marine risks,[96] and therefore the passing of this statute still left insurances on chattels against non-marine risks subject only to the common law and accordingly unfettered by any prohibition against wagering transactions.

1-029 It has been held that the Act does not apply to indemnity insurances but only to contingency insurances which provide for the payment of a specified sum upon the happening of an insured event, such as life and accident policies.[97]

1-030 The Life Assurance Act 1774 was not intended to prohibit wagering, but only to prohibit wagering under the cloak of a mercantile document which purported to be a contract of insurance.[98] Contracts therefore in the form of an ordinary policy of insurance are within the Act, although not strictly contracts of insurance.[99] A policy made out on a printed form appropriate to marine policies to pay a total loss in the event of peace not being declared between Great Britain and Germany on or before March 31, 1918, was held to be an assurance within the Life Assurance Act 1774, but not within the Marine Insurance Act 1906.[100] Contracts not in the form of a policy are not within the Act, although they may incidentally fulfil some of the objects of a contract of insurance.[101] An advertisement issued by the proprietors of a medical preparation called "The Carbolic Smoke Ball" contained a promise to pay £100 to any person who might contract influenza after having used the ball. Although the acceptance of that offer created a binding contract it was not a policy of insurance and therefore not subject to the provisions of the Life Assurance Act 1774. Lindley LJ said: "You have only to look at the advertisement to dismiss the suggestion."[102]

1-031 **When interest must exist.** The Life Assurance Act 1774 is very differently worded from the Marine Insurance Act 1745. Both alike prohibit policies made by way of gaming or wagering, but here the similarity ends. The Act of 1745 prohibited policies that made "interest or no interest or without further proof of interest than the policy", and that was construed as requiring the contract to be a contract to pay on interest subsisting at the date of the loss, and no other interest was required. The Act of 1774 provides that no insurance shall be made on any event wherein the insured "shall have no interest" and "no greater amount shall be recovered than the amount or value of the interest". Those words have been construed in relation to a life policy as requiring interest to be shown only at the date of the contract and as limiting the amount recoverable to the amount of that interest, without any reference to the interest or amount of interest at the date of the loss.[103] The Act deals with all contracts of insurance to which it applies, on exactly the same footing, and the

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[96] *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E. & B. 870. As to what may be considered insurances on "chattels", see para.1-042, below.

[97] *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 A.C. 199 at 211, preferring the dicta of Kerr LJ in *Mark Rowlands Ltd v Berni Inns Ltd* [1986] Q.B. 211 at 227 to those of Lord Denning MR in *Re King, deceased* [1963] Ch. 459 at 485. See paras 1-165 to 1-166, below.

[98] *Good v Elliott* (1790) 3 T.R. 693; *Paterson v Powell* (1832) 9 Bing. 320; *Roebuck v Hammerton* (1778) 2 Cowp. 737; *Morgan v Pebrer* (1837) 3 Bing. N.C. 457; *Re London County Commercial Reinsurance Office* [1922] 2 Ch. 67 at 78.

[99] e.g. *Roebuck v Hammerton* (1778) 2 Cowp. 737.

[100] *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch. 67.

[101] *Cook v Field* (1850) 15 Q.B. 460; C.J. Bunyon, *Life Insurance*, 5th edn, p.11; Bunyon, *Bunyon on Fire Insurance*, 6th edn, p.25. In contrast, the Marine Insurance Act 1745 seems to have been applied to contracts not in the form of a policy, but in substance amounting to an insurance; *Kent v Bird* (1777) Cowp. 583.

[102] *Carlill v Carbolic Smoke Ball* [1893] 1 Q.B. 256 at 261.

[103] *Dalby v The India and London Life* (1854) 15 C.B. 365.

interest required in the case of insurances on lives is the same as the interest required in all other classes of insurance. It seems impossible to give the same words a different construction when applied to fire and other risks from that given to them when applied to life risks.[104] It is submitted therefore that, whatever be the risk to which the statute applies, the statute is satisfied by showing interest at the date of the contract only, and probably the statute will not be satisfied unless the insured had, at the date of the contract, an insurable interest to the extent of the amount claimed. An interest acquired afterwards, although before the loss, does not seem to satisfy the express proviso that no contract shall be made unless the insured shall have an interest.[105]

If this is a correct inference, a life policy effected by a creditor on the life of his **1-032** debtor would be void if effected before the debt was legally constituted, and a fire policy effected by the prospective purchaser of a house would be void if effected before he had concluded a binding contract to purchase.[106] The hope or prospect of obtaining an interest during the currency of the policy would not seem to be sufficient even though the hope is realised before the loss. A p.p.i. clause in a policy other than a policy of marine insurance is not fatal to its validity. It is not by itself proof that the policy is made by way of gaming or wagering. It may be inserted on account of the difficulty in proving interest. The p.p.i. clause does not, however, dispense with proof of interest if required by the Act of 1774, and in the absence of such proof may, together with the general character of the risks, lead to the irresistible inference that the policy is an insurance by way of gaming or wagering.[107]

Interest at date of loss not required. The Act itself does not require interest to **1-033** be shown at the date of loss. Whether or not that must be shown depends upon the nature of the particular insurance in question. If it is on its proper construction an indemnity insurance, it follows that interest at the date of loss must be shown quite apart from any legislation on insurable interest, but not necessarily a continuity of interest between time of contract and time of loss.[108] The rule of marine insurance law to construe the contract if possible as a contract of strict indemnity was one so familiar to the judges that, at first, they applied it indiscriminately to all classes of insurance without considering very carefully the peculiar nature of the different contracts with which they were dealing. Thus, in 1807, in the case of *Godsall v Boldero*,[109] the Court of King's Bench held that a life policy in ordinary form effected by a creditor on the life of his debtor was a contract of indemnity, and that the insured must show interest in the life and consequent loss at the time the life dropped. That decision was received by the insurance world with a chorus of disapprobation, and the companies did not in practice follow it, but paid in full on such

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[104] Bunyon suggested that the Act might be construed differently according to the particular type of insurance to which it was being applied: Bunyon, *Fire Insurance*, 3rd edn, pp.8–9, but the suggestion was not retained in the last edition.

[105] In so far as *Barnes v London, Edinburgh and Glasgow Life Assurance Co* [1892] 1 Q.B. 864 at 867, appears to hold to the contrary, it cannot be supported. See para.1-095, below.

[106] This is a reason for holding that indemnity insurances are outside the ambit of the Act, see para.1-029, above.

[107] *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch. 67 at 80.

[108] 1 Phil. *Insurance*, s.85; *Crozier v The Phoenix Insurance* (1870) 13 N.B.R. (2 Han.) 200; *Caldwell v Stadacona Fire and Life Insurance Co* (1883) 11 S.C.R. 212. These problems cannot now arise in view of the decision in *Siu Yin Kwan v Eastern Insurance Co* [1994] 2 A.C. 199 that all indemnity insurances are outside the scope of the Act of 1774.

[109] *Godsall v Boldero* (1807) 9 East 72.

ment of premises confers an interest, the tenant must surely have an interest on this ground.[504] If his user is for business purposes, he cannot recover for loss of business profits consequent upon the destruction of the premises unless he has specifically insured on such profits.[505]

1-151 ***(ii) Liability to pay rent.*** Even assuming that possession alone is not sufficient, if the tenant is liable to pay rent during the remainder of the term, notwithstanding the destruction of the premises, his interest in respect of his right of occupation will be greater than it would be if under the lease the liability for rent ceased. In England a tenant, apart from express stipulation in the lease and the provisions of the War Damage Act,[506] remains liable for rent, notwithstanding the accidental demolition of the premises.[507] In Scotland a tenant may abandon his lease and avoid further liability for rent if the fire was not caused by his own fault and has done such damage as to render the premises for a substantial time practically useless for the purpose for which he took them.[508] If a tenant's liability for rent ceases, his interest in respect of his right of occupation is comparatively small and the measure of it would probably be the difference between the rent he was previously paying and the rent which he would have to pay for similar premises elsewhere, calculated for the remainder of the term, and the cost of removal. In *Mark Rowlands Ltd v Berni Inns Ltd*,[509] it was held, obiter, that a tenant had an insurable interest in premises even when under the terms of the lease he was relieved from liability to pay rent if and for so long as the premises were unable to be occupied consequent on the occurrence of an insured peril.[510]

1-152 ***(iii) Liability to repair.*** A tenant may also have an insurable interest by reason of his liability under the lease.[511] If he has convenanted to repair, he has an interest to the extent to which he may become liable on the covenant,[512] and if he has convenanted to insure he has an interest, because if he does not insure he will be

[504] *Castellain v Preston* (1883) 11 Q.B.D. 380 at 400; *Schaeffer v Anchor Mutual* 113 Iowa 652 (1901). A tenant's claim may well not be limited to the marketable value of his lease: see *Simpson v Scottish Union Insurance* (1863) 1 H. & M. 618 at 628. But possession alone does not confer an interest under Scots law: *Fehilly v General Accident Fire and Life Assurance Corp Ltd*, 1982 S.C. 163; *Aberdeen Harbour Board v Heating Enterprises Ltd*, 1990 S.L.T. 416.

[505] *Re Wright and Pole* (1834) 1 Ad. & El. 621; *Menzies v North British Insurance Co* (1847) 9 D. 694.

[506] War Damage Act 1943 (6 & 7 Geo. 6, c.21); Landlord and Tenant (War Damage) Acts 1939 and 1941 (2 & 3 Geo. 6, c.72, and 4&5 Geo. 6, c.41).

[507] *Marshall v Schofield* (1882) 47 L.T. 406; *Matthey v Curling* [1992] 2 A.C. 180; *Cricklewood Property v Leighton* [1945] A.C. 221.

[508] *Duff v Fleming* (1870) 8 M. 769; *Allan v Markland* (1882) 10 R. 383; *Fehilly v General Accident Fire and Life Assurance Corp Ltd*, 1982 S.C. 163 at 169.

[509] *Mark Rowlands Ltd v Berni Inns Ltd* [1986] 1 Q.B. 211.

[510] Reliance was placed, unusually, on the broader expectation test of insurable interest said to have been propounded by Lawrence J in *Lucena v Craufurd* (1806) 2 Bos. & P. N.R. 269 at 302 but it is submitted that the decision is correct because the tenant still retained his legal estate and hence his right of occupation. Of course, as stated above, the measure of his interest would be comparatively small if he were claiming a share of the policy moneys, but this was irrelevant on the facts as the landlord was obliged to insure and to reinstate with the policy moneys. See *Glengate-KG Properties v Norwich Union Fire Insurance Society* [1996] 1 Lloyd's Rep. 614 at 624 per Auld LJ and para.1-118, above.

[511] Bowen LJ in *Castellain v Preston* (1883) 11 Q.B.D. 380 at 400.

[512] *Oliver v Greene*, 3 Mass. 133 (1807); *Berry v American Central*, 132 N.Y. 49 (1892); *Joyce v Swann* (1864) 17 C.B.(N.S.) 84 at 104.

liable for the loss as damages for breach of his covenant.[513] Where the lessees of a colliery, having covenanted to keep the premises in repair and to insure, insured "as lessees" on colliery plant "this to insure all their working interest", it was held that they had an interest to the full value and that the risk was sufficiently described.[514] Probably a lessee liable on a covenant to repair could insure generally on the property without specifying his interest unless the conditions of the policy expressly required the interest to be stated.

Lessor. The landlord has an insurable interest as a reversioner, and this is not 1-153
diminished by the fact that the premises are not in his occupation and are let for a term of years. In addition, he is obliged to undertake repairs in the case of certain types of dwelling and lease by virtue of statutory regulations[515] and he may in such cases insure to the full value on that ground also. Wherever the landlord is liable for repair, his claim on the policy is not limited to the value of the reversion. Where the tenant is liable to repair, there is a risk that he may nonetheless be insolvent, and the landlord may effect his own insurance to the full value of the premises.[516] In such a case, however, the principle of subrogation may operate to enable the landlord's insurers to pursue the landlord's rights under the lease against the tenant.[517] Where the lessor has covenanted to insure the demised premises for their full reinstatement value and to lay out the insurance proceeds on reinstatement of the building, he has an insurable interest in the premises up to the full reinstatement cost.[518]

Mortgagor and mortgagee. A mortgagor of land has, as owner of the equity of 1-154
redemption, an insurable interest to the full value, notwithstanding the mortgage. He may be hopelessly insolvent and have no prospect of ever redeeming the security, but so long as he has the equity of redemption the loss of the property means a reduction of his assets to the full value, and therefore he has interest to that extent.[519]

Even if a mortgagor has sold his equity of redemption, he has by reason of his personal covenant an interest to the extent of the debt charged upon the property because the loss of the property destroys the possibility of the debt being satisfied

[513] *Heckman v Isaac* (1862) 6 L.T. 383; *Bartlett v Walter*, 13 Mass. 267 (1816); *Lawrence v St Mark's Fire Insurance*, 43 Barb. 479 (N.Y., 1865); *Fehilly v General Accident Fire & Life Assurance Corp*, 1982 S.C. 163; *Aberdeen Harbour Board v Heating Enterprises Ltd*, 1990 S.L.T. 416. A covenant to insure against loss or damage by fire with a named company or class of companies is a covenant to effect such a policy as was usual at the date of the lease or as might from time to time become usual during the currency of the lease. Prima facie, such a covenant does not oblige the covenantor to insure against war risks: *Enlayde Ltd v Roberts* [1917] 1 Ch. 109; *Upjohn v Hitchens* [1918] 2 K.B. 48. A covenant to insure in a named office "or in some other responsible insurance office to be approved by the lessor" does not confer any option on the lessee if the lessor withholds his approval, which he is entitled to do without giving any reason: *Tredegar v Harwood* [1929] A.C. 72.

[514] *Imperial Fire v Murray*, 73 Pa. 13 (1873).

[515] Landlord and Tenant Act 1985 s.11.

[516] *Hobbs v Hannam* (1811) 3 Camp. 93; *Collingridge v Royal Exchange Assurance* (1877) 3 Q.B.D. 173.

[517] *Darrell v Tibbitts* (1880) 5 Q.B.D. 560; *Castellain v Preston* (1883) 11 Q.B.D. 380 at 406. But see para.24-097, below.

[518] *Lonsdale & Thompson Ltd v Black Arrow Group Plc* [1993] Ch. 361 at 368.

[519] *Smith v Lascelles* (1788) 2 T.R. 187; *Smith v Royal Insurance* (1867) 27 U.C.Q.B. 54; *Insurance Co v Stinson*, 103 U.S. 25 (1880).

its agents, yet if it is a completely executed deed, "sealed and delivered", the company is estopped from denying the receipt of premium therein acknowledged.[32]

That decision was distinguished in a later case in the Privy Council—where it was held that the receipt clause in the particular policy then under consideration ought to be read as merely a matter of common form, and when taken in conjunction with an emphatic condition, that the company should not be liable in respect of loss until the premium "is actually paid", could not reasonably be read as conclusive evidence of actual payment.[33]

In the United States it has also been held that, even where the policy has been delivered to the insured, the acknowledgement of receipt of the premium is not conclusive when it is coupled with the condition that there shall be no insurance until the actual payment of the premium.[34]

In Canada it has been held that where a policy which acknowledges receipt of the premium, and contains a condition suspending the risk until payment of the first premium, is executed and delivered to an agent of the company to exchange against the premium in cash, the company is not estopped from alleging non-payment of the premium.[35]

6-016 It will be noticed that the doctrine applies only to policies under seal, but it is thought that the recital in a Lloyd's policy that the premium has been paid must have the same effect as in a policy under seal, since the underwriter looks for payment to the broker, to whom he allows terms of credit. Failure of the insured to pay the broker is irrelevant, since the broker cannot cancel the contract without the authority of the insured.[36]

6-017 **Estoppel by deed as against an assignee.** Although acknowledgement of the receipt of premium contained in the policy may not be conclusive evidence of payment as against the insured, yet, if the policy is under seal, the insurers will be estopped, as against an assignee for value without notice of non-payment, from denying the payment of the premium so acknowledged to have been paid.[37]

6-018 **Waiver of prepayment condition.** Besides estoppel by deed, the insurers may be estopped by their conduct from relying upon the condition for prepayment of the premium—in other words they may expressly or impliedly waive it as a condition precedent to liability. Generally, an unequivocal act leading the insured to believe that the contract will be effective without payment of premium amounts to a waiver of the condition.[38] Thus, for instance, the insurers will be held to have waived payment of the premium where credit is given,[39] or a negotiable instrument taken

[32] *Roberts v Security Co* [1897] 1 Q.B. 111. See para.5-010, above, for a suggestion for avoiding this result by means of a resolution of the board of directors.

[33] *Equitable Fire and Life Office v The Ching Wo Hong* [1907] A.C. 96.

[34] *Sheldon v Atlantic Fire & Marine Insurance Co*, 26 N.Y. 460 (1863).

[35] *Western Assurance Co v Provincial Assurance Co* (1880) 5 Ont.A.R. 190.

[36] *Xenos v Wickham* (1867) L.R. 2 H.L. 296 at 319. Section 54 of the Marine Insurance Act 1906 provides that where a marine policy effected on behalf of an insured by a broker acknowledges receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between insurer and insured, but not as between insurer and broker.

[37] Law of Property Act 1925 s.68.

[38] *Bragdon v Appleton Mutual* (1856) 42 Me. 259; *Sheldon v Atlantic Fire* (1863) 26 N.Y. 460; *O'Brien v Union Insurance* (1884) 22 Fed.Rep. 586; *Supple v Cann* (1858) 9 Ir.C.L.R. 1; *Bodine v Exchange Fire Insurance Co* (1872) 51 N.Y. App. 117.

[39] *Prince of Wales Life Assurance Co v Harding* (1858) E.B. E. & 183.

instead,[40] or where in any circumstances the insured is justified in believing, from what the insurers say or write, that payment of the premium is not necessary at that stage,[41] or that it has been paid even if this is not so.[42]

If renewal premiums are habitually accepted by the insurers after the expiration of the days of grace, the insured may well be able to rely on their conduct as a waiver of the conditions for payment,[43] but it is always open to the insurers to notify the insured that in future they will insist on payment within the time laid down, and that will defeat a subsequent plea of waiver.[44]

As a general rule, unless the insurers commit or omit some act whereby the insured has just grounds to believe and does believe that the contract will be made, continued or restored without payment of premium, there is no waiver or estoppel.[45]

6-019 The actual delivery of a policy to the insured without demanding payment of the premium may constitute a waiver notwithstanding that the condition is contained in the policy as delivered.[46] Where the usual practice is to insist upon payment of the premium against the delivery of the policy, a departure from that practice by delivering the policy without demanding payment may justify the insured in believing that the prepayment condition will not be insisted on. The question may be whether the delivery was made on such terms as to imply a giving of credit without prejudice to the immediate validity of the policy.[47]

That is a question of inference from the facts proved. Probably the bare fact that a policy was actually delivered to the insured would not be evidence upon which a finding could be made that a condition in the policy requiring prepayment of the premium was waived,[48] but very little more might be sufficient; as, for instance, the fact that the insurers usually did insist upon payment before delivery.[49]

A condition in a preliminary contract requiring prepayment of the premium would be waived by delivery of a policy which contained no such condition, and in a case in the United States[50] where the company's policies contained the condition and there was an oral contract to insure, the court held that the fact that the company had previously issued policies to the same insured without demanding prepayment was evidence of the condition having been waived.

6-020 In considering the authorities on the waiver summarised above, it is important

[40] *Masse v Hochelaga Mutual Insurance Co* (1878) 22 L.C.J. 124; *London and Lancashire Life Assurance Co v Fleming* [1897] A.C. 499, where, however, the insured failed to meet the terms on which the note was taken.

[41] *Benson v Ottawa Agricultural Insurance Co* (1877) 42 U.C.R. 282; *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All E.R. 124.

[42] *Re Economic Fire Office Ltd* (1896) 12 T.L.R. 142.

[43] *Peppit v North British and Mercantile Insurance Co* (1878) 13 N.S.R.(I.R. & G.) 219.

[44] *Laing v Commercial Union Assurance Co* (1922) 11 Lloyd's Rep. 54; *Redmond v Canadian Mutual Aid Association* (1891) 18 Ont.A.R. 335.

[45] *Equitable Life Assurance Society v McElroy* (1897) 83 Fed.Rep. 631; *State Life v Murray* (1908) 159 Fed.Rep. 408.

[46] *Roberts v Security Co* [1897] 1 Q.B. 111; *Boehen v Williamsburgh Insurance* (1866) 35 N.Y. 131; *Trustees of First Baptist Church v Brooklyn Fire* (1859) 19 N.Y. 305; *Washoe Tool Manufacturing Co v Hibernia Fire Insurance Co* (1876) 7 Hun. 74, affirmed 66 N.Y. 613; *Hodge v Security Co of New Haven* (1884) 33 Hun. 583; *Mutual Reserve Life Insurance Co v Heidel* (1908) 161 Fed.Rep. 535.

[47] *Farnum v Phoenix Insurance Co* (1890) 83 Cal. 246.

[48] *Equitable Fire and Life Office v The Ching Wo Hong* [1907] A.C. 96; *Wood v Poughkeepsie* (1865) 32 N.Y. 619.

[49] *Miller v Life Insurance Co* (1870) 79 U.S. (12 Wall.) 285, where the policy also contained no condition requiring payment of premium as a condition precedent to operation of the policy.

[50] *Church v La Fayette* (1876) 66 N.Y. 222.

ing premiums, it was held that they did not acquire a charge on the policy by paying out of their own pockets.[40] Not only are trustees entitled to a charge in respect of disbursements for premiums paid out of their own pockets, but they may give a like charge to others who advance the premiums at their request.[41]

It has been said that if the trustees have trust funds available for the premiums, they cannot charge the policy by borrowing from strangers any more than they can by paying out of their own pockets[42]; but, on the other hand, if a trustee requests a beneficiary of the trust to pay the premiums, the beneficiary has a charge on the policy even though there are available funds in the possession of the trustee.[43]

9-013 **Payment by beneficiary of trust.** There is some authority for saying that if a beneficiary of a trust pays the premiums in default of the person who ought to pay them, he is entitled to a charge even though he did not act on the request of the trustees[44]; but there seems to be no reason why a beneficial part owner under a trust should have any greater right to an indemnity than a part owner at law, and therefore the better opinion seems to be that only in the case of joint tenancy or tenancy in common has a beneficiary the right to contribution against the other beneficiaries, and even then he has no lien on the policy unless he has acted by request of the trustees.[45]

Where a person has an interest in a policy under an assignment which is voidable, as in the case of a voluntary assignment which is voidable by the assignor's trustee in bankruptcy, the premiums which he has paid before the date when the assignment is avoided constitute a first charge on the policy moneys.[46] Equity makes such a charge a condition of the right to have the assignment set aside against an innocent holder.[47]

9-014 **Lien on policy.** Any person can, by contract with the beneficial owner of a policy, acquire a right to recover the premiums which he has paid to keep it on foot, and his contract may give him a charge on the policy for that purpose.[48] Once a lien has been acquired he can keep the policy on foot for his own benefit, and add the further premiums to the charge,[49] and he may, by requesting others to advance the premiums, give them a charge upon the policy, since that is the same as if he had borrowed the money and assigned his security.[50]

9-015 **Scots law.** The law of Scotland with regard to salvage premiums has developed in some respects differently from the law of England. It is now beginning to acquire a conceptual and linguistic coherence which was hitherto lacking. The trend of more recent judicial authority has been to consider, as a general question, whether one

McElroy v Hancock Mutual Life Insurance Co (1898) 88 Md. 137.

40 *Clack v Holland* (1854) 19 Beav. 262.

41 *Clack v Holland* (1854) 19 Beav. 262.

42 *Clack v Holland* (1854) 19 Beav. 262.

43 *Todd v Moorhouse* (1874) L.R. 19 Eq. 69.

44 *Burridge v Row* (1842) 1 Y. & C.Ch. 183; *Re Tharp* (1852) 2 Sm. & G. 578n.

45 See para.9-008, above.

46 *West v Reid* (1843) 2 Hare 249; *Edwards v Martin* (1865) L.R. 1 Eq. 121.

47 *West v Reid* (1843) 2 Hare 249; *Edwards v Martin* (1865) L.R. 1 Eq. 121.

48 *Aylwin v Witty* (1861) 30 L.J.Ch. 860.

49 *Aylwin v Witty* (1861) 30 L.J.Ch. 860.

50 *Aylwin v Witty* (1861) 30 L.J.Ch. 860.

party has been unjustifiably enriched at the expense of another party without there being a legal ground which would justify him in retaining that benefit.[51]

The appropriate remedy to recover a sum paid to keep in force the policy of another is recompense, as is illustrated by earlier case law, and the awarding of this remedy does not depend upon an express or implied request by the policyholder.[52] Stair speaks of recompense as "a most natural obligation" giving rise to "the action in law de in rem verso whereby whatsoever turneth to the behoof of any makes him liable for recompense, though without any engagement of his own".[53]

All that is necessary to lay a foundation for a claim for the recovery of the premiums paid is either that the premiums have been paid with the direct intention of benefiting the owner of the policy, but without any intention of making a gift of the premiums, or that the premiums have been paid in the bona fide belief that the policy belonged to the claimant, or that the claimant, having a partial interest in the policy, has found it necessary to pay the premiums both for his own benefit and that of the owner.[54]

Where a husband and wife had joined in an assignation, in security for the husband's debts, of a policy effected by the husband under the Married Women's Policies of Assurance (Scotland) Act 1880,[55] for the benefit of his wife, the assurance company raised a multiplepoinding in which the claimants were the widow and the assignees in security. Lord Mackenzie held that the assignation was invalid in that it was inconsistent with, and amounted to an attempt to revoke, the irrevocable statutory trust contained in the policy.[56]

Since the assignees had paid the whole premiums on the policy since the date of the assignation in the belief that the assignation was valid, they were nevertheless entitled to be recouped the money expended by them. Accordingly, he held that they were entitled to be paid out of the policy moneys a sum equal to the total amount of the premiums paid by them with interest at five per cent on each premium paid from the date of payment thereof and that the widow was entitled to the balance of the policy money.[57]

9-016 Where a policy effected by a husband on his own life was assigned by him to trustees in trust to hold the policy money and pay his widow the interest thereon during her life and thereafter for the benefit of the children of the marriage, and the husband covenanted to pay the premiums, he, after paying a number of premiums, became bankrupt, and thereafter until his death his wife's father and later his wife herself paid the premiums for behoof of the trust and in order to prevent the policy lapsing. It was admitted that the widow paid the premiums in the expectation of recovering them on maturity. After the husband's death the widow brought an action against the judicial factor appointed by the court as trustee to administer the

51 *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 S.C. 331 at 348–349 per Lord Cullen, and applied in the seminal case of *Shilliday v Smith* 1998 S.C. 725.

52 *Edinburgh and District Tramways Co Ltd v Courtenay*, 1909 S.C. 99; *Varney (Scotland) Ltd v Lanark Town Council*, 1974 S.C. 245; *Lawrence Building Co Ltd v Lanark County Council*, 1978 S.C. 60; *Christie's Executor v Armstrong*, 1996 S.L.T. 948.

53 J.D. Stair, *Stair: Institutions of the Law of Scotland*, 5th edn (Bell and Bradfute, 1832), 1.8.6 and 7; J. Erskine, *Erskine: An Institute of the Laws of Scotland*, 8th edn (Bell and Bradfute, 1871), 3.1.11; G.W. Bell and W. Guthrie, *Bell, Principles of the Laws of Scotland*, 10th edn (1899), s.538.

54 *Morgan v Morgan's Judicial Factor*, 1922 S.L.T. 247.

55 Married Women's Policies of Assurance (Scotland) Act 1880, 43 & 44 Vict. c.26.

56 Following *Beith's Trustees v Beith* 1950 S.C. 66, this aspect of the decision can no longer be regarded as correct.

57 *The Edinburgh Life Assurance Co v Balderston* 1909 2 S.L.T. 323.

policy could be cancelled for misrepresentation notwithstanding that there would also be a breach of warranty,[341] but it may be said in answer that the insurers should be held to the parties agreement and that the insured's statements must be treated as terms of the contract.

10-101 It is also possible that the insurers may repudiate the contract of insurance wrongfully, before any claim has arisen upon it, by refusing to accept further premiums or by asserting, without any good cause, that it is invalid for breach of warranty or, for that matter, illegality or non-disclosure. The rights of the insured are then determined by the ordinary principles of the law of contract. The insured may accept the repudiation as an anticipatory breach of contract and sue for damages. The measure of damages would depend on the nature of the policy. In the case of a life policy the measure would probably include the present value of the disputed policy having regard to the contingency upon which the sum is to be payable and to the amount of the future premiums. On the other hand, the insured is not bound to accept a repudiation by the insurers and may, in appropriate circumstances, continue to tender the renewal premiums until the maturity of the policy. If this course is followed the insured will in all probability desire to obtain a declaration that the policy is valid and still subsisting. The award of this remedy is discretionary and depends upon the circumstances of the particular case, but two factors may be mentioned. First, there must be a dispute concerning the validity of the policy before the court can entertain an action for a declaration. Thus, in one case the insurers denied the validity of a life policy after being told that a condition in the policy had been broken. The insured demanded the return of premiums paid after the date of the breach. He did not assert the validity of the policy until after a considerable interval when he amended his statement of claim a few weeks before the trial to include an alternative claim for a declaration that the policy was valid. It was held that the insured could not claim the declaration.[342]

10-102 Secondly, the court may be of the opinion that the action for a declaration is premature and that injustice might be done to the insurers if the declaration were granted. In *Honour v Equitable Life Assurance*,[343] the office had refused a renewal premium on a life policy on the ground that the policy was effected without interest in the life insured and had been obtained by fraudulent misrepresentation. The court was of the opinion that the insured's action for a declaration that the policy was valid and subsisting was premature inasmuch as the office might, when the life dropped, be in possession of information which they had not then and could not for the moment entertain. In that case the court was prepared to dismiss the action for a declaration of the validity of the policy on the defendants' undertaking that in case any action should be brought on the policy they would not rely on the non-payment of the subsequent premiums on the due dates as a defence to the claim.

(e) Waiver

10-103 We have seen that the breach of a term of the policy by the insured gives the insurer a remedy which varies according to the status of the term which is broken.[344] Circumstances may arise in which the insurer is held to have waived the right to

enacted as the Third Parties (Rights against Insurers) Act 2010; see Ch.31 for discussion thereof.

341 *Smith v Grand Orange Lodge* (1903) 6 Ont.L.R. 588.

342 *Sparenborg v Edinburgh Life Assurance* [1912] 1 K.B. 185.

343 *Honour v Equitable Life Assurance* [1900] 1 Ch. 852.

344 See paras 10-006 (collateral stipulation), 10-011 and 10-093 (condition), and 10-090 to 10-092 (warranty), above.

exercise that remedy as a result of his conduct either before or, more frequently, after the breach by the insured. In order to appreciate how the doctrine of waiver applies to breaches of policy terms it is first necessary to consider its juristic basis.

10-104 "Waiver" is not a term of art[345] and has been criticised as vague.[346] In the present context it means the abandonment or relinquishment of a right or a defence which may occur as the result either of an election by the insurer or of the creation of an estoppel precluding him from relying upon his contractual rights against the insured.[347] Election arises where the insurer becomes entitled to exercise a right on the commission of the insured's breach of contract, and he must decide whether to do so. An example would be the right to avoid the policy in reliance on a forfeiture clause.[348] If the insurer is aware of the facts which create the right in question and (though this is not completely clear) is also aware of his legal right, and he acts in such a way as clearly to evince a decision to relinquish it, he will be held to have elected not to exercise it against the insured, and that election is irrevocable.[349] The time may come when the law will deem him to have elected to exercise or to forgo his right, as the case may be, when he takes no action to communicate a decision.[350]

10-105 Election is to be contrasted with equitable, or "promissory", estoppel. Where a person who possesses a legal right or defence against another unequivocally represents by words or conduct that he does not intend to rely upon it, and the other party acts, or desists from acting, in reliance on that representation, the representor will be estopped from enforcing his legal rights inconsistently with his representation to the extent that it would be inequitable for him to do so.[351] Whereas election requires a party to have knowledge of the facts which create a right exercisable by him (and, at least possibly, knowledge of the legal right) before he can be held to have made an election in respect of it—the principle of equitable estoppel does not require any particular state of knowledge on his part, although it is submitted that in practice it will be difficult for an insured to make out the elements of an equitable estoppel against an insurer unless the latter is known to be aware of the insured's breach of contract. Another point of distinction is that an election, once

345 *Banning v Wright* [1972] 1 W.L.R. 972 at 981, per Lord Reid.

346 *Ross T. Smyth & Co v Bailey* [1940] 3 All E.R. 6 at 70, per Lord Wright, approved in *Banning v Wright* [1972] 1 W.L.R. 972.

347 *P. Samuel & Co v Dumas* [1924] A.C. 431 at 442; *Kammins Ballrooms Co v Zenith Investments (Torquay) Ltd* [1971] A.C. 850 at 882–883; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74 at 87–88; *Motor Oil Hellas SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391 at 397–399. This statement of the law was cited with approval by the Privy Council in *Diab v Regent Insurance Co Ltd* [2007] 1 W.L.R. 797.

348 *Croft v Lumley* (1858) 6 H.L.Cas. 672 at 705; *Matthews v Smallwood* [1910] 1 Ch. 777; *Kammins Ballrooms Co v Zenith Investments (Torquay) Ltd* [1971] A.C. 850 at 883.

349 *Motor Oil Hellas SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391 at 399. It is not necessary that the insurer should subjectively intend to excuse the breach of contract—*Compagnia Tirrena Assicurazioni v Grand Union Insurance Co* [1991] 2 Lloyd's Rep. 143 at 153, 154. Nor is it necessary for the insured to prove reliance upon the insurer's decision (*Compagnia Tirrena Assicurazioni v Grand Union Insurance Co*). As to whether the insurer needs to have knowledge of its legal rights, see *Peyman v Lanjani* [1985] Ch. 457 and, more recently, *Bhopal v Sphere Drake Insurance Plc* [2002] Lloyd's Rep. I.R. 413.

350 *The "Laconia"* [1977] A.C. 850 at 872; *Motor Oil Hellas SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398.

351 *Kammins Ballrooms Co v Zenith Investments (Torquay) Ltd* [1971] A.C. 850 at 883–884; *Motor Oil Hellas SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391 at 399. This type of estoppel can be traced back to *Hughes v Metropolitan Railway Co* (1877) 2 App.Cas. 439 via *Central London Property Trust v High Trees House* [1947] K.B. 130.

and said:

> "The statute having made the exportation of and trade in naval stores, contrary to the king's proclamation, illegal, impliedly avoids all contracts made for protecting the stores so exported."[46]

The idea that the navigation statutes contained such an implied prohibition, or that public policy compelled such insurances to be avoided, may well have been reinforced by a consideration of s.4 of the Convoy Act[47] which expressly avoided the insurance on a vessel which, contrary to the Act, sailed alone without convoy.[48]

14-013 This explanation is not, however, entirely satisfactory. In the later cases of *Cunard v Hyde*,[49] *Wilson v Rankin*[50] and *Dudgeon v Pembroke*[51] it was made quite clear that the insurance was avoided only if the insured was privy to the infringement of the relevant Act of Parliament, and that it was valid if he did not know of this. This emphasis on the insured's intention to break the law as the vital factor in vitiating the policy cannot now be supported in the light of modern authorities which hold that, once it is shown that a statute actually prohibits a particular type of contract from being performed as opposed to merely exacting a penalty for something done in the course of the transaction, it is irrelevant whether the claimant intended to break the law or not.[52]

It is enough that the contract as performed was one which was prohibited by the statute, and, presumably, this reasoning would apply to a contract prohibited on grounds of public policy by the common law. It follows that the nineteenth-century marine insurance cases were not decided upon rules of public policy and illegality as these are understood today.

14-014 The best explanation of these decisions, it is submitted, is that suggested by the Marine Insurance Act 1906, which provides in s.41 that the insured under a marine policy impliedly warrants that, so far as he can control the matter, the adventure upon which insured property is bound shall be carried out in a lawful manner. Such a warranty explains the importance attached to the insured's knowledge of the illegality in the later cases where, in some instances, the courts were not at all certain whether the statute in question was intended to affect the insurance directly, or even to prohibit the voyage.[53]

14-015 If we are right in suggesting that the maritime insurance cases concerning illegal user depend upon the implication of a warranty of legal user, it would be quite wrong to apply the same rule by simple analogy to non-marine policies, where no such warranty will be implied, as has been decided in a non-marine case.[54]

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[46] *Parkin v Dick* (1809) 11 East 502 at 503.
[47] Convoy Act Geo. 3, c.57.
[48] See *Camden v Anderson* (1798) 1 Bos. & P. 272 at 274.
[49] *Cunard v Hyde* (1858) E. & E. 70; (1859) 2 E. & E. 1.
[50] *Wilson v Rankin* (1865) L.R. 1 Q.B. 162.
[51] *Dudgeon v Pembroke* (1874) L.R. 9 Q.B. 581. The privity of the insured was made the decisive factor in two cases decided at the end of the Napoleonic Wars on breaches of the Convoy Act Geo. 3, c.57 (*Carstairs v Allnutt* (1813) 3 Camp. 497; *Metcalfe v Parry* (1814) 4 Camp. 123).
[52] *St John Shipping v Rank* [1957] 1 Q.B. 267 at 283 et seq.; *Archbold v Spanglett* [1961] 1 Q.B. 374; *Shaw v Groom* [1970] 2 Q.B. 504. Contracts prohibited by law were described as a "rather special case" by Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430 at [25]. The analysis of the *St John Shipping* case by the Court of Appeal in *ParkingEye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338; [2013] Q.B. 840 was in relation to the issue of a party who intended from the outset to perform a contract in an illegal manner.
[53] *Cunard v Hyde* (1859) 2 E. & E. 1.
[54] *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1.

In *Leggate v Brown*[55] a motor tractor was held covered under a policy expressed to be operative while it was being used with not more than two trailers attached to it. The insured took it on the highway with two laden trailers attached, contrary to s.18(1)(b) of the Road Traffic Act 1930, and he was prosecuted for using it when it was not covered by an effective insurance policy. It was held that the insurance policy was effective and not void as contrary to public policy, and that the insurers would be bound to indemnify the insured for liability incurred to a third party. This decision at least suggests that the insured under a policy of motor insurance does not impliedly warrant lawful user of the insured vehicle in terms similar to those in s.41 of the Marine Insurance Act, and shows clearly that something more than merely a temporary illegal user of property has to be shown before an insurance on it is without more rendered unenforceable.

14-016 In *Euro-Diam Ltd v Bathurst*[56] the plaintiff claimed under an all-risks policy in respect of goods stolen whilst in Germany on a "sale or return" basis. At the request of its customer the plaintiff had issued a false invoice showing a value lower than the true value of the goods. This gave rise to an offence under German law. It was held that the policy was not subject to an implied warranty as to the legality of the venture. Furthermore, there were no other grounds to refuse to enforce the claim. The plaintiff did not need to rely on its reprehensible conduct in order to prove its claim, nor had it derived any tangible benefit from the false invoice. The receipt of the insurance proceeds would not enable the plaintiff to derive a benefit from crime. In these circumstances the defence of illegality failed. Kerr LJ stated (at p.35 C) that the ex turpi causa defence "… applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts".

14-017 However, in *Laboratoires Servier*,[57] Lord Sumption commented that this "public conscience" test had been "decisively rejected by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340". Lord Sumption also noted at [16]–[18], however, that their Lordships in *Tinsley v Milligan* were divided on what should be the correct test. One approach was a rule which would bar any claim tainted by a sufficiently close factual connection with the illegal purpose. Another approach was the "reliance test", the effect of which was that the claim was barred only if the claimant needed to rely on (i.e. to assert, whether by way of pleading or evidence) facts which disclosed the illegality. As stated by Lord Sumption in *Laboratoires Servier* at [18], "[b]oth [approaches] are intended to exclude those consequences of an illegal act which are merely collateral to the claim. Neither makes the application of the illegality defence dependent on a value judgment about the significance of the illegality or the consequences for the parties of barring the claim. … neither test is discretionary in nature. Neither of them is based on achieving proportionality between the claimant's misconduct and his loss …". However, at [20] Lord Sumption noted that the Law Commission made little secret of its preference for the approach of the Court of Appeal in *Euro-Diam* (above). Whilst Lord Sumption was critical of this approach (see [20]–[21]), the reader is referred to fnn.1, 3 and 4 above in relation to the apparently (or potentially) different approaches taken in other recent judgments in the Supreme Court.

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[55] *Leggate v Brown* (1950) 66(2) T.L.R. 281.
[56] *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1.
[57] *Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430 at [15].

tion would also need to seek relief in equity, although such contracts are of course also within the ambit of the remedies for negligent misrepresentation provided in tort and under statute law.[40] For these reasons, it is proposed to devote less space to the equitable jurisdiction than in the previous edition of this work, while drawing attention to differences between the two regimes.

4. CHARACTERISTICS OF ACTIONABLE MISREPRESENTATION[41]

16-011 Requirements of actionable misrepresentation.[42] In order for an innocent misrepresentation to entitle a party to avoid the contract of insurance it must satisfy the following conditions:

(1) it must be a statement of fact or, in relation to the insurer's remedy under s.20 of the 1906 Act only, a statement of opinion or belief;
(2) it must be untrue;
(3) if made to the insurer,[43] it must be material to his appraisal of the risk, and in other cases material in the wider sense;
(4) it must be a statement as to present or past fact and not *de futuro*; and
(5) it must have induced the aggrieved party to enter into the contract of insurance.[44]

16-012 Fact distinguished from opinion. It is necessary to distinguish between a statement of fact and a statement of opinion or belief, because they are treated differently under both s.20 of the 1906 Act and in equity. If the representee knows or ought to know that the representor has no first-hand knowledge of the matters stated, that, together with the words used, may lead his statement to be construed as an expression of opinion rather than a statement of fact.[45] A statement that an anchorage was "good and safe", made by a party who professed not to have first-hand experience of it, was construed as a mere expression of opinion.[46] Again, certain matters are by their nature such that statements about them can only be expressions of opinion, such as questions of valuation,[47] predictions of future events, or certain statements as to good health.[48] Under the Act a statement of opinion is required to be true, but it is deemed to be true if it be made in good faith, meaning

General Insurance Ltd v Chase Manhattan Bank [2001] 2 Lloyd's Rep. 483 at 495.

40 *Avon Insurance Plc v Swire Fraser Ltd* [2000] 1 All E.R. (Comm) 573.

41 See para.16-001, above for the recent legislative developments.

42 Applied in *Rendall v Combined Insurance Co of America* [2006] Lloyd's Rep. I.R. 732 [88]; *Limit No.2 Ltd v Axa Versicherungs AG (formerly Albingia Versicherung AG)* [2008] Lloyd's Rep. I.R. 330 at 338, [28] (there was no dissent from these requirements in the decision on appeal: [2008] EWCA Civ 1231; [2009] Lloyd's Rep. I.R. 396). For a recent example, see *Sea Glory Maritime Co v Al Sagr National Insurance Co (The Nancy)* [2013] EWHC 2116 (Comm); [2014] 1 Lloyd's Rep. 14, in particular at [58]–[59].

43 In *Western Trading Ltd v Great Lakes Reinsurance (UK) Plc* [2015] EWHC 103 (QB), the insurer's misrepresentation defence failed at the first stage because the proposal form containing the false statement had not formed a part of the presentation to the defendant insurers.

44 A similar set of questions were posed by HHJ Mackie QC in *Western Trading Ltd v Great Lakes Reinsurance (UK) Plc* [2015] EWHC 103 (QB) at [62]. This decision has been appealed and the appeal is awaited, as at the time of writing.

45 *Bissett v Wilkinson* [1927] A.C. 177; *Hubbard v Glover* (1812) 3 Camp. 313; *Brine v Featherstone* (1813) 4 Taunt. 869.

46 *Anderson v Pacific Fire & Marine Insurance Co* (1872) L.R. 7 C.P. 65.

47 *Economides v Commercial Union Assurance* [1998] Q.B. 587.

48 *Joel v Law Union & Crown Insurance Co* [1908] 2 K.B. 863; *Life Association of Scotland v Foster*

that the opinion is honestly held, so that no liability attaches merely because the opinion turns out to be wrong.[49] Under the general law an expression of opinion is in itself not actionable, although the speaker will be held to have represented impliedly that the opinion is genuinely held, so creating a representation of fact which is actionable as a fraudulent misstatement if he does not truly believe it,[50] and reaching the same result as the Act.

16-013 The representee's position is stronger than the above summary might suggest. First, what at first blush may seem to be an expression of belief may turn out on closer examination to be a statement of fact where the maker is in a good position to know the facts in question.[51] Even if the relevant insured does not have first-hand knowledge of the facts stated, they may nonetheless clearly represent such facts to be true, and the knowledge of their agents may also be a relevant factor: see *Crane v Hannover Ruckversicherungs AG*,[52] a case concerning representations in retrocession renewal proposals as to the underwriting practice of the original insured, where the original insured and the reinsurers making the representations both shared the same brokers. Where the insured said that "he thought" that the ship on which insured cargo was shipped was the new Norwegian vessel *Socrates* and not the old French vessel *Socrate*, this was treated as a statement of fact.[53] A plain "No" to a question in a proposal form will generally be construed to relate to the facts and not merely the proposer's belief in them,[54] although it would be otherwise if he was required to declare that his answers were true to the best of his knowledge and belief. In *Kamidian v Wareham Holt*[55] the court was tasked with identifying the relevant implied representation made in respect of an antique clock insured under a "fine arts" policy. The clock was described in the relevant schedule as "nephrite mantle clock, 46822, Fabergé Moser" against which the "insurance price" was US $2,500,000.[56] Tomlinson J relied upon the commercial considerations relevant to the context of fine art insurance in rejecting the possibility that the implied representation was only one as to the claimant insured's honest belief, considering that to be uncommercial and unlikely. He held instead that, whilst an implied representation that as a fact the clock was made by Fabergé was unrealistic, there was an implied statement of fact that there was general acceptance in the art world that the piece was an authentic Fabergé Egg Clock.[57]

16-014 Secondly, it has been held in a number of cases that an opinion given by a proposer for insurance may well give rise to an implied representation of fact accompanying it that the speaker possesses reasonable grounds for his opinion.[58]

(1873) 11 M. 351; *Delahaye v British Empire Mutual Life* (1897) 13 T.L.R. 245. Cf. *Thomson v Weems* (1884) 9 App.Cas. 671, where the statement that the insured was of temperate habits was held to be one of fact.

49 Marine Insurance Act 1906 s.20(5). Based upon *Anderson v Pacific Fire & Marine Insurance Co* (1872) L.R. 7 C.P. 65.

50 *Brown v Raphael* [1958] Ch. 636 at 641; *Hercules Insurance Co v Hunter* (1837) 15 S. 800.

51 *Yorke v Yorkshire Insurance Co* [1918] K.B. 662 at 669.

52 *Crane v Hannover Ruckversicherungs AG* [2008] EWHC 3165 (Comm); [2010] Lloyd's Rep. I.R. 93 at [123].

53 *Ionides v Pacific Fire & Marine Insurance Co* (1871) L.R. 6 Q.B. 674.

54 *Zurich General Accident & Liability Insurance Co v Leven*, 1940 S.C. 407.

55 *Kamidian v Wareham Holt* [2008] EWHC 1483 (Comm); [2009] Lloyd's Rep. I.R. 242 at [88].

56 *Kamidian v Wareham Holt* [2008] EWHC 1483 (Comm); [2009] Lloyd's Rep. I.R. 242 at [38].

57 *Kamidian v Wareham Holt* [2008] EWHC 1483 (Comm); [2009] Lloyd's Rep. I.R. 242 at [85]–[92].

58 *Ionides v Pacific Fire & Marine Insurance Co* (1871) L.R. 6 Q.B. 674 at 683; *Irish National Insur-*

ment of a material fact for the proposer to omit to state he did not own the insured vehicle if the proposal form gave the impression that he did.[234]

It has been held immaterial that the proposer for motor insurance failed his driving test,[235] at least where the policy was intended to cover inexperienced drivers.

17-058 **Character and motive of insured.** Facts may be material if they suggest that the integrity of the proposer for insurance is open to doubt, or that his motive in seeking cover is not merely the prudent one of covering himself against losses which might occur in the ordinary course of events. The phrase "moral hazard" is used to describe circumstances, invariably involving dishonesty on the part of the insured, which give rise to a concern that there will be dishonesty in the reporting and presentation of claims.[236]

17-059 **Previous convictions.** The most obvious circumstance falling under the rubric "moral hazard" is where the proposer has been convicted in the past of a criminal offence.[237] Indeed, before the Rehabilitation of Offenders Act 1974 the non-disclosure of such facts often came before the courts as a basis for avoidance. In motor insurance not only previous convictions for driving offences of the insured[238] or of intended drivers of the insured car are material,[239] but also convictions for quite different offences. Thus convictions of the insured for garage-breaking, forgery, breach of recognisances and theft are material,[240] and in another case convictions of the insured for drinking offences in no way connected with the driving of motor vehicles were held material, and also a conviction for permitting a car to be used without proper insurance.[241] In other types of insurance a similar rule has prevailed. A jeweller who effected a policy against loss by burglary had as a young man been convicted of larceny on six occasions over a period of seven years ending 14 years before the date of the policy, and a jury found that these were material facts.[242] The Court of Appeal refused to disturb this finding, despite the fact that the insured's record related, as Asquith LJ said, to a "dim and remote past".[243]

A wife who renews a policy on jewellery belonging partly to herself and partly to her husband is under a duty to disclose the fact that her husband, though not the insured, had been convicted of two crimes involving dishonesty during the previous year in which the policy was in force, at least when it was not the first time he had been convicted of such a crime.[244] A director of a company should disclose when applying for renewal of its traders' combined policy that he had been

[1978] 2 Lloyd's Rep. 18; *Hazel v Whitlam* [2005] Lloyd's Rep. I.R. 168.

234 *Guardian Assurance v Sutherland* (1939) 63 Lloyd's Rep. 220.

235 *Zurich General Accident & Liability Co v Morrison* [1942] 2 K.B. 53.

236 This passage in the 11th edition of this work was recently cited with approval by Blair J in *Sharon's Bakery (Europe) Ltd v AXA Insurance UK Plc* [2011] EWHC 210 (Comm); [2012] Lloyd's Rep. I.R. 164 at [60].

237 See the ABI Good Practice Guide titled "*Insurers' Approach to People with Convictions and Related Offences*" (dated March 10, 2014), addressed in more detail at fn.254, below.

238 *Jester-Barnes v Licenses and General Insurance Co Ltd* (1934) 49 Lloyd's Rep. 231. *Aliter* if the offence was trivial, *Mackay v London General Insurance* (1935) 51 Lloyd's Rep. 201.

239 *Bond v Commercial Union Assurance Co* (1930) 35 Com.Cas. 171; *Jester-Barnes v Licenses and General* (1934) 49 Lloyd's Rep. 231.

240 *Cleland v London General Insurance Co* (1935) 51 Lloyd's Rep. 156.

241 *Taylor v Eagle Star & British Dominions Insurance Co* (1940) 67 Lloyd's Rep. 136.

242 *Schoolman v Hall* [1951] 1 Lloyd's Rep. 139.

243 *Schoolman v Hall* [1951] 1 Lloyd's Rep. 139 at 143.

244 *Lambert v Co-operative Insurance Society Ltd* [1975] 1 Lloyd's Rep. 485.

convicted of handling stolen property in the year prior to renewal.[245] The non-disclosure of a conviction in 1960 for a robbery on the part of a mortgagor was held to entitle the insurance company to avoid liability to him under a building society block policy to which he was added in 1972, although not to the building society in respect of its separate interest.[246] A conviction for attempting to extort money from an insurance company is by its very nature material to a fire policy[247] and no doubt to any other type of policy. A conviction for vandalism some 18 months prior to proposal is material to an insurance of home contents against fire, theft and vandalism.[248] It is material to a proposal for yacht insurance that the skipper has been convicted seven times under a foreign law of drawing cheques against insufficient funds within a period of five years before the proposal.[249] It is material to the quota share reinsurer of an American insurance pool that the president and chief operating officer of the managing general agent of the pool had been convicted of securities fraud some 15 years prior to placement and sentenced to four years' imprisonment.[250]

Where the insured has been convicted of a crime prior to placement, but does not disclose it because he is convinced that he was the victim of a miscarriage of justice, the insurer is entitled to avoid the insurance on discovering the non-disclosure notwithstanding that the insured by then possesses the evidence to prove his innocence.[251] Materiality is to be tested at the time of placement and not by reference to subsequent events.

It is difficult to deduce a general principle from cases which differ widely on their facts, but it is submitted that the insured must disclose previous convictions at least in cases where: (i) these involved a degree of dishonesty or irresponsibility repugnant to ordinary social or business standards of integrity; and (ii) they were *either* directly related to the risks insured against under the policy in question *or*, if not so related, would by their nature and proximity in time indicate to a prudent insurer that there was a real risk of continuing dishonesty on the part of the insured. The refusal of an insurer to accept a risk offered to him has important consequences for an applicant who has to disclose the fact of the refusal to other insurers, and insurers ought not to regard a conviction as material unless it can fairly be said to have a bearing on the risk proposed.[252]

Rehabilitation of Offenders Act 1974. The Rehabilitation of Offenders Act 17-060

245 *March Cabaret Club v London Assurance* [1975] 1 Lloyd's Rep. 169.

246 *Woolcott v Sun Alliance & London Insurance Ltd* [1978] 1 W.L.R. 493. But see para.17-034, above, on this aspect.

247 *Arif v Excess Insurance Group Ltd*, 1987 S.L.T. 183 at 186.

248 *Hooper v Royal London General Insurance Co Ltd*, 1993 S.C. 242.

249 *Inversiones Manria v Sphere Drake Insurance Co, The Dora* [1989] 1 Lloyd's Rep. 69. A conviction for corruption of a public official involves dishonesty and is a material fact—*Stewart v Commercial Union Assurance Co*, 1993 S.C. 1.

250 *ERC Frankona Reinsurance v American National Insurance Group* [2006] Lloyd's Rep. I.R. 157.

251 *March Cabaret & Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep. 169 at 177; *Brotherton v Aseguradora Colseguros* [2003] 2 All E.R. (Comm) 298 at 309, [23].

252 *Reynolds v Phoenix Assurance Co* [1978] 2 Lloyd's Rep. 440 at 459. In interlocutory proceedings Lord Denning MR had thought it debatable whether a conviction of 10 years' standing for receiving resulting in a fine, ought to be disclosed: [1978] 2 Lloyd's Rep. 22 at 25, and Forbes J held at the trial of the action that it was not material: [1978] 2 Lloyd's Rep. 440 at 461. In *Deutsche Ruckversicherung Akt v Wallbrook Insurance Co Ltd* [1995] 1 Lloyd's Rep. 153, Phillips J stated that dishonest conduct should have an impact on the risk if it was to be material. See also the ABI Good Practice Guide titled "*Insurers' Approach to People with Convictions and Related Offences*" (dated March 10, 2014), addressed in more detail at fn.254, below.

tor; the FSA is distracted from its key purpose; and the courts are systematically forced to reach unfair decisions. (5) *Increasingly, differences in law between the UK and its European partners need to be justified*. The rules set out in Pt 2 cannot be justified before an international audience."

19-014 The rest of Pt 3 of the Report goes on to address these points in more detail. Two points are in particular important to note here. First, at para.3.51 of the Report, the Law Commissions state that:

"We can understand that Parliament would be reluctant to reform the law if the new law were to become outdated quickly. We have therefore deliberately drafted the Bill in a way that would enable it to develop with changing circumstances. We have, for example, used open-textured words (such as 'reasonable') and provided non-exhaustive lists of factors to show how such words should be interpreted. We think this will give the courts and the FOS a clear steer, without precluding them from taking into account new factors as the market changes."

This may, of course, be important in future litigation concerning the Act. Secondly, at paras 3.53 and 3.55 of the Act, the Law Commissions state that:

"The European Commission has mentioned insurance contract law as one particular area where common legal rules should be considered. … The problem with the system of law set out in Pt 2, however, is that it cannot be justified before an international audience."

At para.3.56 of the Report, the Law Commissions go on to state that:

"In Pts 4 to 9 we set out details of a reformed law, which would be seen to be fair and reasonable both within the UK and abroad."[7]

3. COMMENTARY ON THE ACT

19-015 The following commentary on the Act follows the outline set out in Pt 4 of the Report[8] and the order in which the provisions of the Act are set out. A more detailed exposition of the Law Commissions' recommendations, including the reasoning behind those recommendations and a number of arguments for and against the same, are set out in Pts 5–9 of the Report. The Explanatory Notes are (to the relevant extent and in the appropriate manner) helpful and are referred to below.[9]

[7] See para.6.19 of *Consumer Insurance Law: Disclosure, Representation and Basis of the Contract Clauses* (Peter J. Tyldesley, Bloomsbury Professional, 2013), which states, in relevant part, as follows: "Over the last few years, insurance law has been reformed across the globe, from Chile to China. In the EU there are moves to provide an optional code based on civil law principles. The UK's patchwork of inconsistent rules has begun to look vulnerable. New legislation should enable the UK once again to become the benchmark of best practice. This, we hope, will strengthen the international negotiating position of the UK government and the UK insurance industry." Chapter 6 of *Consumer Insurance Law: Disclosure, Representation and Basis of the Contract Clauses* is written by David Hertzell, at that time the Law Commissioner responsible for commercial and common law projects, including those to reform the law of insurance and sale of goods.

[8] This structure is followed for ease of reference and also for ease of exposition of the content of the Act. The correct approach to the proper interpretation of the Act (and, in particular, whether or not the Report and/or the Explanatory Notes are referred to in this regard) is beyond the scope of this work and will, of course, be a matter for submission and ultimately for determination by the courts. For example, in "Reform of insurance law: the Consumer Insurance (Disclosure and Representations) Act 2012" (Graham Charkham (2013) 25 I.L.M. 4 1) it is stated (under the heading "Mixed purposes") that: "The Law Commission's Report, upon which the Act is based but which is not admissible as an aid to construction … ."

[9] As set out above, it is important to note that, despite the Act coming into force on April 6, 2013, no Explanatory Notes to the Act have been issued. The Explanatory Notes referred to above and throughout this chapter were prepared by HM Treasury in order to assist the reader of the Bill and

A hyperlink to the full text of the Act is set out in fn.1 above. References below to sections are references to sections in the Act.

19-016 **The scope of the Act.** The Act is relatively narrow in its scope. As set out above, the Act applies only to consumer insurance contracts. Furthermore, it only deals with the issue of what a consumer must tell an insurer before entering into or varying an insurance contract. As set out above, the Act abolishes the duty currently imposed on consumers to volunteer material facts. In its place, the Act places a duty on consumers to take reasonable care not to make a misrepresentation. Where an insurer has been induced by a misrepresentation to enter into an insurance contract, the insurer's remedy (if any) will depend on the consumer's state of mind. Insurers are required to pay claims where the consumer has acted reasonably. Insurers may avoid policies where the consumer has acted deliberately or recklessly. For careless misrepresentations, insurers are entitled to a compensatory remedy. In addition, the Act:

(1) abolishes basis of the contract clauses;
(2) gives insurers remedies where misrepresentations are made by group scheme members and those whose lives are insured by others (and who are not party to the insurance contract);
(3) provides a structure to decide for whom an intermediary acts when passing information from a consumer to the insurer; and
(4) prevents insurers from contracting out of this scheme to the detriment of the consumer.

19-017 **Main definitions.** Section 1 sets out the "Main definitions". A "consumer insurance contract" is defined as being a contract of insurance between an individual (i.e. a natural person, rather than a legal person) who enters into the contract for purposes wholly or mainly unrelated to their trade, business or profession,[10] and "a person who carries on the business of insurance and who becomes a party to the contract by way of that business". The definition expressly provides for mixed use contracts.[11] Where a policy covers some non-business and some business use, the main purpose of the insurance needs to be considered (see the Explanatory Notes, para.18). For example, insurance would be considered to be "consumer insurance" if private vehicle insurance covers a limited amount of business use, or if

to help inform debate on it. They did not form part of the Bill, they do not form part of the Act and they have not been endorsed by Parliament. Care must be taken, therefore, if and when referring to the Explanatory Notes. This applies to all references to the Explanatory Notes made in this chapter.

[10] For the Law Commissions' views on the meaning of "trade, business or profession", see para.5.13 to 5.16 of the Report.

[11] What amounts to a "consumer insurance contract" is, of course, critically important. Whilst the approach taken in the Act to what is a consumer broadly follows the general approach of European law, as imported into UK consumer legislation by EU directives, this is not entirely the case because the Act provides (as above) for "mixed use" contracts: see paras 5.5 to 5.19 of the Report. Understandably, given the importance of these core definitions, commentators have expressed various views: see, for example, para.6.7 of *Consumer Insurance Law: Disclosure, Representation and Basis of the Contract Clauses* (Peter J. Tyldesley, Bloomsbury Professional, 2013), *Arnould: Law of Marine Insurance and Average*, 18th edn, (London: Sweet & Maxwell, 2013) paras 15–219 to 15–220 and "Reform of insurance law: the Consumer Insurance (Disclosure and Representations) Act 2012" (Graham Charkham (2013) 25 I.L.M. 41, under the headings "The definition of 'consumer insurance contract'" and "Mixed purposes").

Agnew, The Aegeon,[251] Mance LJ expressed the tentative view that the common law rule fell outside the scope of s.17 and that accordingly no question of avoidance ab initio arose. In *Axa General Insurance Ltd v Gottlieb*,[252] the Court of Appeal held that the common law rule does not cause an insured to forfeit sums paid in settlement of claims honestly made before a fraudulent claim was made. In that case, the insured householders had made four claims under their buildings policy within a policy year. The first two claims were honestly presented and were paid before the last two claims were made. There was fraud in relation to the latter, but interim payments on those claims had been before the insureds had used fraudulent means in seeking payment of the balances. It was held that the insurers were not entitled to recover the moneys paid on the first two (honest) claims, but were entitled to recover the interim payments made on the later fraudulent ones, regardless of the fact that the interim payments had preceded the employment of fraudulent means on those claims.

21-061 **In litigation.** In contrast to authority upon fraud conditions in policies,[253] it has been held that neither the common law rule nor its "sub-species" apply to fraud by the assured after the commencement of proceedings.[254]

21-062 **Conditions relating to fraudulent claims.** Insurers have long sought protection against fraudulent claims by including express conditions in their policies, in terms that sometimes caused harshness to the insured. In the eighteenth century it was common to find a clause requiring the insured to procure:

> "[a] certificate under the hand of the minister and churchwardens, together with some other reputable inhabitants of the parish … importing that they were well acquainted with the character and the circumstances of the person … insured and do know or verily believe that he she or they really and by misfortune without any fraud or evil practice have sustained the claimed loss or damage by fire".[255]

This could work hardship if the insured could not produce a certificate and the requirement for such a certificate was expressed to be a condition precedent to liability.[256] By the early nineteenth century it was more usual to find a clause in these terms, "[i]f there appear fraud in the claim made, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under the policy"[257] and the common Lloyd's form in use in the twentieth century has been:

> "If the assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this policy shall become void and all claim thereunder shall be forfeited."[258]

[251] [2003] Q.B. 556 at [45]; [2002] Lloyd's Rep. I.R. 573 at 585.
[252] *Axa General Insurance Ltd v Gottlieb* [2005] 1 All E.R. (Comm) 445.
[253] *Lek v Mathews* (1927) 29 Lloyd's Rep. 141 at 145.
[254] *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd, The Star Sea* [2001] UKHL 1; [2001] 1 Lloyd's Rep. 389 [2001] Lloyd's Rep. I.R. 247 at [73]–[78]; *Agapitos v Agnew, The Aegeon* [2003] Q.B. 556; [2002] 1 Lloyd's Rep. I.R. 573 at [52]–[53]; *The DC Merwestone* [2015] 1 Lloyd's Rep. I.R. 115 at [78].
[255] *Oldman v Bewicke* (1786) 2 Hy.Bl. 577, note (a).
[256] *Routledge v Burrell* (1793) 1 Hy.Bl. 254; *Worsley v Wood* (1796) 6 T.R. 710.
[257] *Levy v Baillie* (1831) 7 Bing. 349.
[258] *Albion Mills Co v Hill* (1922) 12 Lloyd's Rep. 96; *Harris v Evans* (1924) 19 Lloyd's Rep. 346; *Dome Mining Corp Ltd v Drysdale* (1931) 41 Lloyd's Rep. 109. Sometimes the clause says "all claims hereunder" shall be forfeited—*K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters, The Mercandian Continent* [2001] 2 Lloyd's Rep. 563 at 568. A modern variant is—[i]f the claim be in any respect fraudulent or if any fraudulent means or devices be used by the insured … to obtain any benefit under this Policy … all benefit under this Policy shall be forfeited"—*Insurance Corp of the Channel Islands v McHugh* [1997] L.R.L.R. 94 at 98; *Baghbadrani v Commercial Union Assurance Co* [2000] Lloyd's Rep. I.R. 94 at 102; *Nsubuga v Commercial Union Assurance Co* [1998] 2 Lloyd's Rep. 682 at 684.

21-063 If the insured makes a claim where he has suffered no loss or claims for a loss which he has himself caused, insurers do not need to rely on any condition relating to fraudulent claims; but in practice, where the circumstances are suspicious, it may be much easier to show that the insured has made a fraudulent statement in the advancement of his claim than it is to show that he wilfully destroyed his own property. The clause thus enables the insurers to assume a lesser burden and still defeat the claim. This approach had the full support of, at any rate, Willes J in his summing-up to the jury in *Britton v Royal Insurance Co*[259]:

> "Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even supposing it were not wilful, yet as it is a contract of indemnity only, that is, a contract to recoup the insured the value of the property insured by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-by to the origin of the fire, and it amounts to this—that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in claim, the insured forfeits all claim whatever upon the policy."

The clause is most commonly invoked where the insured includes a claim for goods which he either never had or which were disposed of before the fire or burglary in question,[260] or where the claim is inflated deliberately.[261] Being a clause of a kind frequently found in policies, it is unnecessary to bring it specifically to the notice of an insured in order for him to be bound by it.[262] Since it is an agreed term of the contract, questions concerning its meaning and effect are to be resolved according to its proper interpretation. In this regard assistance is to be gained from decisions on the common law rule referred to above, since the clause has been said to produce the same results as the latter.[263] What is clear is that the insured who is detected in dishonestly making a false statement as to a not insubstantial part of his claim automatically forfeits the entire claim.[264] Where a fraud condition provided that the policy was to be void "if any part of any claim" was fraudulent, this was construed

[259] *Britton v Royal Insurance Co* (1866) 4 F. & F. 905. In effect, the judge withdrew the issue of arson from the jury, leaving them to decide merely whether the claim had been presented fraudulently.
[260] *Britton v Royal Insurance Co* (1866) 4 F. & F. 905 at 907, 913; *Albion Mills Co v Hill* (1922) 12 Lloyd's Rep. 96; *Cuppitman v Marshall* (1924) 18 Lloyd's Rep. 277; *Herman v Phoenix* (1924) 18 Lloyd's Rep. 371; *Lek v Mathews* (1927) 29 Lloyd's Rep. 141; *Nsubuga v Royal Insurance Co* [1998] 2 Lloyd's Rep. 682.
[261] *Goulstone v Royal Insurance Co* (1858) 1 F. & F. 276; *London Assurance Co v Clare* (1937) 57 Lloyd's Rep. 254; *Central Bank of India v Guardian Assurance Co* (1934) 54 Lloyd's Rep. 247; *Insurance Corp of the Channel Islands v McHugh* [1997] L.R.L.R. 94.
[262] *Nsubuga v Royal Insurance Co* [1998] 2 Lloyd's Rep. 682 at 685.
[263] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209 at 211; *Nsubuga v Royal Insurance Co* [1998] 2 Lloyd's Rep. 682 at 686.
[264] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep. I.R. 209 at 213; *Tonkin v UK Insurance Ltd* [2006] 2 All E.R. (Comm) 550 at [178]; *Danepoint Ltd v Allied Underwriting Insur-*

7. APPLICATION TO PARTICULAR CASES

24-076 **Carriers and bailees.** When goods which have been insured by their owner are lost or damaged, the insurers on payment are subrogated to the owner's remedy against any carrier, warehouseman or other bailee responsible for the safety of the goods,[225] and they are entitled to recover the whole loss from the carrier or bailee who is liable to the owner irrespective of the extent of their liability to the insured.[226] A common carrier is absolutely responsible for goods in his possession and is commonly called an insurer of the goods; but he is not an insurer in the strict sense of the word and cannot claim contribution from the insurers.[227] The owner's insurers are only deprived of their right of subrogation when they have in fact insured both owner and bailee[228] or where the owner has contracted that the bailee shall not be liable for loss.[229] A bailee can exempt himself from liability for negligence provided he does so in express terms but general words of exclusion will be presumed not to exclude negligence on the part of the bailee if there is any other liability on his part to which the excluding words can apply.[230] If there are two recognised rates of carriage, it may be held that carriage at the cheaper rate will entail no liability for negligence on the part of the carrier, and in a case where the goods-owner insured his goods under a policy expressed to be "without recourse to lightermen", it was held that underwriters were precluded from recovering in the name of their insured against the lightermen.[231] Where a bailee has contracted to insure for the benefit of the bailor but has omitted to do so, he is liable in the case of loss by fire to pay damages for breach of contract amounting to the sum which the bailor would have recovered on the policy if it had been effected.[232]

24-077 **Rights of the carrier's or bailee's insurers.** Since insurers are subrogated to the rights of those whom they have contracted to indemnify, they cannot, in the absence of express provision in the policy, be subrogated to the rights of a mere payee who is entitled to receive the money but whose interest is not separately insured.[233] Such a payee may, however, effectively possess cover under the policy, and one case is where a carrier takes out a "goods in transit" policy which covers the full value of the goods. It is settled law that a bailee, such as a carrier, has an insurable interest in the full value of the goods and that any sum which he recovers from the insurer in excess of his own loss (if any) is held by him for the owner of the goods.[234] But it has never been considered whether the insurer, on payment for a loss to the carrier, is subrogated to the rights of the goods-owner after he has received the insurance money from the carrier. This may be a problem which will not often arise in practice, because the carrier will usually possess a right of suit against a wrongdoing third party and these rights can then be exercised by the insurers in the carrier's name; but such rights may be defeated by an exclusion clause in a contract or for some other reason, and it will then be important to know if the insurer can exercise the rights of the goods-owner.[235]

[225] *North British and Mercantile Insurance Co v London Liverpool and Globe Insurance Co* (1877) 5 Ch. D. 569; *Hall and Long v Railroad Companies* 13 Wall. 367 (1871).
[226] *Mobile and Montgomery Railway Co v Jurey* 111 U.S. 584 (1883).
[227] *Hall and Long v Railroad Companies* 13 Wall. 367 (1871).
[228] *Wager v Providence Insurance Co* 150 U.S. 99 (1893). In *The Surf City* [1995] 2 Lloyd's Rep. 242 a waiver of subrogation clause in the contract between insurer and c.i.f. seller was held to enure to the benefit of the carrier. Problems of privity were circumvented by a concession made by the subrogated cargo insurers. See para.22-064, above.
[229] See para.24-033, above; *Thomas & Co v Brown* (1899) 4 Com.Cas. 186; *Phoenix Insurance Co v Erie and Western Transportation Co* 117 U.S. 312 (1886).
[230] *Rutter v Palmer* [1922] 2 K.B. 87; *Alderslade v Hendon Laundry* [1945] K.B. 189.
[231] *Thomas & Co v Brown* (1899) 4 Com.Cas. 186.
[232] *Ex p. Bateman* (1856) 8 De G.M. & G. 263.
[233] *Wager v Providence Insurance Co* 150 U.S. 99 (1893). The contract may expressly provide for insurers to be subrogated to the rights of a third party to whom payment is to be made—see, e.g. *Anderson v Saugeen Mutual Fire Insurance Co* (1889) 18 Ont.R. 355 at 359, 367–368.
[234] *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451.

24-078 If it is correct that an insurer is subrogated only to the rights of parties to the contract of insurance who have a right to payment under the policy, it follows that the insurer will be subrogated to the rights of a goods-owner only where that owner was himself an insured because the carrier specifically effected the cover on behalf of the goods-owner as his agent. In the usual case, however, the carrier will have effected the policy before the goods are entrusted to him and cannot be said to have acted as the goods-owner's agent. In practice the bailor will not be aware of the policy until after the loss. Quite apart from the difficulties attendant on ratification after loss,[236] he will not normally be entitled to sue on the policy as the bailee's undisclosed principal.[237]

24-079 In such a case, the orthodox view is that because the goods-owner cannot directly enforce the contract of insurance against the insurer, there being no privity of contract, the insurer likewise cannot exercise rights of subrogation in his name. It might be argued, however, that the law, by allowing the carrier to claim an indemnity for the benefit of the goods-owner and by obliging the carrier to account to the goods-owner for his successful recovery, is sanctioning an exception to the doctrine of privity of contract, so that the insurer is, however indirectly, obliged to indemnify the goods owner. If that is correct, it could be said that on equitable grounds an insurer should be permitted to sue in the name of the goods-owner who can in this manner claim an indemnity from him, especially as the insurer's rights of subrogation, to some extent, derive from equitable principles.[238] However, the so-called obligation of the insurer towards the goods-owner has never been upheld in a situation where the carrier refuses to claim the insurance money for the latter's benefit or where the goods-owner wishes to make a direct recovery under the policy. Although it has been said obiter that the goods-owner is entitled to claim the value of his goods from the insurer,[239] it has never been spelled out what form his action should take and such statements have been doubted in the Court of Appeal.[240] It would be wrong to assume that, because the policy moneys are impressed with a charge in favour of the goods-owner once they are received by the carrier, the goods-owner possesses any direct action against the insurer.[241]

24-080 **Negligence of insured or his servants.** If the insured would be disentitled to

[235] See *Morris v C.W. Marten & Sons* [1966] 1 Q.B. 716.
[236] See para.1-197, above and para.38-014, below.
[237] See the discussion at paras 22-026 to 22-028, above.
[238] See para.24-023, above.
[239] *Re King* [1963] Ch. 459 at 491, per Upjohn LJ, and at 499, per Diplock LJ who referred to agency in more guarded words.
[240] *D.G. Finance Ltd v Scott* [1999] Lloyd's Rep. I.R. 387.
[241] *D.G. Finance Ltd v Scott* [1999] Lloyd's Rep. I.R. 387 applying *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451; *Re Dibbens* [1990] B.C.L.C. 577; and *The Albazero* [1977] A.C. 774 at 845. The better view today, it is submitted, is that the goods-owner possesses a statutory right to enforce the bailee's insurance under s.1 of the Contracts (Rights of Third Parties) Act 1999—see para.22-063, above.

terms for the benefit of wife and children or children without specifying the respective interests of the beneficiaries inter se, or the policy may be expressed to be for the benefit of the persons designated in such shares and proportions and interest and generally in such manner as the insured shall by will or deed appoint.[464] In the absence of any appointment or apportionment of interests either in the policy or by will or deed of the insured the persons designated as beneficiaries will take in equal shares as joint tenants.[465] When the beneficiaries are the widow and children of the insured the widow shares equally as a joint tenant with the children unless the wording or some special circumstance indicates an intention that the widow is to have a life interest in the whole with remainder to the children.[466] A joint tenancy means that until there is a division of the policy moneys among the beneficiaries they take with benefit of survivorship and the share of any beneficiary who dies before division accrues to the survivor or survivors.[467]

26-187 **Exercise of options.** If a policy contains options exercisable by the insured and the policy is effected for the benefit of a spouse or children so as to create a trust under the Act then, so long as any of the trust purposes remain unperformed, the trust may not be defeated by the exercise of any of the options, and the insured is a trustee of the powers granted to him by the policy and may also exercise the options for the benefit of the beneficiaries, whether their interests be vested or contingent.[468]

The fact that some of the options are capable of being exercised against the interest of the beneficiaries does not entitle the court to construe the policy as one conferring interest on the beneficiaries defeasible to the extent to which the insured can exercise the options. The insured's duty is still to exercise the options for the best benefit of the beneficiaries and if, for example, the insured is unable or unwilling to continue to pay the premiums, his duty in those circumstances may be to elect to have the policy converted into a paid-up insurance payable on his death.[469]

26-188 In *Re Fleetwood's Policy*,[470] the wife of the insured was the sole beneficiary of a settlement policy contingent upon her surviving the insured. The insured exercised an option contained in the policy of receiving the entire cash value and of discontinuing the policy. The company paid the proceeds into court. It was held that by exercising the option the insured could not defeat the beneficial interest of his wife, and that the proceeds must accordingly remain in court and be accumulated to await the event determining who was to be ultimately entitled to it.

26-189 **Resulting trust in favour of insured.** If the whole trust purposes fail there is a resulting trust for the insured and his estate.[471] In *Cleaver v Mutual Reserve Fund Life*,[472] a policy effected by a married man was expressed to be for the benefit of his named wife, and the policy moneys were made payable to her if living at the death

[464] *Re Parker's Policies* [1906] 1 Ch. 526.
[465] *Re Seyton* (1887) 34 Ch. D. 511; *Re Davies' Policy Trusts* [1892] Ch. 90; *Re Griffiths' Policy* [1903] 1 Ch. 739; *Re Browne's Policy* [1903] 1 Ch. 188.
[466] *Re Seyton* (1887) 34 Ch. D. 511.
[467] *Re Seyton* (1887) 34 Ch. D. 511.
[468] *Re Fleetwood's Policy* [1926] Ch. 48; *Re Equitable Life Assurance Society of US and Mitchell* (1911) 27 T.L.R. 213.
[469] *Re Fleetwood's Policy* [1926] Ch. 48.
[470] *Re Fleetwood's Policy* [1926] Ch. 48.
[471] Regardless of whether this is specifically stated in the policy.
[472] *Cleaver v Mutual Reserve Fund Life* [1892] 1 Q.B. 147.

of the insured, otherwise to the insured's personal representatives. The insured died and his wife was convicted of murdering him. A joint action was thereupon brought against the company by a representative of the wife and her estate on the one hand and the personal representatives of the husband on the other hand. The company argued that the wife could not claim since the death of the insured was the consequence of her own felony,[473] and that the personal representatives of the insured could not claim as the insured was only entitled if he survived his wife. It was held that, as the wife's claim was barred on the grounds of public policy, the sole object of the statutory trust had failed. There was, therefore, no object of the trust remaining unperformed and accordingly there was a resulting trust of the policy moneys in favour of the insured. The policy moneys were therefore recoverable by the insured's personal representatives.

Discharge for policy money. As stated below in this chapter,[474] in relation to any dealing with a settled policy the company ought to obtain a discharge from the trustees of the settlement under which the policy is held. In paying the policy moneys or advancing money to pay premiums or accepting a surrender of a policy effected under the Married Women's Property Acts, the company ought therefore to be satisfied that it is dealing with the properly constituted trustee of the policy, and that such trustee has power to bind all the persons with beneficial interests in the policy. **26-190**

The Act of 1870 contained no provision for determining the trustee of the policy, and consequently, when a policy was effected under that Act, it was necessary, before the company could obtain a valid discharge for the proceeds of the policy and before there could be any dealing with the policy, to apply to the court for the appointment of a trustee.[475] **26-191**

This deficiency was remedied by s.11 of the Act of 1882. This section provides that the insured may, by the policy or by any memorandum under his or her hand, appoint a trustee or trustees of the policy, and from time to time appoint a new trustee or trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under the policy; and that, in default of appointment, the policy shall vest in the insured or his or her personal representatives as trustee of the policy. The insured is specifically given no power to remove a trustee or to appoint another in his place, but it is reasonably clear that the statutory power conferred by s.36 of the Trustee Act 1925 would apply. Although it is open to some doubt, it is submitted that the insured is the person who, within the meaning of s.36(1)(a) of the Trustee Act 1925, is the "person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust", and hence the person given power under s.36 to discharge trustees for the reasons there given and appoint new trustees in their place. This would stem from the fact that, although the "instrument creating the trust" is the policy, the policy may be said to incorporate by reference the provisions of s.11 of the Act of 1882. **26-192**

It follows from the above that when the policy moneys become payable on the death of the insured and no trustees have been appointed, the company may safely pay the insured's personal representatives. Similarly, in relation to any surrender- **26-193**

[473] i.e. applying the legal maxim "ex turpi causa non oritur action".
[474] See para.26-204 and following, below.
[475] *Re Turnbull* [1897] 2 Ch. 415; *Re Kuyper's Policy Trusts* [1899] 1 Ch. 38. The application was either to the High Court or to the County Court for the district in which the insurance office was situated.

J drew the inference that they were due to incendiarism committed by disorderly people. He held that the fire was sufficiently connected with the military occupation to prevent the plaintiff from recovering and the Court of Appeal agreed with him. Bankes LJ said he desired to base his judgment on the ground that the loss or damage of which the plaintiffs complained was proximately or remotely contributed to by or in connection with or in consequence of events or causes which determined the proclamation or maintenance of martial law or state of siege. Scrutton LJ said that the fire was at any rate contributed to by incendiarism directly caused by the state of war.

28-036 There is little modern authority on the meaning of "war risks" but sometimes policies are very particular as to the precise terms of cover afforded. The latent (and often patent) hostilities in the Middle East have caused underwriters and their insureds much difficulty. In *American Airlines v Hope*[101] three aircraft had been destroyed by the Israeli Government while grounded at Beirut airport, in retaliation for a previous attack by Arab terrorists on Israeli aircraft at Athens two days before. No policy had been issued but the slip excluded war risks. There was, however, much argument whether the contract of insurance included two clauses which had been in previous insurances:

(1) "This policy is extended to cover loss or damage arising out of any unprovoked or accidentally provoked incidents which arise during the normal course of the Assured's operations between Israel/Arab countries".

(2) "Including liability for loss or damage arising out of any unprovoked or accidentally provoked incident or incidents which occur during normal course of the Assured's operations over Arab/Israel territory."

The House of Lords eventually held that neither of these clauses was incorporated in the contract of insurance, but it was also held (obiter) that a deliberate act of retaliation was not an unprovoked or accidentally provoked incident and that an attack on grounded aircraft did not occur during the normal course of operations "over" the relevant territories.

28-037 The ambit of war risk provisions may require careful analysis in relation to terrorist activity. In *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd*[102] the Court of Appeal considered, obiter, whether the 9/11 attacks on the World Trade Centre fell within provisions relating to "acts of war" or "armed conflict". Rix LJ indicated that these terms appeared to be broader than "war", since they could arise in the absence of war, and that, in construing these terms in a policy, considerable weight might have to be given to the concerns of businessmen and insurers over the scale and ramifications of a conflict. Ward LJ commented that he did not believe that insurers and the insured would have regarded the 9/11 attacks as "acts of war", and that they would have been seen as terrorist attacks. He regarded the hallmark of "armed conflict" as persistent combat. The court did not reach a conclusion on the issue.

28-038 **Acts of state.** Certain old cases in the law of marine insurance lay down a principle to the effect that an insured cannot recover in respect of damage wilfully

[101] *American Airlines v Hope* [1974] 2 Lloyd's Rep. 301; see also the judgments of the Court of Appeal and Mocatta J at [1973] 1 Lloyd's Rep. 233 and [1972] 1 Lloyd's Rep. 253, respectively, and *Pan American World Airways Inc v Aetna Casualty and Surety Co* [1975] 1 Lloyd's Rep. 77.

[102] *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd* [2004] Lloyd's Rep. I.R. 696.

done by an alien government of which the insured was a subject.[103] The rationale of the rule appears to be that in such a case an alien insured must be identified with the acts of his own government for otherwise it would be impossible to prevent fraudulent collusion between the insured and his government for the purpose of obtaining the insurance money. The rule has been criticised[104] and has been doubted in the United States[105] and it is doubtful whether it would be extended to cases of fire insurance.

It is perhaps unlikely that the question will be decided since most policies have an exception for loss by military power, but cases not within the exception might arise. In *Curtis & Sons v Mathews*[106] there was an express term in the policy excepting confiscation or destruction by the government of the country in which the property was situated and the Court of Appeal held that this referred only to intentional and direct destruction such as destruction of buildings which were a hindrance to military operations.

Spontaneous combustion. Many policies contain an exception of "loss or damage to property occasioned by or happening through its own spontaneous fermentation or heating". It is submitted that if a stackyard was insured, and one stack were to ignite through spontaneous combustion, the loss of that stack would fall within the exception, but if the fire were to spread to the rest of the stacks their loss would be recoverable. The exception only excludes the loss of the particular thing which has been lost through its own spontaneous combustion. **28-039**

It is not clear whether a fire policy without such an exception will extend to loss through spontaneous combustion; it is submitted that it should, since there has been an ignition of something which is not intended to be ignited. There is, however, authority in the law of marine insurance that where loss or damage is caused solely by the defective condition of the thing insured, there can be no recovery, e.g. when a vessel on a time policy goes to sea in an unseaworthy condition and has to put into a port of refuge for repairs[107] or when cargo shipped is liable to catch fire.[108] **28-040**

These cases can be distinguished on the ground that loss due to inherent vice is not a loss covered by a marine policy but is a loss due solely to an independent cause. In the case of a fire policy, however, the intention of the parties is to insure against the happening of any unintended fire and it has been held in Quebec that a fire policy on a quantity of coal stored on land covered the risk of spontaneous combustion due to the negligent stacking of the coal in a damp condition.[109]

It is submitted that, in any event, if the inherent defect is brought into activity by a peril insured against or if it gives rise to a peril insured against, the loss or damage so caused should be within a fire policy.

Earthquake. Earthquakes are often the subject of an exception in fire policies, and two cases arose out of the earthquake in Jamaica in 1907. In each case, it is for **28-041**

[103] *Conway v Gray* (1809) 10 East 536; *Campbell v Innes* (1821) 4 B. & Ald. 423; J. Arnould, *The Law of Marine Insurance and Average* (1981), para.787.

[104] *Aubert v Gray* (1862) 3 B. & S. 169.

[105] *Ocean Insurance Co v Francis* 2 Wend. 64 (1828).

[106] *Curtis & Sons v Mathews* [1919] 1 K.B. 425.

[107] *Fawcus v Sarsfield* (1856) 6 E. & B. 192.

[108] *Boyd v Dubois* (1811) 3 Camp. 133; *Providence Washington Insurance Co v Adler* 65 Md. 162 (1885); *Sassoon v Yorkshire Insurance Co* (1923) 14 Lloyd's Rep. 167; affirmed 16 Lloyd's Rep. 129.

[109] *British American Insurance Co v Joseph* (1857) 9 Low.Can.R. 448.

This approach to construction was justified by the fact that the insurers had provided insurance against the background of a regulatory regime with which they were familiar, and which allowed for this method of claiming by investors.

3. EMPLOYERS' LIABILITY POLICIES

30-110 Compulsion to insure. An employer[307] carrying on any business in Great Britain[308] must insure and maintain insurance under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment in Great Britain in that business.[309]

An approved policy must not contain provisions rendering the insurer's liability conditional upon the exercise of reasonable care, the compliance with safety legislation or the keeping of specified records by the employer or provisions defeating a claim by reason of acts or omissions by the employer subsequent to the event giving rise to the claims.[310]

Neither must a policy contain any condition requiring a relevant employee to pay or an insured employer to pay the relevant employee the first amount of any claim or any aggregation of claims.[311]

Cover must extend to an amount of five million pounds in respect of claims relating to any one or more of his employees arising out of any one occurrence.[312]

A certificate of insurance must be displayed at every place of business where persons are employed.[313]

It has been remarked that such a certificate can be misleading, inasmuch as there are clauses suspending cover under certain circumstances which are not proscribed by statute and of which the employee will be ignorant.[314] Under s.5 of the 1969 Act, it is an offence not to maintain employer's liability insurance. It appears that this provision is not directed at the continued existence of the policy after the expiry of the policy period. Therefore no offence would be committed where a genuine dispute as to coverage was compromised on a basis which restricted or amended the operation of the cover.[315]

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[307] This applies to all employers with certain exceptions, for which see the Employers' Liability (Compulsory Insurance) Act 1969 s.3 (as amended); Local Government Act 1972 ss.1(10), 179(3); Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573) reg.9 and Sch.2, as amended by the Employers' Liability (Compulsory Insurance) Regulations 2004 (SI 2004/2882), the Employers' Liability (Compulsory Insurance) Regulations 2008 (SI 2008/1765) and the Employers' Liability (Compulsory Insurance) Regulations 2011 (SI 2011/686). The exemptions relate principally to bodies with exemption certificates from government departments; foreign and Commonwealth governments, and certain public bodies. Certain members of ship-owners mutual assurance associations are exempted, as are employers required to insure under a compulsory motor insurance scheme by virtue of the fact that employees are carried in or use vehicles. There is also an exemption for companies with one employee where the employee owns 50 per cent or more of the share capital.

[308] Similar legislation is in force in Northern Ireland, the Channel Islands and the Isle of Man. The legislation extends to offshore installations, see the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995 (SI 1995/738), and the Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573), as amended.

[309] Employers' Liability (Compulsory Insurance) Act 1969 s.1(1). In *BAI (Run-Off) Ltd v Durham* [2012] Lloyd's Rep. I.R. 371 on appeal from *Employers Liability Policy Trigger Litigation* [2011] Lloyds Rep. I R. 1 CA, on appeal from Burton J in *Durham v BAI (Run-Off) Ltd* [2009] Lloyd's Rep. I.R. 295, the Supreme Court held (reversing both Burton J and a majority of the Court of Appeal, and upholding the dissenting judgment of Rix LJ on this point) that s.1(1) of the 1969 Act requires an employer to insure against liability for disease that is *caused* during the policy period, even if the disease only manifests itself at a later time. The *BAI* case concerned whether the insurance policies in question responded to claims in respect of the relevant employers' liability for mesothelioma. The principal issue turned on the construction of various policy wordings, some of which provided cover for injury or disease "sustained" during the policy period, and some for injury or disease "caused" during the policy period. Burton J had held that the commercial purpose of employers' liability insurance required that expressions such as "injury *sustained*" in the policy period be given the same meaning as "injury *caused*". A majority of the Court of Appeal (Rix and Stanley Burnton LJJ, Smith LJ dissenting) rejected that purposive construction, holding that under "injury *sustained*" wording liability is triggered only upon the actual onset of the disease, and not by the tortious exposure to asbestos fibres causative of the eventual disease. Rix LJ had considered that despite the commercial purpose being to insure the employer against liability which its activities as an employer engendered during the policy period ([219]), in the context of standard wordings renewed year after year and where other tariff wordings were available it was extremely difficult to conclude that anything had gone wrong with the language, and the more natural or literal interpretation of "sustained" as referring to the later manifestation of the disease was not absurd or meaningless ([234]–[235]). Lord Mance, with whom the other members of the Supreme Court agreed, held (at [26]) that in light of the Supreme Court's recent decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2012] 1 Lloyd's Rep. 34, the approach of the majority in the Court of Appeal gave too little weight to the implications of the rival interpretations and to the principle that "where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense". The Supreme Court's ruling on this point removes what would otherwise have been a lacuna in the protection to employees: since the actual onset of mesothelioma usually occurs many years after an employee has been exposed to asbestos fibres, it is likely that persons developing mesothelioma as a result of negligent exposure to asbestos fibres in the course of their employment will no longer be employed by the employer responsible at the time of the actual onset of the disease, such that on the approach taken by the majority in the Court of Appeal, the liability of the employer who caused the exposure to asbestos would not be covered by insurance if that employer had later ceased carrying on business in the United Kingdom or indeed had switched to a policy with "causation" wording. In those circumstances, the negligent former employer of such a person (if still existing) would be without cover for its liability to the former employee; and if the former employer were insolvent, the victim of the tort would have had no claim under the Third Parties (Rights Against Insurers) Act 1930 (or under the 2010 Act when it comes into force, as to which see paras 30-024 and following, above). For an illuminating discussion of *BAI (Run-Off) Ltd v Durham* in particular on the question of what will suffice to satisfy the "causal requirement" for a liability insurer of an employer to be liable to indemnify the insured, see *International Energy Group Ltd v Zurich Insurance Plc UK* [2013] EWCA Civ 39; [2013] Lloyd's Rep. I.R. 379.

[310] Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573) reg.2(1).

[311] Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573) reg.2(2). A relevant employee is an employee who is ordinarily resident in the United Kingdom, or who, though not ordinarily resident in the United Kingdom, has been employed on or from an offshore installation or associated structure for a continuous period of not less than seven days, or who, though not ordinarily resident in Great Britain, is present in Great Britain in the course of employment for a continuous period of not less than 14 days (reg.1(2)). The purpose of the regulations is to prevent a policy excess from affecting the employee's right to receive full compensation. It is permissible to provide that, if the employee is so compensated, the insurer will seek reimbursement for part of the claim from the employer: *Aitken v Independent Insurance Co*, 2001 S.L.T. 376.

[312] Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573) reg.3.

[313] Employers' Liability (Compulsory Insurance) Act 1969 s.4(1). For further provisions as to certificates, see the Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998/2573) regs 4–6 and Sch.1.

[314] *Dunbar v A.&B. Painters Ltd* [1986] 2 Lloyd's Rep. 38 at 43, per Balcombe LJ (clause excluding cover arising in connection with work carried out at over 40 feet from the ground).

[315] *Re T&N Ltd (No.4)* [2006] Lloyd's Rep. I.R. 817. The decision left open the question whether voluntary commutations after the expiry of the policy were outside the scope of the Act.

not necessarily be the principal debtor, since it may be a surety[65] or even an insurer[66] whose liability is the subject-matter of the insurance.

The event on the happening of which the insurer is to become liable differs from policy to policy. Usually, it is non-payment of a debt on the due date[67] or within a specified time thereafter[68]; if this is the case it is irrelevant to consider the reason why payment is not made.[69] In other cases the policy specifically provides for payment in the event of insolvency of the debtor,[70] but any allegation that a debt has not been paid for some other reason will be scrutinised closely if the debtor is, in fact, insolvent.[71]

33-017 In *Waterkeyn v Eagle Star & British Dominions Insurance Co Ltd*[72] the policy covered,

> "the risk of … loss arising from the bankruptcy or insolvency of all or any of the said banks … directly due to damage or destruction of the premises and contents of the said banks through riots, civil commotions, war, civil war, revolutions, rebellions, military or usurped power …".

The subject-matter was money deposited in Russian banks and the plaintiff had taken out the policy with the defendants while the Kerensky Government was in power. The Bolshevists subsequently abolished private banks and confiscated their assets and the plaintiff then claimed to recover under the policy. Greer J held that three things had to be proved, viz: (1) insolvency; (2) damage or destruction of the premises and contents; and (3) that the damage or destruction was due to one of the specified perils. There was no evidence that the premises of the banks had been destroyed or damaged in any way and he therefore gave judgment for the defendants, saying it was impossible to read the words "damage or destruction" as if they were equivalent to damage or destruction of the banks' business.

33-018 **Alteration of the risk.** There is usually an express condition in the policy preventing the creditor from assenting to any arrangements which modify his rights or remedies against the debtor[73] and, if this condition is not fulfilled, the insurer will

Dane v Mortgage Insurance Corp [1894] 1 Q.B. 54; a mortgage—*Re Law Guarantee Trust and Accident Society* (1913) 108 L.T. 830; a debenture—*Shaw v Royce Ltd* [1911] 1 Ch. 318; *Re Law Guarantee Trust and Accident Society Ltd (Liverpool Mortgage Insurance Co Ltd's Case)* [1914] 2 Ch. 617; or the sum outstanding on a hire-purchase agreement—*Construction Finance Co v English Insurance Co* (1924) 19 Lloyd's Rep. 144.

64 *Seaton v Burnand* [1900] A.C. 135 at 141, per Lord Halsbury; *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com.Cas. 1. See also *Moore Large & Co Ltd v Hermes Credit & Guarantee Plc* [2003] Lloyd's Rep. I.R. 315.

65 *Seaton v Burnand* [1900] A.C. 135.

66 *MacVicar v Poland* (1894) 10 T.L.R. 566.

67 *Shaw v Royce Ltd* [1911] 1 Ch. 138.

68 *Finlay v Mexican Investment Corp* [1897] 1 Q.B. 517; *Kazakstan Wool Process (Europe) Ltd v NCM* [2000] Lloyd's Rep. I.R. 371.

69 *Mortgage Insurance Corp v Inland Revenue Commissioners* (1887) 57 L.J.Q.B. 174 at 181, per Hawkins J; *Laird v Securities Insurance Co* (1895) 22 R. 452 at 459, per Lord McLaren.

70 *Hambro v Burnand* [1904] 2 K.B. 10 at 19 per Collins MR; *Waterkeyn v Eagle Star & British Dominions Insurance Co* (1920) 5 Lloyd's Rep. 42. Cf. *Murdock v Heath* (1899) 80 L.T. 50.

71 *MacVicar v Poland* (1894) 10 T.L.R. 566.

72 *Waterkeyn v Eagle Star & British Dominions Insurance Co Ltd* (1920) 5 Lloyd's Rep. 42.

73 See, e.g. *Finlay v Mexican Investment Corp* [1897] 1 Q.B. 517. In *HIH Casualty & General Insurance Co v New Hampshire Insurance Co* [2001] Lloyd's Rep. I.R. 596, it was held (at 623) that a term in reinsurance of film finance cover that the reinsured would obtain the reinsurers' approval to all amendments was a warranty, and that this result reflected the position at common law.

be able to decline liability. In the absence of any such condition, the question will be whether such alteration or modification gives rise to a material alteration in the risk.[74] The policy may, however, give the insured an express power to alter the risk; thus an insurance of debentures may expressly reserve a power to the debenture-holders to sanction any modification or compromise of their rights against the debtor company, e.g. a postponement of payment, and in such a case the insurer will be bound despite any such modifications.[75] A creditor who does not consent to any such modification is nevertheless entitled to payment from the insurer once the event insured against has happened, and the insurer will be subrogated to the creditor's rights against the company, as modified.[76] Where, however, a creditor's rights are not modified but extinguished, the insurer can no longer be liable—unless there is an express clause covering that additional risk. Thus a creditor may find that he is bound, pursuant to the terms of his contract with the debtor, by a majority decision of other creditors extinguishing old rights, creating new ones and releasing the insurer from his obligations. In such a case he will have no remedy against his insurer even if he does not consent to the new arrangement and he will only be able to pursue his new and, perhaps, less satisfactory rights against his debtor.[77]

Irrelevance of alterations after the event. Once the event insured against has happened, the insurer is liable to pay and any subsequent alteration in the relationship between the debtor and the creditor will not discharge him,[78] unless the creditor agrees to surrender some right to which the insurer ought to be subrogated.[79] The mere fact that a debtor such as a company goes into liquidation and the court sanctions a scheme of arrangement discharging the liabilities of the company and, in effect, preventing the insurer from deriving any benefit from his rights of subrogation, will not affect the liability of the insurer.[80] **33-019**

Non-disclosure of material facts.[81] There is surprisingly little authority in relation to non-disclosure in contracts of credit insurance.[82] It must, on any view, be material for the insurer to know whether the debtor is insolvent or in serious **33-020**

74 See paras 28-046 and following, above. If it appears that any alteration was within the contemplation of the parties when the contract was made, any such alteration will not be held sufficient to discharge the insurer—see *Law Guarantee Trust and Accident Society v Munich Reinsurance Co* [1912] 1 Ch. 138 at 154, per Warrington J. Where, however, the amount of the instalments payable by a debtor was significantly reduced, that was held sufficiently material to discharge the insurer: *Hadenfayre v British National Insurance Society* [1984] 2 Lloyd's Rep. 393.

75 *Laird v Securities Insurance Co Ltd* (1895) 22 R. 452.

76 *Finlay v Medican Investment Corp* [1897] 1 Q.B. 517. If the modification does not bind the creditor, the insurers can presumably exercise the creditor's original unmodified rights.

77 *Shaw v Royce Ltd* [1911] 1 Ch. 138 at 147–148, per Warrington J where the insurers were themselves parties to the agreement whereby the original rights were extinguished and new ones created. There is no indication, however, that the decision would have been any different if the insurers had been strangers to the agreement.

78 *Dane v Mortgage Insurance Corp* [1894] 1 Q.B. 54.

79 See para.24-052, above.

80 Cf. *Laird v Securities Insurance Co* (1893) 22 R. 452 and *Young v Trustee Assets and Investment Insurance Co Ltd* (1893) 21 R. 222.

81 Note the changes made and to be made to the law on non-disclosure by the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. See Chs 19 and 20, above.

82 A defence of non-disclosure in *Bank Leumi v British National Insurance Co* [1988] 1 Lloyd's Rep. 71 failed on the facts.