insurance, the decision of Lord Mansfield in *Carter* v *Boehm*[11] had become the landmark decision in the realm of the duty of disclosure. Lord Mansfield's statement of the law relating to the duty of disclosure has been enshrined in Section 18 of the Marine Insurance Act,[12] which reads as follows:

Insurance Co Ltd [1927] 1 KB 65, at 76-77; *Rozanes* v *Bowen*, *supra*, note 8, at 102) The duty was developed to alow the insurer to make a fully-informed decision on the acceptability of the risk and the appropriate terms of the cover.

10 See Hasson, "The Doctrine of Uberrimae Fides in Insurance Law – A Critical Evaluation" (1969) 32 MLR 615, at 633-634:

> ... the doctrine is in error in assessing the strength of the parties with regard to knowledge. The doctrine assumes that the insured is in a stronger position than the insurer because he (the insured) has more knowledge than the insurer. But the possession of greater knowledge, it is submitted, puts the insured in a weaker position because he (the insured) does not know which parts of that information the insurer wishes to have. It is submitted, however, that it is the insurer who should be seen as the stronger party, since he (the insurer), is aware of what information he seeks to have. As against this, the insured, even under the limited formulation of the doctrine, requiring him to disclose only facts within his knowledge, may well be in the position of either not knowing, or else being uncertain as to the materiality of a particular fact.

See also Birds, *Modern Law of Insurance* (3rd Ed, 1993) at 94:

> ... it is important to remember that *Carter* v *Boehm* involved a contract entered into a time when communications were poor and insurers were not equipped with means easily to discover by the asking of questions of the proposer all the information they needed to know. It must be concluded that the justification for an all-ranging duty of disclosure is not so apparent today ...

11 *Supra*, note 4.

12 Cap 387, Rev Ed 1994. This is a reprint of the UK Marine Insurance Act 1906 which was made applicable without any amendments by virture of its inclusion in the First Schedule of the Application of English Law Act (Cap 7A, Rev Ed 1994). S 9(1) of the latter Act empowers the Law Revision Commissioners appointed under the Revised Edition of the Laws Act (Cap 275, Rev Ed 1994) to prepare and publish a revised edition of any English enactment speicified in the said First Schedule. All further references made to, or disccussions with regard to, one statute are equally applicable to the other.

> (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.

The first thing that would strike any reader is that, under the section, the duty is framed exclusively in terms of what the insured has to do in order to discharge the duty of disclosure incumbent on him. That is perhaps unfortunate as it might have stunted the growth of the notion that the duty of disclosure is a reciprocal one. Reading the section alone, one might be forgiven for thinking that it is a duty placed exclusively on the shoulders of the insured. Lord Mansfield's idea of the duty of disclosure being a mutual one is lost.[13]

B. *Concept of Materiality*

As can be seen from the definition of the duty of disclosure in the realm of marine insurance, the question of materiality is fairly clear in that it must be so from the perspective of the prudent insurer. The question that remains in general insurance is whether the same test is to be adopted. As a preliminary point, it must be noted that the duty to disclose is not a duty to disclose all information but only that which have a bearing on the risk to be undertaken. The question is, then, to whom does this information have to be material? Does the information have to be material

(a) in the view of the particular insured; or

(b) in the view of a reasonable insured; or

(c) in the view of the particular insurer; or

(d) in the view of a reasonable or prudent insurer?

[13] Of course, one should also note S 17 of the Act which reads as follows:

> 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.

Although there is this general declaratory statement, there is no specific provision for the translation of this idea of *uberrimae fidei* into specific duties of disclosure in the Act itself.

Another issue which has arisen for scrutiny is the degree of impact the fact must have on the mind of a prudent insurer. Section 18 of the Marine Insurance Act, 1906 casts materiality as any fact "which would *influence the judgment* of a prudent insurer in fixing the premium, or determining whether he will take the risk" (emphasis my own). However, it still begs the question of the precise degree of significance the non-disclosure must have on the mind of the notional insurer.

Yet another question which required scrutiny is the problem which arises because Section 20 of the Marine Insurance Act, 1906 also casts the duty not to make misrepresentations in a formula similar to that of disclosure.[14] There is no mention of requiring that the innocent party be induced by the misrepresentation into entering the contract.[15] Does this mean that under insurance law, misrepresentation departs from the contract law position in that it does not require that the insurer to show that he was actually induced by the misrepresentation before he can avoid the contract?

C. *Material to Whom? Prudent Insurer or Prudent Insured*

It has been traditionally argued by the insurers that the test should be any fact which is material to a prudent insurer, while it has been strenuously contended, on behalf of the insured, that the duty should only extend to such information which a reasonable insured would consider to be material.[16]

The former test favours the insurance company which has at its disposal huge resources and its past experiences, while on the other hand the insured may be effecting his first insurance and thus be quite ignorant. Thus, one can see the unequal position of the insurer and the insured. As such, the latter test would be fairer to the insured as he is only required to disclose what a reasonable insured would have thought material.[17] Support for this

[14] S 20 of the Marine Insurance Act reads:

(1) Every material misrepresentation made by the assured or his agent to the insurer during the negotiations for the 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.

[15] Under the general law of contract, the right to remedies for misrepresentation depend not just on the conduct of the guilty party alone, but also on the actual impact on the mind of the innocent party in that he must have relied on it: see *Attwood* v *Small* (1828) 6 Cl & F 232; *JEB Fasteners* v *Marks, Bloom & Co* [1983] 1 All ER 583.

[16] See Poh, *supra*, note 8, at 91.

[17] See Poh, *ibid*. See also English Law Commission Rep 104 (1980) Cmnd 8064, "Insurance Law – Non-disclosure and Breach of Warranty" at para 3.19 where it noted that

Prior to the *Lambert* case [*Lambert* v *Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485] there was some doubt as to which was the correct test for the materiality

view have come from Lord Justice Fletcher Moulton's judgment *Joel* v *Law Union and Crown Insurance Co.*[18]

Fletcher Moulton LJ had occasion to opine that it is not true that the duty of disclosure imposes an obligation to disclose what you know, whether you thought it material or not. The insured should disclose to the extent that a reasonable man would have done. The disclosure must be of all you ought to have realised to be material, not of that only which you did in fact realise to be so:

> That duty ... must be performed, but it does not suffice that the applicant should *bona fide* have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his *bona fide* considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. ...
>
> The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. ... If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so.[19]

of a non-disclosed fact. There was a line of authorities which suggested that at least in certain classes of insurance the law was not as stated by the Law Reform Committee but was that the insured was under a duty to disclose only such facts as a reasonable man would believe to be material.

[18] [1908] 2 KB 863. This was an action brought to enforce a policy on the life of a Robina Morrison. The contract had been made after she had answered a list of questions put to her, together with any necessary medical examination by a doctor appointed by the insurer. In answer to a question "What medical men have you consulted?" she named two but did not name a third who had treated her for a nervous breakdown. Fraud was not found by the jury.
It was held, *inter alia*, that since this particular answer was not made the basis of the contract, the insurer could not avoid the contract unless they were able to show that the fact was material and that there was non-disclosure. Due to the circumstances in which the questions were asked, it would be relevant to determine if the nature of the question, or the scope of the duty of disclosure had been changed by any explanation of the question given by the insurer's doctor. The evidence had provided no answer. Thus, in these circumstances the court held that the insurer had not discharged the onus of proving non-disclosure or misrepresentation.

[19] *Ibid*, at 884.

The judgment of the Court of Appeal in the above case sparked off a long series of cases which alternated between the views.[20] However, the test was finally settled by the Court of Appeal in *Lambert* v *Co-operative Insurance Society Ltd.*[21] The test of a prudent insurer, which has always been the test in the field of marine insurance, was held to be also the proper test for determining if the insured has been guilty of misrepresentation or non-disclosure in the field of non-marine insurance. It settled for the test in marine insurance cases:[22]

> A fact is material for the purposes of both non-disclosure and misrepresentation if it is one which would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to charge.

The court accepted that the UK's Law Reform Committee's Fifth Report in 1957 had correctly stated that the applicable test for materiality was that of the prudent insurer and rejected the suggestion that the Committee had misunderstood the law when it recommended that the law be changed to accommodate the test of the reasonable insured for non-marine insurance contracts.[23]

D. *Victory for the Prudent Insurer*

This was not the end of the problems relating to the question of materiality. In the subsequent Court of Appeal decision of *Container Transport International Inc* v *Oceanus Mutual Underwriting Association Ltd,*[24] it had to be clarified that:

(1) for the purposes of section 18, the requirement that a fact must be one which would 'influence the judgment' of a prudent insurer did not mean that an insurer must have acted differently if he had known the fact, but merely that he would have wanted to know of the fact when making his decision; "judgment" was

[20] *Eg*, *Horne* v *Poland* [1922] 2 KB 364; *Becker* v *Marshall* (1922) 12 Ll L Rep 413; *Locker and Woolf Ltd* v *Western Australia Insurance Co Ltd* [1936] 1 KB 408; *Roselodge Ltd* v *Castle* [1966] 2 Lloyd's Rep 113; *Anglo-African Merchants Ltd* v *Bayley* [1970] 1 QB 311.
[21] [1975] 2 Lloyd's Rep 485.
[22] *Ibid*, at 487, 492, 493.
[23] *Ibid*, at 489, 491, 493.
[24] [1982] 2 Lloyd's Rep 178

construed as meaning "the formation of an opinion" not "the final decision";[25]

(2) it must follow from this test of materiality that it is quite irrelevant that the particular insurer considers a fact not to be material, if a reasonable insurer would think otherwise and this can be proved.

In the instant case, the plaintiff leased out containers and insured them with insurer A who, unhappy with the subsequent claims experience, sought to change the terms of the cover in a manner unacceptable to CTI. CTI insured with insurer B and the same occurred. CTI then insured with Oceanus on the basis of an account of their past claims record which, in the view of the court, was not complete or entirely fair. Oceanus sought to avoid the policy for misrepresentation and non-disclosure:

(a) the insured put forward an inaccurate and misleading account of their record

(b) the insured failed to disclose a refusal by underwriters to renew.

In its decision, the Court of Appeal pointed out that it was a crucial qualification that the right to avoid a contract of insurance on the ground of non-disclosure arises only if the undisclosed circumstances are "material to the risk". Under this formulation of the duty, the actual insurer is entitled to the disclosure to him of every fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk. For a fact to be regarded as material, all that is required is that a prudent insurer would have wanted to know or to take into account during his decision-making process,[26] the fact in question, or that this fact would have some impact on the formation of his opinion and on his decision-

[25] The competing propositions put before the Court of Appeal on the construction of the phrase "influence the judgment" were:

(1) for the insurer to be deemed as having been influenced it must be shown that he would have, upon the revelation of the erstwhile undisclosed fact, taken a different course of action insofar as accepting the risk or pegging the premium is concerned;

(2) it is not necessary for the undisclosed fact to have a decisive influence on the insurer – all that is required is that the undisclosed fact would have some impact on his opinion or judgment on the whole. It is not necessary to show that the fact would have had an impact on his final decision.

[26] See Parker LJ, *supra*, note 24, at 507 and 510-511.

making process,[27] on the risk to be put before him for consideration and it is absolutely irrelevant that had the fact been correctly stated or disclosed, the same prudent insurer would have discounted its relevance and would have proceeded to offer the insured insurance cover without any alteration of the premium or of the other terms of the contract.[28]

The term "judgment" used in Section 18 of the Marine Insurance Act is used in the sense of "the formation of an opinion". Further, the word "influence", as used in Section 18 of the Marine Insurance Act, means that the disclosure is one which would have had an impact on the formation of his opinion and on his decision-making process in relation to the matters covered by Section 18(2). It is thus not necessary that the prudent insurer who has been informed of it would have been influenced in the sense that he would either have refused the risk or would only have taken it at a higher premium.

Since the yardstick is that of the prudent insurer, and not the particular insurer, there is no requirement that the particular insurer should have been induced to take the risk or charge a lower premium than he would have otherwise have done as a result of the non-disclosure, *ie*, there is no need to show actual influence or factual causation.[29]

[27] See Kerr LJ, *supra*, note 24, at 492.

[28] Kerr LJ was of the opinion that the phrase "would influence the judgment of a prudent underwriter" simply meant that the fact would have had an impact on the formation of the prudent insurer's opinion of the risk rather than a decisive influence upon his ultimate underwriting decision. Thus, materiality followed from the relevance of the fact or circumstance, not from its weight: see *ibid*, at 492.

Parker LJ cast the problem from a slightly different angle: his Lordship observed that there would be practical difficulties in adopting a decisive influence or different decision test. Whether a fact would carry sufficient influence to induce a different decision would inevitably depend upon the prudent insurer in question. Years after the risk has been accepted, a number of insurers may be called as expert witnesses who might all legitimately disagree as to whether the relevant fact or circumstance, if it had been disclosed, would have led to a different decision and the court would have no ground for accepting the testimony of one expert witness over that of another, *ibid*, at 511:

> The very choice of a prudent underwriter as the yardstick in my view indicates that the test intended was one which could sensibly be answered in relation to prudent underwriters in general. It is possible to say that the prudent underwriters in general would consider a particular circumstance as bearing on the risk and exercising an influence on their judgment towards declining the risk or loading the premium. It is not possible to say, save in extreme cases, that prudent underwriters would have *acted* differently, because there is no absolute standard by which they would have acted in the first place or as to the precise weight they would give to the undisclosed circumstance.

[29] See Parker LJ, *ibid*, at 510.

The propositions which arose from the Court of Appeal decision of *CTI* v *Oceanus*[30] can be summed up as follows:

(1) The test of materiality turns on the impact on a prudent insurer. (objective test)

(2) The view of the particular insurer as to the materiality of the undisclosed fact is irrelevant. (although the view of the particular insurer may be relevant for the purposes of invoking the principle of waiver).

(3) The phrase "in fixing the premium or determining whether or not to accept the risk" covers three situations:

  (a) acceptance or rejection of the risk

  (b) fixing of the premium

  (c) imposition of any exclusion clauses, conditions or warranties.

(4) The duty of good faith is a continuing duty (as opposed to the duty of disclosure) because the duty of disclosure is but one facet of the duty of utmost good faith. Thus there may be situations where the insured may be required to act with utmost good faith during the contract of insurance.

(5) The duty of disclosure extends to material facts coming to the knowledge of the insured before the contract of insurance is concluded.

E. *Materiality Revisited*

The Court of Appeal decision, in *CTI* v *Oceanus,*[31] despite fairly widespread criticism, remained the leading authority with regard to the question of when an insurer is entitled to avoid a policy on the basis of the breach by the insured of his duty of disclosure.[32] All the more then that the sequence

[30] *Ibid,* note 24.

[31] *Ibid*.

[32] The decision was viewed as being too favourable to the insurers and was not followed by the New South Wales Court of Appeal in *Barclay Holdings (Australia) Ltd* v *British National Insurance Co Ltd* (1987) 8 NSWLR 514. See also criticisms of commentators: Brooke, "Materiality in Insurance Contracts" [1985] LMCLQ 437; Clarke, "Failure to disclose and

of events set off by the first instance decision in *Pan Atlantic* v *Pine Top*[33] came as a pleasant surprise.

The facts of the case were fairly simple: The plaintiffs had reinsured certain risks under their Casualty Account with the defendants. However, the defendants denied liability under the reinsurance contracts, *inter alia*, on the ground that the plaintiffs had failed to disclose the additional losses sustained by themselves in 1980/81. It was held by the first instance court that these losses were material and ought to have been disclosed by the plaintiffs to the defendant reinsurers.

When the appeal came before the Court of Appeal,[34] Steyn LJ took the opportunity to review the decision of *CTI* v *Oceanus*[35] insofar as the question of materiality was concerned. It was his Lordship's opinion that all *CTI* v *Oceanus*[36] decided (and by which he was bound as a matter of precedent) was that it was not necessary for the alleged non-disclosure to have had a decisive influence on the prudent insurer, as well as the irrelevance of the actual insurer. The Court of Appeal in that case had simply answered in the negative the question to whom it was posed.

The question then remained as to how a precise test for materiality as a positive question could be crafted out of the negative proposition made by the earlier decision. Stated as positive statement, there were two viable alternatives:

i. the fact was material as long as the prudent insurer would wish to be aware of it.[37]

ii. the fact was material only if the prudent insurer would appreciate that it represented a different or increased risk.[38]

failure to legislate: is it material?" [1988] JBL 206, both of whom suggested that the decision of the Court of Appeal was arrived at their conclusion upon a misconstruction of earlier authorities. See also Diamond, "The Law of Marine Insurance – has it a future?" (1986) LMCLQ 25. *Contra* Khan, "A New Test for Materiality in Insurance Law" [1986] JBL 37.

33 [1992] 1 Lloyd's Rep 101.

34 [1993] 1 Lloyd's Rep 496.

35 *Ibid,* note 24.

36 *Ibid.*

37 The "would want to know" test finds support from statements by Kerr and Parker LJJ, see *supra*, note 26 and 27.

38 This test finds support from statements by Lord Mansfield in *Carter* v *Boehm*, *supra*, note 4, where he referred to non-disclosure having the effect "that the risque run is really different from the risque understood and intended to be run, at the time of the agreement...".

The question to ask, Steyn LJ concluded, was "whether the prudent insurer would have viewed the undisclosed material as probably tending to increase the risk"[39] or whether a prudent insurer would have viewed the true risk as increased or different in comparison with that which was presented to the insurer.[40]

When the appeal came before the House of Lords,[41] it was held by the majority[42] that:

1. A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent insurer's decision whether to accept the risk and if so at what premium;[43] but

2. The insurer is not entitled to rely on the non-disclosure of a material fact as a ground for avoiding the contract unless he can show that it did in fact induce the making of the contract.[44]

[39] *Supra*, note 34, at 506.

[40] *Supra*, note 34, at 505.

[41] *Supra*, note 5.

[42] While all five of their Lordships agreed on proposition (2), only the majority (Lord Mustill, Lord Goff & Lord Slynn) accepted proposition (1). The minority (Lord Lloyd & Lord Templeman) rejected it.

[43] This, of course, affirms the decision in *CTI* v *Oceanus*, *supra*, note 24, insofar as the test for materiality is concerned. There were two main reasons relied on by Lord Mustill for the rejection of the decisive influence test, who delivered the leading speech for the majority. The first ground was on a matter of semantics: since there was an absence of any qualifying adverb, such as "decisively" or "conclusively", in s 18(2) of the Marine Insurance Act for the verb "influence", it must mean that it denotes only an effect on the thought processes of the insurer in weighing the risk he is presented with, *supra*, note 5, at 531. The second was basically an endorsement of the practical difficulties of the decisive influence test highlighted by Parker LJ in *CTI* v *Oceanus* (see *supra*, note 28).
Of course, one should take note that Lord Lloyd, *ibid,* at 559, demonstrated that as a matter of language, the decisive influence test was equally tenable on the construction of the word "influence" since nothing can be described, in the proper sense of the word, as "influencing" anything unless it does actually have a positive effect on behaviour. Lord Lloyd, *ibid,* at 557-558, was not convinced that there were insuperable difficulties with the decisive influence test either: Experienced and prudent insurers are just as likely to disagree about what they would have liked to know as about what they would have done. Moreover, his Lordship was of the opinion that while the decisive influence test presented a "precise and clear-cut" test, what the prudent insurer would have wanted to know is "nebulous and ill-defined".

[44] See Lord Mustill, *ibid,* at 550:

> If the misrepresentation or non-disclosure of a material fact did not in fact induce the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract.

II. Reciprocal Duties?

Since the insurance contract is a contract of utmost good faith, it is only logical that the duty of good faith applies equally to and is equally applicable to the insurer. After all, Section 17 of the Marine Insurance Act, 1906 clearly articulates the idea of a reciprocal duty of utmost good faith owed by both the parties to the contract of insurance.

In fact, in *Carter* v *Boehm*[45] itself, Lord Mansfield had taken the opportunity to emphasise the duality of the duty of good faith and had even had envisaged a situation where the insurer would be in breach of his duty of disclosure – where an insurer agrees to cover a ship for a voyage which the insurer already knows, but does not disclose to the insured, has been safely completed. In this scenario, it can be seen why Lord Mansfield was content to confine himself to avoidance as this remedy would be sufficient to redress fully the insured in that he will be able to recover his otherwise wasted premium.

Different considerations, however, may arise when the insurer fails to inform the insured of a fact or circumstance, which is within the insurer's knowledge prior to the conclusion of the contract, which will prevent the insured from recovering under the policy. Although the insured is entitled to rely on the fact that the insurer has breached his duty of disclosure, it may be of scant comfort to the insured. This is because the only remedy that has hitherto been available to the insured is to rescind or avoid the contract *ab initio* and have all premiums paid thus far returned to him. It still leaves him uncovered for the risk or loss which he has suffered, something which might have been prevented if the insurers had disclosed

The majority of the House was not concerned by the omission of any reference to inducement in s 20(1) of the Act as that had to be read alongside s 91(2) which preserves the rules of the common law other than in the event of inconsistency with an express provision in the Act and the fact that the requirement of inducement was well established in the general law of contract and misrepresentation by the time the Act was drafted. The absence of a general common law of non-disclosure prevented a similar implication of an inducement requirement into s 18(1) of the Act. This, however, did not bother Lord Mustill who felt that having such a distinction between misrepresentation and non-disclosure on the requirement of inducement was not acceptable.

See Birds & Hird, "Misrepresentation and Non-disclosure in Insurance Law – Identical Twins or Separate Issues?" (1996) 59 MLR 285, at 291-295, for a criticism on the need to impose the inducement requirement on non-disclosure as well merely because "such a course of action provides consistency".

See also Hird, "Rationality in the House of Lords?" [1995] JBL 194; Hird, "Pan Atlantic – Yet More to Disclose" [1995] JBL 608; Bennet, "Utmost Good Faith in the House of Lords" (1995) 111 LQR 181; Clarke, "Insurers – Influenced but yet not Induced" [1994] LMCLQ 473.

45 *Supra*, note 4.

the information. The question has thus arisen as to whether the insured is entitled to damages from the insurers for any loss caused by their breach of their duty of disclosure.

Another point to note here is that after the articulation of the reciprocal nature of the duty of utmost good faith in *Carter* v *Boehm*[46] and its subsequent codification in Section 17 of the Marine Insurance Act, 1906, most of the development since 1766 has been focused on the duties of the insured.[47]

Thus, it can be seen that two questions come to mind when regarding the duty of disclosure which the insurer owes to the insured:

(1) What is the scope of that duty and when is it breached?

(2) Is the insured limited to the remedy of avoidance?

A. *The Skandia Litigation*

This point was brought home rather painfully in the litigation in *Banque Keyser* v *Skandia*.[48] The case involved massive frauds by a number of persons. In essence, the plaintiff banks had lent large sums of money to a Mr Ballestero on the security of some gemstones. They also obtained credit policies which, due to the fraud exclusion clause, were insufficient to cover the primary debtor's fraudulent default. Upon default by Ballestero on the loans, the banks sought to recover their loss from the insurers, not as monies payable under the policy, but as damages for breach of duty. Due to the fraud of Lee, an agent of the brokers, (this dishonesty had no direct connection with that of Ballestero) which related to the extent of the credit insurance in place. The fraud of Lee was known to a senior employee of the leading insurers, and the banks argued that the failure of the insurers to disclose

[46] *Supra*, note 4.

[47] See Scotford, "The Insurer's Duty of Utmost Good Faith: Implications for Australian Insurers" (1988) 1 In LJ 1, at 5, where he notes that

> It would seem from the many subsequent cases relating to non-disclosure by the insured, that the application of Lord Mansfield's famous words has been somewhat lopsided so that the insurer's role has been cast as more passive, whereas the duty of disclosure has appeared to be predominantly upon the insured. ...

See further, Scotford, *ibid*, at 6

> Perhaps this somewhat unbalanced development is not surprising because most of relevant knowledge, so it is said, rests with the insured, and many more opportunities would be likely to arise in which the insured, rather than the insurer, had failed to make full disclosure.

See also Hasson, *supra*, note 10.

[48] [1987] 1 Lloyd's Rep 69. The complicated facts of this case are noted by Trindade (1989) 105 LQR 191. See also Scotford, *supra*, note 47.

the brokers' employee's fraud constituted a breach of the insurers' duty of utmost good faith resulting in loss to the banks – if they had known the truth, they would not have advanced, and lost, a further sum of money to Ballestero, the amount of which they now claimed as damages.

Both the High Court[49] and the Court of Appeal[50] agreed that there was a reciprocal duty on the insurer of utmost good faith, which of course includes the duty of disclosure. In this case, both courts agreed that there was a breach of that duty by the insurers. However, the Court of Appeal was unable to agree with Steyn J's view that, in addition to rescission, a remedy in damages was available to the banks.

Steyn J held that the insurers owed a duty to disclose material facts and that this duty was not an implied term in the contract but an established principle which arises from rules of law developed by the courts.[51] He was of the opinion that once it is accepted that the principle of utmost good faith imposes meaningful reciprocal duties, owed by the insured to the insurer and vice versa, it seems anomalous that there should be no claim for damages for breach of those duties in a case where that is the only effective remedy. Thus justice and policy considerations combine to lead to the conclusion that there should be a claim for damages available to the insured.[52]

[49] *Ibid*.

[50] [1988] 2 Lloyd's Rep 513.

[51] *Supra*, note 48, at 94:

> ... the body of rules which are described as the *uberrima fides* principle, are rules of law developed by judges. The relevant duties apply before the contract comes into existence, and they apply to every contract of insurance. In my judgment it is incorrect to categorise them as implied terms.

[52] *Ibid*, at 96:

> The question of whether an action for damages lies for breach of the obligation of he utmost good faith in an insurance context must be considered from the point of view of legal principle and policy. Once it is accepted that the principle of utmost good faith imposes meaningful reciprocal duties, owed by the insured to the insurers and vice versa, it seem anomalous that there should be no claim for damages for breach of those duties in a case where that is the only effective remedy. The principle *ubi jus ibi remedium* succinctly expresses the policy of our law.
>
> ... Avoidance is almost invariably the only remedy an insurer needs in cases of non-disclosure. It is just as conceivable that a case can arise where the insurer's interests ought to be protected by an action for damages, *eg*, where an insurer incurs expense in the surveying of a rig, which proves to be wasted because the insurer subsequently avoids the policy for non-disclosure. But such cases must be very rare. On the other hand, avoidance of a policy and a claim for return for 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.

The Court of Appeal reversed the lower court's decision on the ground that a breach of the insurer's duty of disclosure only entitles the insured to rescind the contract and to recover his premium but does not entitle the insured to claim damages.[53] Slade LJ affirmed that the duty on the insurer must at least 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 the 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.[54]

The House of Lords, in hearing the appeal,[55] agreed that there was a reciprocal duty of disclosure on the part of the insurers, and also approved and adopted Slade LJ's formulation of the insurer's duty:

> The duty of upon the insurer extended at least to disclosing all facts known to him which were material either to the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he sought cover with the insurer.[56]

But an obligation on the insurer to disclose what he knew of the broker's employee's frauds could only fall within that duty if the frauds were such as would entitle the insurer to repudiate liability which palpably they did not, and accordingly, the insurer's failure to disclose to the banks the dishonesty of their agent did not give rise to the breach of any legal duty.

However, Lord Bridge reserved his opinion on the issue of law on which the High Court and the Court of Appeal disagreed.[57] On the other hand, Lord Templeman expressly stated that he agreed, albeit in *dicta*, that he agreed 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

[53] *Supra*, note 50, at 546-551.

[54] *Supra*, note 50, at 545.

[55] [1990] 2 Lloyd's Rep 377. The House felt that although the cause of the advance was the fraud of Lee, the cause of the loss of the advance was the fraud of Ballestero, which would not have been the scope of any duty of disclosure in any event nor was it known to the insurers. There was therefore a lack of causation between the failure to inform the bank of the fraud of Lee and the loss in question, which was caused by the fraud of Ballestero.: see Lord Templeman, *ibid*, at 957-958.

[56] *Ibid*, at 380; approving the formulation of Slade LJ at *supra*, note 50, at 545.

[57] *Ibid*, at 380:

> ... The result is that the questions of law so fully and carefully canvassed in both judgments below have become academic. I reserve my opinion on the issues of law on which the Judge and the Court of Appeal differed, thinking it better that they should be resolved if and when they arise again on facts which require their determination.

policy and recover the premium. He referred with approval the authorities and reasons advanced by Slade LJ.[58] Lords Brandon, Ackner and Jauncey agreed with both Lord Bridge and Lord Templeman as far as their reasons for dismissing the appeal were concerned.[59]

B. *Second Bite at the Cherry – The Good Luck Litigation*

Another valiant attempt was made in argument in *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd.*[60] to reopen the issue of damages as a remedy for the breach of the insurer's breach of his duty of disclosure. In this case, the ship, The Good Luck, was insured with the defendant mutual indemnity club and mortgaged to the plaintiff bank. As required by the mortgage, the benefit of the insurance was assigned to the bank, and the club gave a letter of undertaking to the bank, whereby the club promised to advise the bank promptly if the club should "cease to insure" the ship. The ship was sent to part of the Arabian Gulf in breach of warranty under the insurance, was hit by Iraqi missiles and became a constructive total loss. Both the club and the bank knew of the loss but, whereas the club discovered the breach of warranty, the bank did not and (negligently) did not investigate the possibility. In the mistaken belief that the loss was covered, the bank made further loans to the shipowners. In view of the breach of warranty, the insurance could not be enforced, but the bank sued the club for having failed to give prompt notice that the club had ceased to insure the ship.

It was reiterated by the Court of Appeal that a breach of the duty of utmost good faith by an insurer during the currency of the policy did not give rise to an action for damages. As such the bank had no right to claim damages arising from the insurers' breach of their duty of utmost good faith.

May LJ, in referring to the Court of Appeal decision in *Le Banque Financiere* v *Westgate*[61] and their reasons why the pre-contractual duty of

[58] *Ibid*, at 387-388:

> In the circumstances it is not necessary to consider whether Hodge were under a duty to disclose the misconduct of Mr Lee by reason of the obligation of an insurer to deal with the proposer of insurance with the utmost good faith. If Hodge were in breach of that duty no damage flowed from the breach for the reasons I have already given. But it may be helpful to observe that 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. The authorities cited and the cogent reasons advanced by Lord Justice Slade are to be found in the report of the proceedings ...

[59] *Ibid*, at 381; *ibid*, at 388; *ibid*, at 388 respectively.

[60] [1989] 2 Lloyd's Rep 238.

[61] *Supra*, note 50.

disclosure in a contract of utmost good faith could not be held to constitute a tort so as to give rise to a claim for damages:[62]

(1) the powers of the Court to grant relief in cases of non-disclosure stem from the jurisdiction originally exercised by the Courts of Equity. Since duress and undue influence did not give rise to claims for damages, there is no reason why non-disclosure should be any different.

(2) the decision in *CTI* v *Oceanus*[63] established that why an underwriter seeks the remedy of avoidance of the policy, the actual effect of the non-disclosure on his mind is irrelevant and what matters is the effect of the non-disclosure on the mind of a notional prudent underwriter. This principle illustrated one of the conceptual difficulties involved in upholding the remedy by way of damages.

(3) the clear inference from the Marine Insurance Act, 1906 is that Parliament did not contemplate that a breach of the obligation would give rise to a claim for damages.

(4) since in the case of a contract *uberrimae fidei* the obligation to disclose a known material fact is an absolute one, a decision that a breach of such an obligation in every case and by itself constituted a tort, if it caused damage, could give rise to great potential hardship to insurers and even more, perhaps, to insured persons.

Assuming that the obligation can continue, there is no reason why the source in law of the obligation, or the remedy for its breach, should be different after the contract is made from what it is at the precontractual stage.[64]

62 *Supra*, note 60, at 263.

63 *Supra*, note 24.

64 May LJ, *supra*, note 60, at 263, was commenting on the decision of Hirst J in *The Litsion Pride* [1985] 1 Lloyd's Rep 437 where it was suggested that the duty of utmost good faith can, in certain circumstances, continue throughout the duration of the contract:

> We do not think it is necessary to question the decision of Mr Justice Hirst in *The Litsion Pride* so far as concerns his decision that the obligation of utmost good faith could continue after the contract was made with reference to a matter as the fixing of the rate of additional premiums. Assuming that the obligation can continue, we can see no reason why the source in law of the obligation, or the remedy for its breach, should be different after the contract is made from what it is at the pre-contract stage...

The House of Lords did not hear arguments nor did they discuss this point, but disposed the case on the law relating to promissory warranties as found in Section 33(3) of the Marine Insurance Act.[65]

III. Life After the Skandia Litigation

What emerges at the end of the day, after the lengthy trials in the *Skandia* and *The Good Luck* litigation are the following points:

(1) it is clear that the duty of disclosure is a reciprocal and mutual one between both the insurers and the insured.[66]

(2) the scope of the insurer's duty of disclosure must at least 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 the policy which a prudent assured would take into account in deciding whether or not to place the risk for which he seeks cover.[67]

[65] [1992] 1 AC 233. The traditional view, at least in the realm of non-marine insurance contracts, that was widely held until the decision of Lord Goff in *The Good Luck* in 1991, was the breach of a warranty entitled the insurer to a right of election – whether to treat himself as discharged from his obligations under the contract of insurance from the time of such election, or to affirm the contract and instead have resort to the right of damages, *ie,* consistent with the general law of contract insofar as the result of a breach of a condition is concerned. This frame of analysis has now been rendered dubious by the decision of the House of Lords. Lord Goff, with whom the rest of the House agreed, overruled the Court of Appeal which had approached the question from the general contract law perspective rather than having primary regard to the express provisions of the Marine Insurance Act 1906. Lord Goff felt that the Court of Appeal had been "led astray by passages in certain books and other texts which refer to the insurer being entitled to avoid the policy of insurance, or to repudiate." All these extrinsic aids to construction were irrelevant as the words of the codifying statute were clear.
According to Lord Goff, the effect of a breach of warranty is clear – when an insured is in breach of a warranty, the insurer is automatically discharged from his liability under the contract as from the date of the breach. The hitherto held view of the effect of a breach of warranty in insurance law had thus been totally discredited in light of Lord Goff's decision.

[66] Steyn J, *supra*, note 48, at 92-93; Slade LJ, *supra*, note 50, at 544; Lord Bridge, *supra*, note 55, at 380; Lord Templeman, *supra*, note 55, at 387-388; Lord Jauncey, *supra*, note 55, at 389; May LJ, *supra*, note 60, at 263.

[67] Slade LJ, *supra*, note 50, at 545; approved by Lord Bridge, *supra*, note 55, at 380.

(3) the weight of authority is against the proposition that a breach of the duty of disclosure does give an action in damages.[68]

There, however, remains lingering questions on two fronts. Firstly, where exactly do all these leave the insured insofar as the duty of disclosure owed to him by the insurer is concerned. What is the test of materiality in this respect? Does the requirement of inducement introduced by Steyn J at the first instance decision survive the speeches of the Court of Appeal and the House of Lords respectively? A further question relates to what category of facts may be considered material from the perspective of the insurer's duty of disclosure. The second main question is whether the issue of damages as a remedy for the breach of this duty owed to the insured is really closed? This would really depend on whether the grounds on which the Court of Appeal in *Le Banque Financiere* v *Westgate*[69] and *The Good Luck*[70] dismissed the possibility of damages, rather than avoidance, as a remedy for the breach of this duty are unimpeachable.

IV. Duty of Disclosure of The Insurer

It is clear that the duty of utmost good faith has always been held to be a mutual one as between the insurer and the insured. This has always been clear from Lord Mansfield's decision in *Carter* v *Boehm*[71] and its later codification in the Marine Insurance Act, 1906.[72] Now that has been recognised and given full effect to by the courts. As has been noted earlier, neither *Carter* v *Boehm*[73] nor the Marine Insurance Act, 1906[74] specify the requirements as to the exact extent or the test to be applied to ascertain if there has been a breach of that duty by the insurer.

Steyn J in *Banque Keyser* v *Skandia,*[75] at first instance, had described the insurer's duty of disclosure as thus:

[68] Slade LJ, *supra*, note 50, at 546-551; approved by Lord Templeman, *supra*, note 55, at 387-388; May LJ, *supra*, note 60, at 263; point reserved by Lord Bridge, *supra*, note 55, at 380.

[69] *Supra*, note 50.

[70] *Supra*, note 60.

[71] *Supra*, note 4, at 1909-1910, where Lord Mansfield said:

> The policy would be equally void against the underwriter if he concealed ... Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing to the contrary.

[72] S 17, see *supra*, note 13.

[73] *Supra*, note 4.

[74] See *supra*, note 13.

[75] *Supra*, note 48.

> ... In considering the ambit of the duty of the disclosure of the insurers, the starting point seems to me as follows: in a proper case it will cover matters peculiarly within the knowledge of the insurers, which the insurers know that the insured is ignorant of and unable to discover but which are material in the sense of being calculated to influence the decision of the insured to conclude the contract of insurance. In considering whether the duty of disclosure is activated in a given case the court ought, in my judgment, to test any provisional conclusion by asking the single question: Did good faith and fair dealing require a disclosure?[76]

In *Le Banque Financiere de La Cite SA* v *Westgate Insurance Co Ltd,*[77] the Court of Appeal adopted a different view of the requirement of materiality. It felt that the test laid down by Steyn J was not entirely satisfactory as

> ... in the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent ...[78]

The Court of Appeal was also wary of the width of the proposition that any fact is material if it is "calculated to influence the decision of the insured to conclude the contract of insurance". An example of this concern was given by Slade LJ:

> ... it might well be that in a particular case proposed insurers would be aware of another reputable underwriter who would be prepared to underwrite the same risk at a substantially lower premium. In our judgment the mere existence of the relationship of insurers and insured would not place upon them the duty to inform the insured of this fact.[79]

The interesting thing about this concern is that the Court of Appeal is suggesting that there should not be any consideration given to whether the non-disclosure by the insurer was calculated to induce the insured into entering into the contract. The first query which one might have about this concern is this: what is the impact of the imposition by the House of Lords

[76] *Ibid*, at 94.
[77] *Supra*, note 50.
[78] *Ibid*, at 544-545.
[79] *Ibid*, at 545.

in *Pan Atlantic* v *Pine Top*[80] of the requirement that the particular insurer will not be allowed to avoid the contract for non-disclosure unless he can show that he was so induced into entering the contract?[81] The easiest way around this possible problem is to point out that the Court of Appeal was simply trying to expunge the equating of a calculation to induce with the concept of materiality. In any event, the House of Lords' introduction of the requirement of inducement forms a concept separate from that of materiality – it is basically a second hurdle, besides showing that the circumstance not disclosed being material, that the innocent party must cross in order to avoid the policy. So, as such, the rejection of this inducement factor within the concept of materiality may not be as inconsistent with *Pan Atlantic* v *Pine Top*[82] as it may first appear.

In any event, the example given by Slade LJ to express his concern - about the fact that other insurers may be offering a lower premium is hardly the stuff that the duty of disclosure is made of. The rates charged by competitors is hardly something which is outside the public domain – any potential insured worth his salt would be able to easily get a quote from other insurers. It has never been suggested that the duty of disclosure is a passive one, in that the party should be able to simply sit back and receive information without doing some homework of his own.[83] This is manifest

[80] *Supra*, note 5.

[81] Of course it had been argued by Birds & Hird, *supra*, note 44, that it would not have been necessary to do this if the House of Lords in *Pan Atlantic* had realised that the probable reason why Lord Chalmers did not see the need to draft the requirement of inducement into the provisions relating to non-disclosure and misrepresentation in the Marine Insurance Act, 1906, was because it was accepted then, as the commentator suggests should also be accepted today, that the circumstance would be material if it was material to the *particular* insurer, rather the *notional* prudent insurer.

[82] *Supra*, note 5.

[83] Scotford, *supra*, note 47, at 5:

> There is another significant seed in Lord Mansfield's judgment. On carefully reading that judgment, it becomes clear that the insurer was required to obtain certain relevant information. One matter that was alleged to have been concealed was that relating to the "condition of the place". Lord Mansfield refers to the fact that the underwriter took the knowledge of the state of the place upon himself – "it was a matter as to which he might be informed in various ways; it was not a matter within the private knowledge of the Governor only". So it is that the dual character of the duty of utmost good faith does require full disclosure from one party to the other, but also does not entitle one party, such as the insurer, to adopt an entirely passive role. He must become informed and it is in those areas in which the insurer can reasonably be expected to make his own inquiry that the absolute duty upon the insured as to disclosure does become somewhat ameliorated. ...

in the decision of Lord Mansfield himself in *Carter* v *Boehm*,[84] where the insurer failed in his claim as one of the grounds relied on was held to be easily discoverable if the insurer had taken the trouble to make further enquiries.[85] In the same way, the insured should not be able to rely on a fact which is not disclosed, which may either be a matter of common knowledge, or which he ought reasonably to know in the course of shopping around for an insurer. Of course, it must be noted that these are not matters which are not material,[86] but rather are things which Lord Mansfield feels should be dispensed with insofar as disclosure is concerned. This, in itself, suggests that the existence of the duty of disclosure does not, of itself, mean that the innocent party should be excused from being diligent in his own interests.

A. *Inducement?*

There is a further problem in light of the introduction of the "inducement" requirement by the House of Lords in *Pan Atlantic* v *Pine Top*.[87] It is clear

[84] *Supra*, note 4, at 1910

> But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aluid, tacere; neque enum id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire. ...*
>
> There are many matters, as to which the insured may be innocently silent – he need not mention what the underwriter knows ... An under-writer can not insist that the policy is void, because the insured did not tell what he actually knew; what way soever he came to the knowledge. The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter need not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He need not be told general topics of speculation...

[85] This point was also codified in s 18(3) of the Marine Insurance Act, 1906:

> In the absence of inquiry the following circumstances need not be disclosed, namely:
> ...
> (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.

[86] See *St Paul Fire & Marine* v *McConnell* [1995] 2 Lloyd's Rep 116, at 124, *per* Evans LJ (when discussing S 18(3)(c) of the Marine Insurance Act, 1906:

> This means that the insurer has not right to avoid the policy on the ground that a circumstance of that sort was not disclosed, but it does not state that the circumstance is not "material" within the definition in s 18(2). The contrary inference, if any, should be drawn. If the circumstance was not material, it would be unnecessary to provide that it should not be disclosed.

[87] *Supra*, note 5.

that the decisive influence test of inducement is the correct test to apply.[88] The Court of Appeal has, subsequent to *Pan Atlantic* v *Pine Top,*[89] held that although the legal burden of proving inducement rests on the party allegedly induced, once such party has established the materiality of a non-disclosure, he benefits from a "fair inference of fact" that he was thereby induced into the contract, although the weight to be attached to this inference will vary according to the circumstances which establish materiality. The more obvious the materiality, the stronger the inference of inducement.[90]

All this is very fine, but it must be remembered that the House imposed this requirement on the basis that it would be intolerable that, once it decided that there was a requirement of inducement before the insurer could avoid the policy for material misrepresentation, there was not a similar requirement for non-disclosure.[91] Perhaps, not sufficient consideration may have been given to certain problems which may arise in the context of imposing this requirement in the insurer's duty of disclosure. The first problem is a general one, applicable to both incarnations of the duty of utmost good faith. Lord Mustill glossed over the difference between misrepresentation and non-disclosure by suggesting that "in practice the line between misrepresentation and non-disclosure is often imperceptible".[92] In many cases, that may well be true: if the guilty party should disclose other things, but fails to disclose some other circumstances, it might well be said that he has failed to disclose these facts, or it might be said that he is, by implication misrepresenting

[88] *Pan Atlantic* v *Pine Top*, *supra*, note 5, at 549, 551. This was also assumed to be correct in *St Paul Fire* v *McConnell*, *supra*, note 86, at 124.

[89] *St Paul Fire* v *McConnell*, *ibid*.

[90] *St Paul Fire* v *McConnell*, *ibid*, at 124. See further Bennett, "Utmost Good Faith, Materiality and Inducement" (1996) 112 LQR 405.

[91] *Supra*, note 5, at 549, *per* Lord Mustill

> It must be accepted at once that the route *via* s 91(2) of the Act and the general common law which leads to a solution for misrepresentation is not available here, since there was and is no general common law of non-disclosure. Nor does the complex interaction between fraud and materiality, which makes the old insurance law on misrepresentation so hard to decipher, exist in respect of non-disclosure. Nevertheless 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) a requirement that the misrepresentation shall have induced the contract, and yet no such requirement can be accommodated in s 18(1), the answer must surely be that it is not – the more so since in practice the line between misrepresentation and non-disclosure is often imperceptible. If the Act, which did not set out to be a complete codification of existing law, will yield to the qualification in one case surely it must in common sense do so in the other. If this requires the making of new law, so be it. There is no subversion here of established precedent. It is only in recent years that the problem has been squarely faced. Facing it now, I believe that to do justice a need for inducement can and should be implied into the Act.

[92] *Ibid.*

that the facts he has volunteered are the only facts to be taken into account. However, a conceptual problem arises when one talks of an insured being induced into a contract by a total non-disclosure, *ie*, silence. Is it possible for anyone to be induced by silence? Of course, the factual matrix could be characterised as a situation where the insurer is under a duty to disclose and his silence is, in effect, a representation that there is nothing to disclose, *ie*, either a non-disclosure or a misrepresentation that there is nothing to disclose. One of the set of circumstances where silence constitutes misrepresentation is where the silence distorts a positive representation[93] which would cover the situation where one tells the truth, but not the whole truth. Although it has been suggested that silence or non-disclosure affords a ground for relief "where the contract requires *uberrima fides*",[94] such statements are made in the context of the remedy of the duty of disclosure and do not relate to the question of inducement.[95] There will invariably be difficulties in the context of non-disclosure where nothing is said of material facts – how can one be said to be induced when there is nothing said? The possible way out of this dilemma is perhaps to cast silence, in the context of a positive duty to disclose material facts, as a representation that there is nothing material to disclose and such constitute a misrepresentation, which can then logically be seen as an "incorrect positive statement by way of conduct".[96]

It is clear that because of the requirement of inducement, a misrepresentation is legally harmless if the innocent party never knew of its existence.[97] That poses a serious problem in the context of an insured who applies for a policy and he does not know of the existence of the duty of disclosure. Granted that it may be possible to impute a representation by conduct by way of silence in light of the duty to disclose, if the insured is not aware of this positive duty on the part of the insurer, it may be conceptually difficult to speak of silence by the insurer as inducing the insured into entering the contract, not to mention it will be difficult to adduce

93 See Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract: Singapore and Malaysian Edition* (1994), at 412.

94 *Ibid*, at 412.

95 See *ibid*, at 448-453. In any event, the statements and the discussion that follows are on the basis of case law prior the House of Lords decision in *Pan Atlantic* v *Pine Top*, *supra*, note 5.

96 A representation can be expressed either as a positive assertion of fact or may be inferred from conduct: see Andrew Phang, *ibid*, at 411. Although the general rule is that mere silence is not misrepresentation, perhaps that rule, as developed in general contract law, is explicable on the basis that in general contract law there is no positive duty to disclose material facts. Where there is such a duty, silence may well constitute such a representation.
See also Birds & Hird, *supra*, note 44, at 294-295.

97 See Andrew Phang, *ibid*, at 412-413.

evidence of reliance – you cannot rely on something of which you are not aware. This poses particular problems in the realm of consumer insurance, where the insured may never see any representative of the insurer.[98]

There is no doubt that there exist conceptual problems that need to be worked out by the courts with regard to the requirement of inducement in the context of the insurer's duty of disclosure.

B. *Concept of Materiality*

Be that as it may, the concept of materiality, in the opinion of the Court of Appeal in *Le Banque Financiere* v *Westgate,*[99] would cover at least two types of fact that a prudent insured would take into account in deciding whether or not to enter into the contract: those material to the risk itself and those material to the recoverability under the contract of insurance:

> In adapting the well established principles relating to the duty of disclosure falling upon the insured to the obverse case of the insurer himself, due account must be taken of the rather different reasons for which the insured and the insurer require the protection of full disclosure. In our judgment, the duty falling upon the insurer must at least 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 the 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*. (emphasis my own)[100]

(i) *Will the prudent insured please stand up?*

The first question which comes to mind is who is the "prudent insured"? Thus far, the normal situation that the courts have had to deal with is ascertaining what the prudent insurer would think about a particular fact or circumstance. However, now the obverse situation must arise for consideration whenever it is alleged that the insurer has breached his duty of disclosure. When considering what the prudent insurer would think or

[98] On the basis, of course, of the rulings that the insurance agent is normally the agent of the insured and not the insurer during the precontractual stage: see *Newsholme Brothers* v *Road Transport and General Insurance Co Ltd* [1929] 2 KB 356; *National Employers' Mutual General Insurance Association Ltd* v *Globe Trawlers Pte Ltd* [1991] 2 MLJ 92. *cf*: S 44A of the Insurance Act 1963 (Act 89) of Malaysia.

[99] *Supra*, note 50.

[100] See *supra*, note 50, at 545, *per* Slade LJ.

want to know, the courts have been assisted by expert evidence by experienced underwriters who fit the description of a "prudent insurer".[101] In the obverse situation, when the court is concerned with the case of a prudent insured, this will no longer be possible for the courts to simply have resort to such expert witnesses. Calling upon underwriters to testify as to what the prudent insured thinks would be turning the whole duty on its head - not only would there be a suspicion that the underwriter called may well, in self-interest as well, try to limit the duty of disclosure owed by his brother underwriters; it might even work perversely against insurers in general because of the simple fact that the experienced insurer would probably consider more circumstances and facts to be material than a lay person who is looking for insurance cover. Of course, the latter scenario would not necessarily be a bad thing considering the indulgences afforded insurers by the law for so long, but it would be objectionable on principle since it would not be accord with the test or the rationale of looking at things from the perspective of the prudent insured.

Granted that it would probably not have to be expert testimony from underwriters that determines what the prudent insured would think, there may still be problems if proof should come from the testimony of a reasonable insured or even the court's judicial notice of what a reasonable insured would think. The most obvious problem is that when one speaks of insureds in general they are not as homogenous a bunch as underwriters, where there's probably not very much difference in the conventional market wisdom. The average insured who applies for a wide ranging variety of policies may extend from the experienced businessman (who has loads of experience insofar as insurance cover and related matters are concerned) to the ordinary man on the Mass Rapid Transit train (who may be applying for a policy for the first time in his life and has absolutely no idea what is going on except that he has been swayed by the incessant glossy life insurance commercials on television). The question then is: who is the prudent insured?

[101] See Clarke, *The Law of Insurance Contracts* (2nd Ed, 1994), at 565-569 under s 23-6B "The Search for the Prudent Insurer". See also Forbes J in *Reynolds* v *Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440, at 457-458:

> ... the evidence of insurers called in this way is expert evidence n the sense that such witnesses are assisting the court in deciding what a reasonable and prudent underwriter would or would not do. They are not to give evidence of what they themselves would do, because their evidence is expert, that is opinion evidence and not factual ... Further, in giving expert evidence such witnesses are only assisting the court not deciding it.

His Lordship had rejected suggestions that if an insurer is telling the truth and he is held to be a reasonable insurer, the court must accept his evidence as conclusive – the evidence is expert evidence which assists the court but never binds it.

See also criticism of Hasson, *supra*, note 10, at 631-632.

Does the test laid down by the Court of Appeal in *Le Banque Financiere* v *Westgate*[102] call for a general test or does it require two broad categories of prudent insureds?

The experienced businessman has certain advantages. He may know more about what to take into account when deciding whether or not to place a risk with a particular insurer. He may also have greater access to information and technical information than the average layman may have. It may well be that there is no theoretical objection to the standard of the prudent insured to be pegged to the highest denominator, *ie*, the experienced businessman. In any event, there would be insuperable practical problems if in fact the prudent insured is a flexible concept which would depend on who the particular insured is. If nothing else, there would be inconsistency between the decisions as to whether a fact is material or not as that would have to depend on the knowledge and experience of the insured involved in the case. In any event, the edge that the experienced businessman may have in terms of knowledge and experience would be tempered by one of two things: Firstly, if one accepts that the exemption from disclosure of facts which are within the insurer's knowledge[103] should be tailored to the situation of the insured, then there would be also no need for the insurer to disclose this fact even though the fact may be material.[104] Secondly, the insured would probably not be able to prove that he was induced by the non-disclosure into entering the contract of insurance, especially in light of the fact that he knows the true nature of the circumstance.[105]

(ii) *How applicable are the exemptions from disclosure?*

The other issue which must arise is how applicable are the exemptions found in Section 18(3) applicable in the insurer's duty of disclosure? Section 18(3) of the Marine Insurance Act, 1906 provides:

> In the absence of inquiry the following circumstances need not be disclosed, namely:–

[102] *Supra*, note 50.

[103] See s 18(3)(a) of the Marine Insurance Act, 1906, *supra*, note 85. See also *supra*, note 84, for the same point made by Lord Mansfield in *Carter* v *Boehm*, *supra*, note 4.

[104] See *St Paul Fire* v *McConnell*, *supra*, note 86, where the Court of Appeal pointed out that the exemptions do not mean that the facts are not material.

[105] Even if the fact was one which would, by its very nature, give rise to a initial presumption of inducement, it might well be easily rebutted by evidence of the particular insured's experience.

(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.[106]

a. *Circumstances which diminish the risk*

The first situation contemplated to apply to the duty of disclosure owed by the insured to the insurer may well present some difficulties. For one thing, when Lord Mansfield gave an example of an insurer who is in breach of his duty of disclosure, in *Carter* v *Boehm*[107] itself, he contemplated a situation where an insurer had insured a ship for a voyage knowing that that she had already arrived.[108] Lord Jauncey approved of this example as a situation where the insurer has breached his duty to disclose material facts to the insured.[109] His Lordship went on to add his own example:

> Another example would the insurance against fire of a house which the insurer knew had been demolished. In these cases the undisclosed information would have a material and direct effect upon the risk against

[106] S 18(3) is partly based on the decision of Lord Mansfield in *Carter* v *Boehm*, *supra*, note 4, at 1910:

> There are many matters, as to which the insured may be innocently silent – he need not mention what the underwriter knows – *Scientia utrinque par pares contrahentes facit*.
> An underwriter can not insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.
> The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of.
> The underwriter needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. ...

[107] *Supra*, note 4.

[108] *Supra*, note 4, at 1909

> 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.

[109] *Supra*, note 55, at 389.

> which the insured was seeking to protect himself. Indeed the insured would have said that the risk no longer existed.[110]

These situations contemplated clearly involve situations where the risk has been lowered; in fact as Lord Jauncey pointed out, "the risk no longer existed".

It may well be that the insurer is not exempted from his duty of disclosure even when the risk is decreased. The reason is rather simple. As Slade LJ had pointed out

> In adapting the well established principles relating to the duty of disclosure falling upon the insured to the obverse case of the insurer himself, *due account must be taken of the rather different reasons for which the insured and the insurer require the protection of full disclosure*.[111] (emphasis my own)

For the duty owed to the insurer, it makes good sense that the insured does not have to disclose facts which tend to lower the risk because, even though they are material to the risk, he is not prejudiced by the non-disclosure. If anything, he gets a windfall – he would be charging a rate of premium which is higher than the risk, as it turns out, would have demanded. In the obverse situation, the insured would be prejudiced if the fact, which was not disclosed, would tend to lower or extinguish the risk: he would be paying a rate of premium higher than what he ought to; he might even wish to be self-insured if he feels that the risk is low enough; or if the risk is completely extinguished, if he had known of that, he would not have taken out the policy to begin with. As such, it would not make sense to apply this exemption to the duty of disclosure owed to the insured as this is the sort of non-disclosure which he would need protection from.

This then brings us to the next logical question: if the duty is now being imposed from the opposite perspective, could the exemption be tailored such that the insurer is not under a duty to disclose material facts which tend to increase the risk? At first sight, this may make sense in that the insured is not prejudiced in his premium payment because if the insurer does not say anything, he would be charged the same rate of premium for an increased risk – a windfall for the insured.

However, things may not be as simple as they appear. For one thing, what if the increase in risk comprises of the manifestation of risks which may not be strictly covered by the policy, or they are excluded from the cover. For example, an insured takes out a policy covering his cargo which

[110] *Ibid*, at 389.
[111] *Supra*, note 50, 545.

is being shipped from Singapore to South Korea. The insurer has advance notice from their branch office in Seoul that labour unrest are imminent, but fails to disclose this to the insured. The insured, in ignorance of these developments, only takes out an Institute Cargo Clauses (A) policy which covers "all risks of loss of or damage to the subject-matter insured" but does not cover "loss damage or expense ... caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions" or "resulting from strikes, lock-outs, labour disturbances, riots or civil commotions". In a situation as this, surely there ought to be a duty of disclosure as the interests of the insured would not be protected otherwise. If the insured is informed of the impending labour unrest, he can ensure that he is adequately covered for the risk of such unrest by taking out the Institute Strikes Clauses (Cargo) policy as well. If he is not, should there be loss or damage due to strike action, he would find himself without cover as he would not be able to recover his claim under his existing policy. This situation is surely one which the Court was contemplating when they suggested that the duty of disclosure should at least extend to facts which would affect the recoverability of a claim under the policy. If the insurer could not extend to him cover for strike action risks as well, he might have decided not to place the risk with him and rather shop around for another insurer who could.

The other thing which could work to prejudice the insured insofar as recoverability of the claim is concerned if there is an undisclosed increase of risk is where the policy contains an average clause, such that if the increase of risk should be by way of increase of the value of the goods to be insured, the insured may find himself under-insured and having the policy only pay out that part of the loss which the sum insured bears to the value of the goods. The insured then finds himself his own insurer with respect to the balance.[112]

[112] Under-insurance occurs when the property is insured for a sum which is less than its value. In this respect, where there is a total loss, the under insurance is not cause for any concern as, in any event, the sum insured is the maximum sum recoverable under the policy. A partial loss, on the other hand, raises different issues. The insured would be able to recover for the entire partial loss subject only to the ceiling placed by the sum insured. The insurer is, understandably, unhappy with this situation as he may be of the view that the insured should be considered to be his own insurer for a portion of the partial loss since he has only insured part of the risk.

Such concerns of the insurer are addressed by the inclusion of an "average clause". Such a clause will invariably provide that, in the event of under insurance, the insured shall bear the under-insured portion of the loss.

Under the operation of the average clause, where an insured, whose property is worth $100, insures it for only $75, he will be his own insurer for the uninsured portion, which amounts to 25 per cent. Thus, if the property suffers damage amounting to $60, the insured will

Thus, it is not convincing that the exemption with regards to the increase or decrease in risk should apply in respect of the duty of disclosure owed to the insured because he would otherwise not get the full protection of the duty of disclosure.

b. *Circumstances known to the insurer*

With regards to the second situation where there is no need to disclose a circumstance even thought it may be material, it may well be that there is no objection to it applying equally to the insured. This is, of course, on the assumption that the duty of utmost good faith does not relieve the insured of his duty to use due diligence in the conduct of his own affairs.[113]

c. *Disclosure of circumstance waived*

The third situation contemplated would obviously apply equally to the insurer's duty of disclosure. Since the duty is for the purposes of protecting his interests, it is surely open to him to waive it if he should so desire. However, it may prove a serious obstacle for the insurer to convince the court that the insured has full knowledge of his rights in the respect of disclosure and he has either expressly or has acted in a manner which evinces an intention to so elect to waive the provision of information.[114] The courts should be slow to hold that there is a waiver by the insured unless it can be shown that the insured is well-informed. As most insured persons muddle their way through an proposal for insurance, it will be difficult indeed to see how the insurer can prove that the insured has full knowledge of his rights with regard to the provision of information except in the rarest of situations.

d. *Disclosure of circumstance superfluous by reason of warranty*

The last scenario provided for is where the duty of disclosure is superfluous by reason of their being contractual provisions in place which would sufficiently protect the interests of the innocent party by

have to bear 25 per cent of the loss, which amounts to $15 while the insurer will only be liable for three-quarters of the loss, which amounts to $45. Without such a clause, the insured would have been able to recover the full $60 in this case. In fact, without the average clause, the insured would be able to recover any partial loss up to the limit of the sum insured, *ie*, $75.

See also *Acme Wood Flooring Co. Ltd* v *Marten* (1904) 9 Com Cas 157.

[113] See *supra*, note 83, and corresponding main text.

[114] See Clarke, *supra*, note 101, at 594-597 for waiver of insured's duty of disclosure generally.

providing adequate remedies. In most situations it is rather difficult to imagine that there would a provision in the contract which would protect the interests of the insured – after all, the contract is drawn up by the insurer and most of the duties and provisions are naturally for the protection of the insurer. The only question may rise with regards to terms which provide for the return of premiums. Does a provision like this amount to a "warranty" within the meaning of the exception?[115] It must be said that the term relating to the return of premiums would hardly be considered to be the type of provision contemplated. For one thing, it is not the sort of clause which provides for an alternative mechanism by which a remedy is provided which would offer sufficient protection against the effects of the insurer's non-disclosure. For another, such clauses (even in the event that they should provide for the return of premiums even in the event of a non-disclosure) would be drafted in the context of the insured's duties, not the insurer's. It would be straining the language of the clause to make it fit the situation being considered. In any event, even if the clause is party-neutral and such, such an argument may raised, it may well be that the clause merely states what the legal position is upon avoidance of the policy and does not confer any rights. Even then, this would be on the assumption that the courts will continue to hold their line that the only remedy for a breach of the duty of disclosure by the insurer is avoidance of the contract.

V. Material Facts[116]

In the context of the insured's duty of disclosure, the courts have recognised certain broad categories of circumstances which tend to be accepted as being material and as requiring disclosure. Perhaps, such broad categories may be suggested in the present context of the duty owed by the insurer. Generally speaking, such categories may be arrived at by analogy with existing categories in the obverse context and tailoring them for the protection of the insured. The other possibility is to look at the main "traps" into which

[115] The other clause which relates to premiums and is often labelled a "premium warranty clause" usually provides for the premium due to be paid by the insured within a stipulated number of days from the inception of the policy at the pain of the policy being automatically terminated. This warranty would also not be the type of clause which falls within this exception since it obviously provides for the insurer's protection rather than for the insured. Moreover, it in no way relates to the insurer's duty to the insured.

[116] See generally, Yeo, "Of Reciprocity and Remedies – Duty of Disclosure in Insurance Contracts", (1991) 11LS 131, at 140-144, where the author has made suggestions as to possible categories of material facts in the context of the duty of disclosure as owed to the insured, which provide a useful framework for analysis and has been adopted hereunder for the purposes of discussion.

the insured would fall resulting in the loss of the right to claim under the policy.

Two broad classes have been recognised by the Court of Appeal[117] and approved by the House of Lords:[118]

(1) Circumstances which affect the recoverability of a claim under the policy; and

(2) Circumstances which are material to the nature of the risk.

A. *Circumstances Affecting the Recoverability of the Claim*

(i) *Financial Viability of Insurer*

One of the obvious circumstances which may affect the recoverability of a claim under any policy is the immediate ability of the insurer to pay out claims under its policies. The long-term viability of the insurance company is also critical, particularly with respect to long-term policies like life policies. The importance of this category is starkly illustrated by the situation in *Osman* v *Ralph Moss,*[119] where the insured found himself uninsured due to the negligent failure of his broker to adequately bring to his attention the imminent financial collapse of the insurers.

(ii) *Payment Record of Insurer*

In the context of the duty owed by the insured, the courts have consistently held that a material fact is the claims records of the insured.[120] The main

[117] *Supra*, note 50, at 545.
[118] *Supra*, note 55, at 380.
[119] [1970] 1 Lloyd's Rep 313.
[120] The claims history of the insured is understandably of interest to an insurer as a troublesome claimant or one who has claimed on too may occasions in the past is not someone an insurer would, without more, be keen to have as a client. Of course, this claims history tends to have a bearing on the risk to be undertaken as it would tend to show if the insured is a good or bad risk. It may also show if the insured is a careful or careless person.
See *Becker* v *Marshall* (1922) 12 Ll L. Rep 413, where the Court of Appeal held that previous losses were material facts and ought to have been disclosed in the proposal for the policy in question. Lord Sterndale MR, *ibid,* at 414, explained the importance of such facts:

> The proposal form contains questions which go to show that the underwriters want to know not only whether they are likely to be defrauded, but whether there is sufficient in the facts to show the amount of carefulness in the custody of the property, which it is important to them to know in considering whether they will accept the insurance, and, if so, at what premium. The fact of these three burglaries obviously may be of importance in that respect.

reason for that seems to be the person who makes too many claims may not be a person with whom the insurer may find it desirable to insure either because of the fact that it tends to show that the sort of risk the proposer is insofar as the care with which he handles his own affairs, or that he may pose a moral hazard.[121] Similarly, the scruples of any insurer may be one of the things which any insured would like to know. Obvious questions which must arise here are the expeditiousness with which the insurer handles claims. Has the insurer in the past shown the lack of urgency in processing or paying out claims? Does the insurer dispute claims as a matter of course? Does the insurer impose unreasonable conditions when a claim is made? Are the claims procedures a maze of condition precedents and other unreasonable or obscure requirements? Even if the sincerity or scruples of the insurer is not in doubt, if the particular insurer is simply understaffed or poorly staffed, then any insured would think twice about taking up a policy with the insurer.

(iii) *Character traits of the insurer's staff*

All too often it is seen in the context of filling in proposal forms, the insured is caught out by unscrupulous agents who may fail to draw the attention of the insured to matters which may jeopardise an application for a policy in order to safeguard their own interests, *ie*, the commission.[122] The same concern exists even when the agent is merely careless. In such situations, it is particularly dangerous as the courts have consistently held that the agent is the agent of the insured for the purposes of filling in the

See also *Lyons* v *JW Bentley Ltd* (1944) 77 Ll L Rep 335; *Ewer* v *National Employers' Mutual General Insurance* [1937] 2 All ER 139; *Rozanes* v *Bowen*, *supra*, note 8; *Arterial Caravans Ltd* v *Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169.

[121] See *Lyons* v *JW Bentley Ltd*, *ibid*; *Ewer* v *National Employers' Mutual General Insurance*, *ibid*. See also cases on previous refusals: *Glicksman* v *Lancashire & General Assurance Co* [1927] AC 139; *Locker & Woolf Ltd* v *Western Australian Insurance Co* [1936] KB 408.

[122] See for example: *Newsholme Brothers* v *Road Transport and General Insurance Co Ltd*, *supra*, note 98, where the insurer's agent, who wrote down the answers to questions in the proposal form, made some mistakes either because he had forgotten or misinterpreted what had been told to him by the insured or deliberately in order to ensure his commission with respect to the insurance policy in question was not jeopardised. Upon a claim made by the insured on the policy, the insurer repudiated liability on the grounds that certain statements in the proposal were false. The insured contended that since the agent were told of the true facts by the insured, his knowledge ought to be imputed to the insurer.
It was held by the Court of Appeal that the insurers were entitled to avoid the policy notwithstanding the mistakes of their agent on the basis that an insurance agent who assists the insured in filling in a proposal form is the agent of the insured for that purpose.

proposal form.[123] The misconduct of the broker involved was also the centre of the *Skandia* litigation.[124]

Another possible area which requires disclosure is the criminal convictions of personnel either in the employ of the insurer or persons associated with them. In the realm of the duty owed to the insurer, the courts have consistently held that criminal convictions are material facts which are required to be disclosed.[125] Insurers may find this requirement particularly objectionable as it will invariably make bad business sense to have to disclose past convictions of employees or associates. However, this requirement does not run against the privilege against self-incrimination as all this information is sought for is to enable the insured to make an informed decision. After all, May J in *March Cabaret* v *London Assurance*[126] had pointed out:

> No one has a right to a contract of insurance ... despite the privilege of non-incrimination, which is only a privilege – or he must give up the idea of obtaining insurance at all.[127]

In any event, the fact that the insurer feels confident in the rehabilitation of his employees does not obviate the need nonetheless to allow the insured to judge for himself the risk involved, as was pointed out by McNair J in *Roselodge* v *Castle*:[128]

> I have reached the conclusion and so find that the average reasonable business man, though no doubt impressed by Mr Rosenburg's charitable act in attempting and apparently succeeding in rehabilitating a man

[123] See *Newsholme Brothers* v *Road Transport and General Insurance Co Ltd*, *ibid*; *Biggar* v *Rock Life Assurance Co* [1902] 1 KB 516; *China Insurance Co Ltd* v *Ngau Ah Kau* [1972] 1 MLJ 52; *National Employers' Mutual General Insurance Association Ltd.* v *Globe Trawlers Pte Ltd*, *supra*, note 98. It is in rare and unusual circumstances that the courts will hold other wise: see *Bawden* v *London, Edinburgh and Glasgow Society Ltd* [1972] 1 Lloyd's Rep 469; *Stone* v *Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469.

[124] Of course, at the end of the day, although the dishonesty of the broker was found by the courts, it was irrelevant as this dishonesty did not have any impact on the recoverability of the claim under the policy: it was rather the dishonesty of Mr Ballestero which triggered off the fraud exception and defeated any possible claim under the policy: see Lord Templeman, *supra*, note 55, at 384 and 387.

[125] See *Woolcott* v *Sun Alliance and London Insurance Ltd* [1978] 1 Lloyd's Rep 629; *Regina Fur Co Ltd* v *Bossom* [1958] 2 Lloyd's Rep 425; *Roselodge Ltd* v *Castle* [1966] 2 Lloyd's Rep 113; *Schoolman* v *Hall* [1951] 1 Lloyd's Rep 139; *March Cabaret Club & Casino Ltd* v *London Assurance* [1975] 1 Lloyd's Rep 169; *Reynolds* v *Phoenix Assurance Co Ltd*, *supra*, note 101.

[126] *Ibid*.

[127] *Ibid*, at 177.

> who has paid his penalty, would appreciate that Mr Morfett remained or might remain a security risk and that underwriters should have been given the opportunity to decide for themselves whether the story as a whole was one which would have influenced them in accepting the risk as offered for fixing the premium.[129]

Of course, all this may seem particularly harsh on the insurers. They might bemoan the effect all this disclosure will have on their business. But, one must bear in mind the obverse situation where insurers have never hesitated in relying on this ground in the context of the duty owed to them, nor has the courts been particularly sympathetic towards insured persons who find their past consequently under the microscope. There is no reason why equality and consistency of treatment in this respect should not prevail.[130]

(iv) *Education of the insured?*

One of the situations over which the courts are constantly given to beating their chests and flailing their arms in despair is where the unsuspecting insured finds himself trapped by the terms of the policy which he does not understand or has no notice of:

> It has often been pointed out by judges that it must be very puzzling to the assured, who may find it difficult to fit the disjointed parts together in a way as to get a true and complete prospectus of what their rights and duties are and what acts on their parts may involve a forfeiture of the insurance. An assured may find himself deprived of the benefits of the policy because he has done something quite innocently but in breach of a condition, ascertainable only by the dovetailing of scattered portions.[131]

[128] *Supra*, note 125.

[129] *Ibid*, at 133.

[130] Moreover, the concept of spent convictions is alien to Singapore where there is no equivalent of the UK Rehabilitation of Offenders Act 1974. See also *Tan Kiang Kwang* v *PP* [1996] 1 SLR 280, at 286, where Yong CJ categorically stated that the concept of spent convictions has no application in Singapore. In fact, in *Leong Mun Kwai* v *PP* [1996] 2 SLR 338, at 340-341, Yong CJ specifically considered the application in Singapore of the UK Rehabilitation of Offenders Act 1974, by virtue of s 5 of the Criminal Procedure Code (Cap 68, Rev Ed 1985), and rejected the suggestion that it could be so received into Singapore law.

[131] *Per* Lord Wright in *Provincial Insurance Co* v *Morgan* [1933]AC 240, at 252. See also comments of Fletcher Moulton LJ in *Joel* v *Law Union*, *supra*, note 18, at 885:

> Insurers are thus in the highly favourable position that they are entitled not only to *bona fides* on the part of the applicant, but also to full disclosure of all knowledge possessed

It is clear that there is judicial recognition of the need for the general education of the insured.[132] The first suggestion, of course, would be clearer draftsmanship. Most of the standard forms come in print which would gladden the hearts of many a optometrist. Too many endorsements clutter up the policies, and a fair bit of "dovetailing" of provisions found at various remote corners of the policy is required before certain duties or rights can be determined. Even then, obscure language and technical terms may confuse the insured. A good start would be to provide a clear and comprehensible copy of the policy and the duty of disclosure with regards to the recoverability of claims should perhaps also entail the insurer going through with the insured, as well as a full explanation thereof, the critical terms of the policy, the breach of which may result in the forfeiture of the benefits of the policy – warranties, the various categories of facts which require disclosure,[133] conditions precedent as well as special terms delimiting the risk.[134]

> by the applicant that is material to the risk. And in my opinion they would have wise if they had contented themselves with this. Unfortunately the desire to make themselves doubly secure has made them depart widely from this position by requiring the assured to agree to the accuracy, as well as the *bona fides*, of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy ... I wish I could adequately warn the public against such practises on the part of insurance offices.

[132] See also Zindel, "Developing Duties of Disclosure in Insurance Contracts" (1994) NZLJ 142, where the author suggests that the duty of utmost good faith should extend to the general education of the insured as well as perhaps clear drafting of terms in language discernible by laymen. See also Kelly, "The Insured's Rights in relation to the Provision of Information by Insurers" (1989) 2 In LJ 45, at 51-55.

[133] It is submitted that the mere compliance with S 24(4) of the Insurance Act (Cap 142, 1994 Rev Ed), is not sufficient to discharge this duty. S 24(4) reads as follows:

> No Singapore insurer shall use in the course of carrying on insurance business in Singapore a form of proposal which does not have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy.

Compliance with this section does not go anyway in explaining the substance of the warning, which is the common problem faced by befuddled insureds.

[134] *Eg*, it has been held that the duty of an insurance broker extends to ensuring that the insured is adequately or effectively covered by the policy taken out: *McNealy* v *The Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep 18. There is no reason why this could be extended to the insurer as well as part of his duty of utmost good faith.

The plaintiff approached the defendant, an insurance broker, to arrange for motor insurance. The broker suggested that he insure with the Pennine Insurance Co Ltd as it offered cover for low premium rates. Such low cost insurance was, however, limited in scope in that cover was not afforded to certain classes of drivers including musicians. The plaintiff was a property repairer, who worked as a musician on the side. The defendant made no attempt to inform the plaintiff of the limited scope of the policy, merely asking the plaintiff as to his occupation.When the plaintiff found that he could not recover under the policy, he sued

All the above suggestions may seem rather alien to the duty of disclosure as we recognise it today. However, that is only because the duty has been developed thus far mainly as the duty owed to the insurer. Surely, when formulating such a duty owed to the insured, account must taken of the weaknesses of the insured insofar as knowledge is concerned. The insured requires protection from the insurers imposing terms on the insured which is not brought to the attention of the latter. This was pointed out by Farwell LJ in *In re Bradley, Essex & Suffolk Accident Indemnity Society:*[135]

> Contracts of insurance are contract in which uberrima fides is required, not only from the assured but also from the company assuring. It is the universal practice for companies to prepare both the form of proposal and the form of policy: both are issued by them on printed forms kept ready for use; it is their duty to make the policy accord with and not exceed the proposal, and to express them in clear and unambiguous terms ... it is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay. ...
>
> It is ... incumbent on the company to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance.
>
> ... it is scarcely honest to induce a man to propose on certain terms, and then to accept that proposal and send a policy as in accordance with it when such policy contains numerous provisions not mentioned in the proposal, which operate to defeat any claim under the policy, and all the more so when such provisions are couched in obscure terms.[136]

the broker for the amount claimed.
The court found the broker liable as he had failed to do all that was reasonable to ensure that the plaintiff was properly covered. With his knowledge that the insurer refused to cover certain risks, the broker was under a duty to the insured to ask whether or not he was affected by this.
Similarly, if insurers have certain special terms like this, they should bring them to the attention of the insured. It should not be the case that insurers may take on risks without clearly indicating to the insured these pitfalls, and then seek to avoid liability when a loss occurs.

[135] [1912] 1 KB 415.

Perhaps a further possibility where the insurer ought to volunteer information is where the insurer is aware of the sort of risk which the insured wishes to have covered. This is especially the case where the insured relies on the former for advice. The insurer should be under a duty to ensure that the insured is fully apprised of the various types of policies which may suit his purpose.[137]

A last interesting question may be posed here: Does the duty of disclosure of the insurer extend to the ancillary matters which some policies relate to. Good examples would be endowment funds, and, that new kid on the block, investment-linked policies (where the dividends paid out are linked to investments taken out in stocks and shares). With regard to endowment funds, the insured may well be interested in knowing how much money above the promised rate of return goes to the insurer as profits. In respect of the investment-linked policies, it may be a question of whether the insurer owes a duty to educate a proposer as to the risks involved, as well as the possible windfalls. Perhaps information on the profile of the portfolio of shares should also be made available. These are questions which the law will have to address in light of new insurance packages coming on to the market.

B. C*ircumstances which are Material to the Nature of the Risk.*

This category speaks for itself. It has been argued above that any fact which tends to affect the risk, regardless of whether it increases or lowers it, to be placed with the insurer, if known to the insurer, ought to be disclosed to the insured under his duty of disclosure.[138]

VI. Another Look at Damages as a Remedy

When the Court of Appeal sounded the death-knell for the noble aspirations of Steyn J in imposing equality in the duty of disclosure between that owed to the insurer and the insured respectively, a collective moan went up amongst academics.[139] The despair was made worse by the fact that the promise of

[136] *Ibid*, at 430-431.

[137] See Clarke, *supra*, note 101, at 552-553.

[138] See main text beginning with that corresponding to *supra*, note 107, under heading "*How applicable are the exemptions from disclosure applicable?*"

[139] See Trindade, "Commercial Morality and the Tort of Negligence" (1989) 105 LQR 191; Allen, "Non-Disclosure: Hairshirt or Halo?" (1992) 55 MLR 96; Pincott, "Growing Pains: Two English Decisions on the Duty of Good Faith" (1988) 1 In LJ 27; Davenport, "The Duty of Disclosure" [1989] LMCLQ 251; Larkin, "Uberrima Fides – Quo Vadis? Where

a new horizon was dashed by a decision which was "at least in part, very badly reasoned and leaves the distinct impression of a timid judiciary. It might have been the start of the exciting development of a broad duty of good faith in insurance law, but, sadly, that seems unlikely now to happen".[140]

The point that hurt the most was the rejection of the bold application of *ubi jus ubi remedium* by Steyn J. The Court of Appeal was very concerned with ensuring equality between the insurer and the insured, as can be seen by their "prudent insured" requirement in the context of materiality. However, the main thrust of the reasoning of Steyn J was lost on them: equality of treatment is achieved not merely by applying the same standard of disclosure to both parties, or by providing both parties with the same remedies alone. Equal incentive to offer up material information and equal protection from the failure to do so is only achieved when both parties are treated equally, not just in form, but in substance. That demands an effective remedy.

For the insurer, avoidance of the policy is effective in protecting his interests. He is then not subject to the risk which he had been misled into accepting by the non-disclosure. The prejudice he might have otherwise suffered is remedied. However, the same cannot be said for the insured. If he suffers prejudice by reason of the breach of the insurer's duty of disclosure, for him to avoid the policy and claim back the premiums paid will be sheer folly in most situations. Where the risk has not manifested itself, it may make sense for the insured to avoid the policy, take back the premiums and take out a policy elsewhere. However, where a loss has occurred, unless the prejudice the insured suffers is by way of losing all benefits under the policy or the loss which has occurred is less than the premiums paid, why would any sane insured person not cut his losses, simply pocket the monies paid out under the policy and fume privately.

The fact that Lord Mansfield, when stating the principles in *Carter* v *Boehm,*[141] did not contemplate damages as a remedy for the insured is surely explicable in the context of his statements. His Lordship appeared only to contemplate a situation where avoidance would be sufficient to remedy the breach -– where no loss had occurred under the policy. In his illustration, the ship had already completed its voyage safely. What sort of prejudice did the insured suffer there beyond having paid premiums for a risk which had ceased? Of course, there can be no talk of damages in such a situation because there has been no prejudice which has been suffered by the insured that can only be remedied by awarding damages.

Thus, on principle, if what Slade LJ enunciated about "adapting the well

to from here? (1995) 7 Bond LR 18.

[140] Birds, *supra*, note 10, at 117.

established principles relating to the duty of disclosure falling upon the insured to the obverse case of the insurer himself" and that "due account must be taken of the rather different reasons for which the insured and the insurer require the protection of full disclosure"[142] is to have any credibility, a reconsideration of the question of damages has to be made by the courts. If not, the duty of disclosure owed to the insured would be a mere token of little, or no, value.

A. *Duty of Disclosure – Creature of Equity?*

The first reason for rejecting damages as a remedy for the breach of duty of disclosure was summarised by May LJ in *The Good Luck*[143] as follows:

> First, the powers of the Court to grant relief when there has been non-disclosure of material fact (sic) stemmed from the jurisdiction originally exercised by the Courts of Equity to prevent imposition. Since duress and undue influence as such gave rise to no claim for damages, the Court saw no reason in principle why non-disclosure as such should do so.[144]

The conclusion as to the supposed equitable origin of the duty of disclosure was arrived at, by the Court of Appeal in *Le Banque Financiere* v *Westgate*, based on *dicta* by the Court of Appeal in *Merchants and Manufacturer Insurance Co* v *Hunt & Thorne*.[145] Considering that Lord Mansfield was sitting in a common law court when he expounded the rules as to the duty of disclosure, it is not surprising that it has led one commentator to characterise the Court of Appeal's reasoning as "simply fallacious".[146]

Arguably, the view that the duty of disclosure is of equitable origin is

[141] *Supra*, note 4.
[142] *Supra*, note 50, at 545.
[143] *Supra*, note 60.
[144] *Ibid*, at 263.
[145] [1941] 1 KB 295, at 318, where Luxmoore LJ opined that:

> Whatever may be the position with regard to non-disclosure, as to which I say nothing. I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, depends not only any implied term of the contract but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition.

Although Luxmoore LJ, as well as Scott LJ (who had agreed on this point, see *ibid,* at 312) found it unnecessary to decide this point, the Court of Appeal in *Le Banque Financiere* v *Westgate*, *supra*, note 50, felt that the right to avoid a contract *uberrimae fidei* in the event of non-disclosure must be founded on the same jurisdiction.

[146] Birds, *supra*, note 10, at 116. See also Bennet, *The Law of Marine Insurance* (1996), at 74, where the author points out:

> ... reliance upon the equitable power to prevent imposition is misplaced since Lord Mansfield enunciated the duty of utmost good faith as a doctrine of the common law,

based on the similarity between the duty and the principles and relief espoused by the Courts of Equity. The first thing which may give rise to an initial impression that the duty is indeed founded on such equitable jurisdiction comes from the fact that the duty of disclosure is based on and gives effect to the obligations of the parties to a contract of insurance to act in good faith towards each other.[147] This preoccupation with good faith is also a characteristic peculiar to equity. In fact, the duty to act in utmost good faith finds expression in the duties imposed on parties to a fiduciary relationship. Coupled with this uncanny resemblance is the remedy enunciated by Lord Mansfield in *Carter* v *Boehm*[148] for the breach of this duty: setting aside the bargain. This bears a fair bit of similarity with the relief traditionally granted by equity in cases of undue influence and unconscionable bargains: setting aside the contract. Another fact which have misled the Court of Appeal to come to the conclusion they did is the historical lack of authorities confirming the availability of damages for the breach of this duty. However, the most telling objection to this line of reasoning, which was overlooked by the Court of Appeal, was that *Carter* v *Boehm*[149] was a decision of a common law court over 100 years prior to the fusion of law and equity.[150]

Although not directly relevant to the question, once one accepts that the reasoning behind holding that the duty of disclosure is but an expression of equitable principles, it remains to be seen as to the origins of the duty

> a duty which extended at common law to both non-disclosure and misrepresentation. Whatever the position with respect to the general law of contract, with respect to contracts *uberrimae fidei* relief was and is available at common law.

Of course, there are commentators who are more sympathetic to the confusion which may have arisen in the Court of Appeal due to the hybrid nature and characteristics of the duty of disclosure: see Davis, "The Origin of the Duty of Disclosure under Insurance Law" (1991) 4 In LJ 71, at 71:

> The legal debate on the nature of the duty somewhat resembles that of the early zoologists when first confronted with the duck-billed platypus. It presented a similar dilemma. It had fur like a mammal, a bill like a duck, webbed feet and laid eggs. Was it a bird, a mammal or, some contended, merely a clever hoax? Of course we know the duty is not a hoax, but to which family does it belong? Is it an offspring of contract, a common law duty or, instead, a creation of equity? Certainly its feature find ready analogy in each of these areas of law. Like the platypus, however, it is these similarities with unrelated categories that give rise to the original confusion.

[147] See Lord Mansfield in *Carter* v *Boehm*, *supra*, note 4, at 1910 and 1911 respectively:

> 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....
>
> The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

[148] *Supra*, note 4.

[149] *Ibid.*

of disclosure itself. It has been suggested that the duty of disclosure really has its roots in civil law and was introduced into English law by trade with the Italian city-states.[151] As has been pointed out, the Roman remedy for non-disclosure bears close resemblance to the *uberrimae fidei* doctrine as enunciated by Lord Mansfield.[152] Despite four centuries of Roman occupation, English law did not appear to be influenced by that of Rome to any discernible extent. By contrast, the continent and the Italian city-states never quite lost touch with the ancient Roman *Corpus Juris*. During the fifteenth and sixteenth centuries, when more trading relations were established with the rest of Europe, it is surmised that the notions of good faith crept into English law either through the Admiralty Court or the incorporation of the law merchant by the common law courts of the eighteenth century.[153]

In any event, even if the duty of disclosure could be said to have sprung from the courts of equity, the fact that damages were not available for a breach of the duty, at a time well before the Judicature Acts, it is not a particularly convincing argument that it should be remain so some 100 years after the fusion of the common law and equity.[154] Be that as it may, there are also suggestions that the Courts of Equity have always had the inherent

[150] See Davis, *supra*, note 146, at 73.

[151] Davis, *ibid*, at 74-80.

[152] There are three respects which Davis, *ibid*, at 75-76, relies on:

> First, the common law doctrine does not require proof of fraudulent intent. Second, under the common law it is not necessary to prove the non-disclosure had induced that particular insurer to enter into the insurance contract. Finally, it is not dependent on the existence of a fiduciary relationship between the insurer and the insured. The main difference between the 2 doctrines lies in the fact that the non-disclosure must, under the common law, relate to *material* facts. But this may be overstating their differences, as under the Roman doctrine the aggrieved party still had to establish that he had been misled and one could hardly be misled unless the fact in question was in some sense material.

[153] See Davis, *ibid*, at 76. The Court of Admiralty was responsible for the early development of commercial law in England since it administered maritime law, and later took over the jurisdiction exercised by the Star Chamber over disputes where a foreign party was involved. Of course, it helped that the Court of Admiralty applied the civil law and procedure which would have been much familiar to these foreign merchants: see Holdsworth, *A History of English Law* (3rd Ed, 1945) Vol. 5, at 128. By the later part of the 16th century, the common law courts slowly but surely began to encroach upon the jurisdiction of the Court of Admiralty when it developed a fair measure of expertise in commercial matters, and when merchants preferred its relatively expedited procedure as compared to the lengthy civil law procedures of the Court of Admiralty: see Holdsworth, *ibid*, at 152.

[154] See Davenport, *supra*, note 139, at 258:

> Whatever may have been the position towards the end of the 18th century (and Lord Mansfield seemed to have considered non-disclosure in *Carter* v *Boehm* without mentioning the special remedies available in the Courts of Equity), 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. English law faces many

power to award damages but refrained from doing so unless there was no remedy at law.[155]

B. *Conceptual Difficulties – Irrelevance of Particular Insurer or Insured.*

The second ground for rejecting the possibility of damages for a breach of the duty of disclosure was summed up by May LJ in *The Good Luck*[156] as follows:

> Secondly, the decision in *Container Transport International* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd's Rep. 476 established that the where an underwriter seeks the remedy of avoidance of the policy, the actual effect of the non-disclosure on his mind is irrelevant and what matters is the effect of the non-disclosure on the mind of a notional prudent underwriter. This principle illustrated one of the conceptual difficulties involved in upholding the remedy by way of damages.[157]

The first thing to note about this ground for rejecting the right to damages

> challenges today. 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 for over a century?

[155] See Spry, *Equitable Remedies* (4th Ed, 1990), at 608; McDermott, *Equitable Damages* (1994) at Chapter 1; McDermott, "Jurisdiction of the Court of Chancery to Award Damages" (1992) 108 LQR 652; Michalik, "The Availability of Compensatory and Exemplary Damages in Equity" (1991) 21 Victoria U of Wellington LR 391.

[156] *Supra*, note 60.

[157] *Ibid*, at 263. Slade LJ in *Le Banque Financiere* v *Westgate*, *supra*, note 50 at 530, had put it thus:

> ... the decision in *CTI Oceanus* (sup) establishes that where an underwriter is seeking the conventional remedy of avoidance of the policy, the actual effect of the non-disclosure on his mind is irrelevant. The effect of the non-disclosure on the mind of the notional prudent underwriter, judged objectively, is the relevant criterion. The same approach must, in our judgment, apply in a case where an insured is seeking avoidance of the policy. The Court will be concerned not so much with the effect of the non-disclosure on *his* mind as that of the mind of prudent notional insured in his position. Mr Justice Steyn right recognized the difficulties involved in translating this approach to a case where the insured is seeking damages. He said (at 96):
>
> > Assuming therefore that ... the test is the effect on the notional insured only, it could legitimately be asked how *damages* could be awarded if the non-disclosure had no effect on the insured. In my judgment, the only conceivable answer is that the requirements for avoidance are less than for an action in damages.
>
> We agree that this is the only conceivable answer, but think that the problem posed by the learned Judge is another illustration of the conceptual difficulties involved in

is that the Court of Appeal keeps harping on the fact that in *CTI* v *Oceanus*,[158] the test laid down for a breach of the duty of disclosure, insofar as the test of materiality is concerned, is concerned not with the particular insurer at all – all that is relevant is the mind of the notional prudent insurer. But surely, a different test may be devised for the purposes of determining, not the question of materiality, but the question of whether damages should lie for the breach of the duty of disclosure.[159] It may well be true that this may present a slightly anomalous result that a fact may be material in the eyes of the prudent insurer, but it may not be so in the eyes of the particular insurer and as such, damages may not lie.[160] This is not as queer a result as it might at first sight appear as the converse is true with regards to avoidance of the policy: it matters not that the particular insurer would not have liked to know about the fact, or he would have waived it anyway given the opportunity, as long as the prudent insurer would have been "influenced" by the fact in his "decision-making process". Moreover, it is not particularly satisfactory that the Court of Appeal should play on the "conceptual difficulties" that would arise from the *CTI* v *Oceanus* test of materiality, but shy away from enunciating fully whatever they may be.[161]

Of course, all this is now purely academic as the House of Lords in

a decision that a remedy by way of damages lies in this class of case.

[158] *Supra*, note 24.

[159] See Clarke, *supra*, note 101, at 606:

> An alternative, conceivable and simpler answer, it is submitted, lies in the basic rule that a claimant cannot recover damages unless and to the extent that he has suffered loss, which has been caused by the breach in question. The grounds on which the law allows a contract to be rescinded or terminated and those on which damages are awarded are quite different ... and difficulties in the one area should not be allowed to obstruct relief in the other.

[160] This, of course, is on the assumption that we adopt and apply Steyn J's test, cited at *supra*, note 157.

[161] See also Birds, *supra*, note 10, at 116:

> The second referred to the fact that in relation to avoidance, the effect on the actual insurer (of non-disclosure by the insured) or the actual insured (of non-disclosure by the insurer) is irrelevant. So there would be difficulties in translating this approach to a case where the insured is seeking damages. This may be admitted, but it hardly seems an insuperable difficulty if in fact the actual insured (or for that matter insurer) can prove an actual loss arising from the non-disclosure.

Contra Yeo, "Of Reciprocity and Remedies – Duty of Disclosure in Insurance Contracts", (1991) 11 LS 131, at 151:

> Additionally, the Court of Appeal has noted that the causal connection approach would only spawn further discord in the general rule of non-disclosure. In the normal position where avoidance is the remedy sought for, there is no necessity for any enquiries into the effect on the particular insured and the connection between breach and loss; however, should damages be accorded, then a *nexus* must first be established so as to satisfy the

Pan Atlantic v *Pine Top*[162] has overruled *CTI* v *Oceanus*[163] insofar as it held that the impact of a non-disclosure or misrepresentation on the particular insurer or insured is irrelevant for the purpose of determining whether there has been a breach of the duty of utmost good faith. Since the basis for the "conceptual difficulties" has been removed, so must be this particular hurdle to the right of damages for a breach of the duty: *cessante ratione legis cesset ipsa lex*. Now that the test for a reliance on the breach of the duty of non-disclosure requires not just that the innocent party show the effect on a prudent insurer (or insured), but also that the non-disclosure had a decisive influence on the particular insurer (or insured) himself, the objection that it would be anomalous to adopt different tests depending on the remedy asked for no longer stands.

C. *Omission of Right to Damages in Marine Insurance Act 1906*

The third ground for objecting to the suggestion that the Court can create a tort for the breach of the duty of disclosure was put thus by May LJ:

> ... the clear inference from the Marine Insurance Act, 1906 is that Parliament did not contemplate that a breach of the obligation of utmost good faith would give rise to a claim to damages in the course of such contracts.[164]

This ground for the refusal to grant damages is summed up simply: the

> remoteness rule, following which an enquiry into the particular mind of the aggrieved party has also to be conducted in order to ascertain the flow of causation. The resulting position for the latter scenario would thus be extremely untidy and highly unsatisfactory as different remedies would accordingly require different sets of rules.

[162] *Supra*, note 5.

[163] *Supra*, note 24.

[164] *Supra*, note 60, at 263. See Slade LJ in *Le Banque Financiere* v *Westgate*, *supra*, note 50, at 550:

> Thirdly, s 17 of the 1906 Act, which imposes reciprocal obligations of good faith on both parties to such a contract, specifically gives the injured party the remedy of avoidance of the contract (and no other remedy). Likewise, s 18(1), which specifically defines the duty of disclosure falling upon the assured, concludes by stating the insurer's remedy as follows:
>
> If the assured fails to make such disclosure the insurer may avoid the contract.
>
> There is not a suggestion in any of the succeeding provisions of the 1906 Act that a breach of the obligation of good faith will, as such, give rise to a claim for damages. S 91(2), it is true, provides that –
>
> > ... the rules of the common law including the law merchant, save in so far as they are inconsistent with the provisions of this Act, shall continue to apply to contracts of marine insurance.
>
> Nonetheless, we think the clear inference from the 1906 Act is that Parliament did not

Marine Insurance Act, 1906 shows that Parliament has, by necessary inference from its failure to mention damages, and its express mention of avoidance, provided that the only consequence or remedy available for a breach of a party's duty of disclosure is that of avoidance of the contract of insurance.

There are certain preliminary objections to this line of reasoning which are apparent on first glance. The first is the line of reasoning that the Court of Appeal uses: since the thing asked for is not provided for, whilst the other is expressly mentioned, it must *a fortiori* mean that the latter is available whilst the former is, by inference, not available. Surely, this sort of logic is equally applicable to the duty of disclosure owed by the insurer to the insured. Since Section 18 of the Marine Insurance Act, 1906 expressly provides for the duty owed by the insured to the insurer as well as the remedy of avoidance in the event of a breach, then it must follow, also by necessary implication, that although Section 17 of the same Act[165] seems to provide that the duty of utmost good faith is reciprocal, the failure of subsequent sections to expressly mention the duty of disclosure on the part of the insurers as well as remedies available to the insured for the breach by the insurer thereof, it is merely declaratory and the duty of disclosure is not owed by the insurer to the insured. This is clearly not the case.

Moreover, the Court seems to place too much emphasis on Sections 17 and 18 of the Act, which merely codifies Lord Mansfield's statements in *Carter* v *Boehm*.[166] The failure of Lord Mansfield to mention damages as a possible alternative remedy is equally explicable on the basis that it was not within his contemplation of a situation where there has been real loss suffered by the insured due to the breach of disclosure by the insurer.[167] Moreover, the failure to mention damages as a remedy may also be due to the historical context in which the Act was passed. As has been pointed out by commentators, the Act was purely a codification of the law as it then developed. Again, this may be explicable on the basis that at that point in history in the development of the duty of disclosure, there had been no need nor occasion to consider the issue of damages as an appropriate

contemplate that a breach of the obligation would give rise to a claim for damages in the case of such contracts. Otherwise it would surely have said so. It is not suggested that a remedy is available in the case of non-marine policies which would not be available in the case of marine policies.

[165] Which declares:

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.

[166] *Supra*, note 4.

remedy.[168]

Another interesting point which could be made is that the possible reason why Parliament did not provide for damages as a remedy for the insurer's breach of his duty of disclosure to the insured is simply that since it had failed to make specific provision in the Act for the scope or test for the duty of disclosure from the perspective of the insurers, it could hardly be expected to lay down the remedy for a breach thereof. Since the court was ready to reconstitute the test of materiality as found in Section 18(1) to suit the needs of the insured, would it not be the next logical step to do the same with regards to the remedy available to the insured?[169]

A further point which could be made is that when the Court of Appeal was invited to make new ground on the basis that Section 91(2) preserves the continued application of the common law in so far as they are not

[167] See Bennet, *supra*, note 146, at 74.

[168] See Kelly, *supra*, note 146, at 61 (albeit in a slightly different context):

> Finally, the court's reliance on the provisions of the Marine Insurance Act 1906 (UK) entirely ignores the historical context in which that Act was passed. At that time there was no action for negligent mis-statement causing purely economic loss. Nor was the need for such an action recognised. That need was only recognised and acted on more than half a century later. For that reason, the court should have been reluctant to read into the 1906 Act an inference excluding a remedy not yet devised – particularly when the Act itself preserves common law rules except in so far as they are inconsistent with the express provisions of the Act.

See also Birds, *supra*, note 10, at 116:

> The Court of Appeal's third reason was based on the fact that the Marine Insurance Act 1906 did not refer to damages being available for a breach of the requirement of utmost good faith (section 17) or a non-disclosure by the insured (section 18). With respect, this is very poor reasoning and it is surprising that the House of Lords was content to adopt it. The 1906 Act was merely a codification of the law as it had developed as at a particular date. In those circumstances, the statement that if Parliament had contemplated damages as a remedy, "it would surely have said so" is, with respect, nonsense.

See also Clarke, *supra*, note 10, at 606.

[169] See Yeo, *supra*, note 161, at 149:

> It may, however, be argued that the appellate judges' line of reasoning is not altogether that convincing here. One can equally contend that just as legislature had omitted in s 18(1) to formulate a test for the insurer's duty of disclosure, it could there not be expected to have followed up on the matter of devising a suitable remedy to redress the breach of duty by the insurer. Hence, since the appellate courts (having recognised the fact that the reasons for which the insurer needed the protection of full disclosure were different from those of the insured) were prepared to improvise and tailor the existing test of materiality with respect to the duty of the insured so as to suit the converse situation where the duty was to be imposed on the insurer, they should likewise have adapted the remedies accordingly as well (especially since they were very much aware that, as had been amply demonstrated in the fact situation of the present *Westgate* case, very often avoidance could hardly serve as an adequate remedy to safeguard the insured's

inconsistent with the provisions of the Act, they brusquely brushed it aside. This approach has to be now held in contrast to the House of Lords' approach in *Pan Atlantic* v *Pine Top,*[170] where Lord Mustill did not find himself constrained by the express lack of mention of inducement of the particular insurer in Section 18(1) when he surveyed the development of the common law. It may perhaps be ventured that the mere failure by the legislature to mention a particular matter in the Act will foreclose any further discussion or argument on that point.[171]

D. *Hardship Caused by Award of Damages*

This ground has been summed up by May LJ:

> Fourthly, since in the case of a contract uberrimae fidei the obligation to disclose a known material fact is an absolute one, and attaches with equal force whether the failure is attributable to –
>
> > ... fraud, carelessness, inadvertence, indifference, mistake, error of judgment or even [the] failure to appreciate its materiality
> >
> > [Hardy Ivamy's General Principles of Insurance (5th ed) p 156] ...
>
> a decision that the breach of such an obligation in every case and by itself constituted a tort, if it caused damage, could give rise to great potential hardship to insurers and even more, perhaps, to insured persons ...[172]

This ground for refusing damages is really based on two related lines of

rights).

[170] *Supra*, note 5.

[171] This is especially since the Act does not purport to be an exhaustive codification of the law relating to insurance: see Lord Mustill, *supra*, note 5, at 549:

> ... the Act ... did not set out to be a complete codification of existing law ...

[172] *Supra*, note 60, at 263, citing Slade LJ, *supra*, note 50, at 550 where Slade LJ goes on to explain:

> 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. In many cases warranties given by the insured in the proposal form as to the truth of that statements made by him might afford the insurers the same remedy, but by no means in all cases. In our judgment, it would not be right for this Court by way of judicial legislation to create a new tort, effectively of absolute liability, which could expose either party to an insurance contract to a claim for substantial

thought. Firstly, the Court expressed discomfort with the fact that since the duty of disclosure does not admit of any plea of mere inadvertence or any other excuse, it would be in effect creating a tort of strict liability. The second seems more to answer Steyn J's point, in the lower court, that the insured is the one who is short-changed by the present incarnation of the duty of disclosure and the remedies available to the innocent party for such a breach – it could cause great hardship for an insured who has innocently breach his duty of disclosure if he were to find himself subject to a claim for damages.

While there has been some support for this particular reason,[173] it is submitted that it is not entirely convincing. To begin with, the Court's valiant attempt to quickly brush aside the situation with regards to warranties does not address the question with regards to other types of contractual terms. All contractual obligations are of absolute liability in any event, and yet no suggestion has ever been made that they should not be so since they would cause grave hardship to the guilty party. In any event, it is difficult to see how, particularly from the perspective of the insured, an award of damages would cause more hardship than that of avoidance of the policy by the insurer.[174]

The other point taken by the Court is that the insured may find himself subject to a claim during the currency of the policy, before a loss has occurred, for the shortfall in premiums charged caused by his non-disclosure. No doubt this example raised by the court is to raise particular sympathy for the plight of the insured caught in such circumstances in order to convince us that the right to damages would indeed lead invariably to harsh results. Again, one fails to see the difficulty here. It is not an absolute truth that

damages in the absence of any blameworthy conduct.

[173] See Bennet, *supra*, note 146, at 74-75. See also Clarke, *supra*, note 101, at 606-607.

[174] Particularly in the event where a loss has occurred. Surely, the insurer cannot have his cake and eat it: if he opts to sue for damages, surely it must be that the policy shall continue and in which case, the insured will be covered for the loss. This, of course, is the case other than the situation where the insurer can prove that he has incurred expenses in accepting the risk, *eg*, where he has paid for a survey of the subject matter of the insurance as was contemplated in Steyn J's illustration of the survey of the rig. However, short of that, it is really rather difficult to contemplate a situation where a claim for damages would lie where the insurer suffers no prejudice beyond being induced into underwriting a risk which he would otherwise have taken up – avoidance would be the natural remedy.

See also Birds, *supra*, note 10, at 116:

> Finally, the court referred to the fact that the damages remedy would have to be reciprocal and would cause hardship because of the draconian nature of the duty of disclosure, not being dependent on fault at all. This is somewhat more convincing but not wholly so. After all, a party in breach of contract can be liable in damages to the other party

the insured will always bear the brunt of claims for damages. In a slightly different situation where the insured loss has materialised, no insured would not happily pay up the difference in premiums if the insurer should desire not to avoid the policy. In any event, it is not as shocking as the court appears to think that the insured should have to make up for the shortfall even when the risk has not crystallised – it is only fair that the insured should pay in full for the cover he has sought.[175]

VII. Conclusion

Although much progress has been made by the courts in recognising the duality of the duty of utmost good faith, much work remains to be done. The duty of disclosure imposed on the insurer, as defined by the courts thus far, are still in the infancy of its development as a distinct concept. Admittedly, the foundation is there, but it remains to be seen how the rest of the house will be constructed to shelter the insured from the full acerbity of the inequality of information in any insurance contract.

The other lingering problem, which is much more serious, is the question of appropriate remedies for the breach of this duty. The courts will have to acknowledge that equality of treatment between the insurer and the insured does not mean that they both should be limited to the same remedy. Equality must be looked from the perspective of equality of the possibility of adequate compensation by the remedy allowed. Until that is recognised by the courts, the lament of Nicholls VC in the Court of Appeal in *Pan Atlantic* v *Pine Top*[176] will ring in our ears for some time to come:

> Justice and fairness would suggest that when the inadvertent non-disclosure came to light what was required was an adjustment in the premium or, perhaps, in the amount of cover. Those are not options available under English law. The remedy is all or nothing. The contract

without any fault or other blameworthiness at all.

[175] See Yeo, *supra*, note 161, at 150:

> The scenario that the appellate court painted to illustrate this point revolved around an insured who had innocently failed in his duty but was nevertheless rudely shocked to learn of the insurer's claim against him for a substantially increased premium by way of damages even before any crystallisation of the risk; but then, 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.

of insurance is avoided altogether, or it stands in its entirety. This is not the only field in which the English law still seems to adopt a fairly crude, all-or-nothing approach, when what is needed is a more sophisticated remedy more appropriate, and in that sense more proportionate, to the wrong suffered.[177]

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[176] [1993] 1 Lloyd's Rep 496.
[177] *Ibid*, at 506.

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