CHAPTER 2

FORM AND CONTENTS OF MARINE POLICIES

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WHAT IS A POLICY

2–01 In this chapter it is proposed to discuss in outline the form and contents of the ordinary type of marine insurance policy. Matters of substantive coverage will be dealt with more fully in the later chapters of this work.

The instrument in which the contract of marine insurance is generally embodied is called a policy of insurance.[1] In the Marine Insurance Act 1906 it is called a marine policy.[2]

WHAT INSURANCES MUST BE MADE BY A POLICY

2–02 Section 22 of the Marine Insurance Act 1906 is now the only statutory provision in force which requires a contract of marine insurance to be embodied in a policy. The section is in the following terms:

> "22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards."

Section 22 applies to all marine policies[3]: the former exception in respect of liability policies was removed by the Merchant Shipping Act 1979.[4] The principle that a contract is inadmissible in evidence unless embodied in a policy recognises that the policy is simply the formal manifestation of a contract of marine insurance, and the contract may be made by some other means. Indeed, until 2007 a contract of marine insurance was usually brought into existence by subscription to a slip, with formal policy wording following on at a later date. The requirement for the contract to be in the form of a policy, failing which it cannot be admitted in evidence, was in its inception designed to prevent avoidance of the stamp duty which was first imposed in 1795 and which attached to policies, although stamp duty on policies has long since been abolished.[5] The fact that the claimant is unable to produce the policy is not necessarily fatal to his claim, and it has been held that insurers had no defence to a claim by an assignee even though he could not produce the policy.[6]

[1] From the Italian polizza d'assecurazione.

[2] See Marine Insurance Act 1906 s.22.

[3] Other than those governed by ss.1 and 2 of the Marine and Aviation (War Risks) Insurance Act 1952; Marine Insurance Act 1906 s.7.

[4] This Act repealed s.506 of the Merchant Shipping Act 1894, the policies referred to in that section—liability policies—having been removed from the scope of s.22 of the 1906 Act by the Finance Act 1959 s.30(6).

[5] Contracts of sea insurance made or executed after August 1, 1959, ceased to be subject to ad valorem duty, and a fixed duty of 6d was made chargeable on such contracts; see the Finance Act 1959 s.30. Marine policies executed after that date were valid even though not stamped, and could be stamped after execution on payment of the unpaid duty and a penalty of £10; see the Stamp Act 1891 s.15(1) and the Finance Act 1959 ss.30 and 47. The fixed duty was in turn abolished, with effect from August 1, 1970, by the Finance Act 1970 s.32 and Sch.7.

[6] *Swan & Cleland's Graving Dock and Slipway Co v Maritime Insurance Co* [1907] 1 K.B. 116; *Eide UK Ltd v Lowndes Lambert Group Ltd (The Sun Tender)* [1998] 1 Lloyd's Rep. 389.

The English and Scottish Law Commissions, in their Issues Paper No.9 published in October 2010, recommended the repeal of s.22 of the Marine Insurance Act 1906. That view was confirmed by the Law Commissions, following consultation, in their Consultation Document *Post Contract Duties and other Issues*, published in December 2011. Part 15 of the Consultation Document recommends the repeal of s.22. The Law Commissions, in Part 16 of the December 2011 Consultation Document, went on to consider the knock-on effects of such repeal. They point out that there are various references to "policy" in the 1906 Act, and it would be necessary to substitute the word "contract" for "policy" in most of the places where the latter term presently appears. However, the Law Commissions identified four points at which the term "policy" is not used in that broad sense, but specifically means policy document, and recommended for each of them that there should be repeal.[7]

STATUTORY REQUISITES OF A POLICY

2–03 The Marine Insurance Act 1906 does not require the policy to be in any particular form,[8] nor does it contain any definition of a policy.[9] The policy must, however, comply with the requirements of the following sections if it is to be admissible in evidence under s.22:

> "23. A marine policy must specify–
> (1) The name of the assured,[10] or of some person who effects the insurance on his behalf.[11]
> 24.–(1) A marine policy must be signed by or on behalf of the insurer,[12] provided that in the case of a corporation the corporate seal may be sufficient,[13] but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.
> 26.–(1) The subject-matter insured must be designated in a marine policy with reasonable certainty."

[7] s.2(2), which provides that any risk in "a policy in the form of a marine policy" which is analogous to a marine adventure is a marine insurance (see para.1–03, above); s.30, which introduces the Lloyd's S.G. Policy (see paras 2–21 to 2–22, below); s.50(3), which describes the means of assigning a marine policy by indorsement (a practice which the Law Commissions were told is no longer used); and s.52, which confers a lien over the policy on a broker who has not been indemnified for funding the premium (which was found by the Law Commissions to be redundant).

[8] The Marine Insurance Act 1906 s.30(1) merely provides that the policy *may* be in the form in Sch.1 to the Act. The use of that form was discontinued in 1982.

[9] A policy of insurance was defined in the Stamp Act 1891 s.91 (now repealed, as including "every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced").

[10] The fact that a person is named as assured under a policy taken out by an agent does not make him such. The ordinary principles of agency have to be satisfied before this can occur: *O'Kane v Jones (The Martin P)* [2005] Lloyd's Rep. I.R. 174.

[11] When an agent he insures in this way he is not bound to disclose the name of the real assured: *Glasgow Assurance Corp v Symondson* (1911) 16 Com. Cas. 109. The practice of effecting the policy in the name of the agent is a very old one: see an allegation of custom in *Ridolpho v Nunez* (1562) Seldon Society Publications, Vol.II, p.52.

[12] An impression of the names from a rubber stamp is a sufficient signature: *Cope v Miller* (1896) 1 Com. Cas. 296; see also *Bennett v Brumfield* (1867) L.R. 3 C.P. 28. The effect of ss.22 and 23 is apparently that an unsigned policy cannot be given in evidence, but the question is not of practical importance, since in the unlikely event of the insurers refusing to sign there is no reason why the assured should not bring an action for specific performance.

[13] In *Marine Mutual Ins Ass v Young* (1880) 43 L.T. 441 the seal of the association attested by the manager was held to be sufficient.

Formerly,[14] the policy was also required to specify the subject matter insured and risk insured against, the voyage or period of time, or both, as the case may be, covered by the insurance, the sum or sums insured[15] and the name or names of the insurers, but these requirements have long been repealed.[16] The standard policy commonly known as the S.G. Form which was formally adopted by Lloyd's in 1779, although earlier versions of it were in widespread use, endured until its replacement in1983.

The English and Scottish Law Commissions, in their Issues Paper No.9 published in October 2010, recommended the repeal of ss.23 and 24 of the Marine Insurance Act 1906. Once again, Part 15 of their December 2011 Consultation Document, *Post Contract Duties and other Issues*, confirmed their view that these provisions no longer served any useful purpose.

IS A FORMAL POLICY REQUIRED?

2–04 It has not been decided whether, for the purposes of the Marine Insurance Act, there must be a formal policy in existence containing the statutory particulars, or whether any document containing these particulars is admissible under s.22 and can be sued on. It is submitted that the latter view is probably correct, but the point is unlikely to give rise to difficulty as a matter of law or practice. As a matter of law, with the repeal of the provisions of the Stamp Acts relating to marine policies, there was no reason why slips and cover notes could not be sued on for the purpose of procuring the issue of a policy in an action for specific performance[17] even if those documents did not amount to policies in their own right. As a matter of practice, since the introduction of the Market Reform Contract in 2007 and the discontinuation of the slip procedure, a standard policy form is used for risks placed in the London Market.

[14] Marine Insurance Act 1906 s.23(2)–(5).

[15] See *Home Mar Ins Co v Smith* [1898] 2 Q.B. 351 CA: where the sum insured was left undetermined, because it could not be exactly fixed, and the insurance was held to be void. Where the aggregate sum insured appeared on the face of the policy, and the proportion which each underwriter bore was mentioned, the sum or sums "insured" were held to be described in the policy: *Dowell v Moon* (1815) 4 Camp. 166; *Tyser v Shipowners' Syndicate* [1896] 1 Q.B. 135.

[16] Finance Act 1959 s.30(5).

[17] See *Bhugwandass v Netherlands India Ins Co* (1889) L.R. 14 App. Cas. 83, a Rangoon case in which (before the passage of legislation in India, corresponding to the British Stamp Acts) the Privy Council ordered specific performance of an agreement to issue a policy in the terms of an open cover note. *Royal Exchange Assurance Co v Tod* (1892) 8 T.L.R. 669 was an action before Romer J. for specific performance of an agreement to issue a policy, in which the question at issue was what classes of voyages were covered by the slip. The claim was dismissed on the merits, and the point that an unstamped slip did not constitute an enforceable contract seems to have been taken neither by the defendant nor by the learned judge. But the court will not enforce such a contract, even though, by omission or by consent, the point is not pleaded or argued; see *Nagoremull v Triton Ins Co* (1924) 41 T.L.R. 168, where, no such point having been pleaded or argued in the courts below, the Judicial Committee of its own accord inquired as to Indian legislation corresponding to the Stamp Act 1891.

COURSE OF BUSINESS: THE OLD AND NEW SYSTEMS

2–05 The course of business in the London marine insurance market, and in particular the use of the slip, was established certainly no later than the eighteenth century at Lloyd's[18] and remained all but unchanged until November 2007 with the introduction of the Market Reform Contract. The old course of business nevertheless remains in use in other jurisdictions, and for some years disputes may arise out of pre-2007 placements in London, and accordingly discussion of the old system is maintained in this work.

The old system adopted a two-stage process. At the first stage the broker would obtain subscriptions from underwriters to a slip, a document which summarised the risk. Each scratching on the slip constituted a contract of insurance, but the issue of formal wording—the second stage—would not take place for some time afterwards, and on occasion the parties would be content that no wording would be issued at all.[19] Where wording was issued, each broker or underwriter used its own forms.

With effect from November 2007 the London Market adopted a new procedure. The slip was abolished and now brokers are required to prepare policy wording in the form of a Market Reform Contract (MRC). It is that document which is presented to underwriters for scratching. The old two-stage process has been replaced by a single stage, which has a number of advantages: the assured and underwriters are aware from the outset of the terms which are being proposed by the broker; there is no longer a risk that the slip and the subsequent policy wording are inconsistent; and in the event of a loss before the wording has been issued there is no longer any dispute as to what that wording is, although of course there remains ample room for dispute as to what the wording actually means. Further, the MRC is in standard form and operates as a checklist of what has to be included in the wording. The MRC is divided into six sections, each of which must contain required relevant information. The sections are: (1) risk details (type, the name and address of the assured, period, the interest insured, monetary limits, scope, terms, choice of law and jurisdiction, premium payment); (2) information provided to the insurers on placement; (3) security details (subscriptions, signing down); (4) subscription agreement (amendments to the policy after inception, identification of slip leader and leading underwriter); (5) fiscal and regulatory issues (including taxes which are deducted from the premium); and (6) broker remuneration and deductions.

A number of issues which arose under the slip system are unaffected by the MRC procedure. In the following paragraphs the problems specific to slips will be discussed, and thereafter those problems common to the slip and MRC procedures will be considered.

[18] See the description of the procedure in *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep. 301 HL. At the time of which Arnould was writing, no non-marine insurance was transacted at Lloyd's, and only some three or four companies were seriously competing with Lloyd's underwriters for the marine business. Although the position has completely altered in the intervening years, "Lloyd's" and "marine insurance" are still almost synonymous terms to a great many people, and we make no apology for giving Lloyd's here and elsewhere in this book, pride of place.

[19] In particular, slips for facultative (one-off) reinsurance contracts were typically in the form of "slip policies", thereby indicating that no further wording was to be issued.

THE SLIP PROCEDURE DESCRIBED

2–06 Under the old slip system, the broker, when requested by his principal to effect an insurance,[20] prepared a brief memorandum called the *slip*.[21] That was an oblong piece of paper containing details of the intended insurance, in sufficiently precise form to enable anyone conversant with the business to draw up, without difficulty and without going beyond its four corners, the policy which it was proposed to effect. It gave the name of the vessel, or description of the subject matter to be insured, the voyage or period for which insurance was required, the valuation (if any) and amount to be insured, and the standard clauses to be incorporated, and set out any special terms or warranties that were required. The broker then took the slip round successively to the various underwriters[22] to whom he was disposed to offer the business. Those underwriters who were willing to accept the risk signified their willingness by stamping on the slip the name of their syndicate or company and signing it, a process known as "scratching". The scratch indicated the percentage of the risk which the underwriter was willing to accept and the amount for which he is willing to become insurer. The process normally continued until the entire risk has been subscribed.[23]

When the broker had succeeded in completing the slip for the full amount required, it was then his duty to procure the execution of policies in accordance therewith. Until May 1, 2001, that function was carried out by the Lloyd's Policy Signing Office.[24] The broker took the policy, on to which the special clauses had been added, and the slip, to the LPSO, where, after the policy had been examined and compared with the slip, a table showing the syndicates which had underwritten the policy was attached and it was stamped and signed. On May 1, 2001, the functions of the LPSO were taken over by Xchanging Ins-sure Services ("XIS"), a body owned partly by Lloyd's and by the International Underwriting Association to act as Lloyd's policy signing bureau.[25]

[20] i.e. a firm order; sometimes he is merely instructed to obtain quotations.

[21] If the underwriter is simply giving a quotation, the slip is a "quotation slip" and any signature on it does not create a binding contract.

[22] It should also be explained here that the word "underwriter" is now generally used to denote the underwriting agent to whom the broker actually shows the risk, and who accepts or declines it for the syndicate or insurance company for which he writes. Each syndicate at Lloyd's consists of non-active members. Until 1996 members of syndicates were individuals—generally referred to as "names"—who faced unlimited personal liability on their underwriting accounts. Since the Reconstruction and Renewal of Lloyd's in 1996, only companies may be admitted as members of syndicates. The overwhelming majority of Lloyd's capital is now corporate, although a few individual names do remain.

[23] The procedure may be streamlined by the use of line slips, which are authorities given by underwriters to one of their number authorising him to accept risks on their behalves: see *Balfour v Beaumont* [1984] 1 Lloyd's Rep. 272; *Denby v English and Scottish Maritime Insurance Co Ltd* [1998] Lloyd's Rep. I.R. 343. The relevant authority was found not to have been granted in *Syndicate 1242 at Lloyd's v Morgan Read & Sharman* [2003] Lloyd's Rep. I.R. 412. The terms of the line slip are not a part of the contract with the insured: *Touche Ross & Co v Baker* [1992] 2 Lloyd's Rep. 207.

[24] First introduced, owing to the wartime shortage of clerical labour, in 1915, under the title of Lloyd's Policy Bureau. The name was changed in 1928. For the procedure for executing policies, see *Eagle Star Ins Co Ltd v Spratt* [1971] 2 Lloyd's Rep. 116.

[25] The old practice was for the policy to be submitted to each underwriter.

A "cover note" might be issued to the insured once the slip had been scratched. If issued by the underwriters, it was a confirmation of what had been agreed, although it was not a contract in its own right. If issued by the brokers, it was a notification by the broker to the insured of the cover which he had obtained: it was not a contract of insurance in its own right and is not binding on the underwriters.

A number of further questions arise in relation to a slip: what is the contractual effect of a scratched slip; does a slip constitute a "policy"; what is the effect of the slip once the policy has been issued; and can a slip be used as a means of rectifying a policy?

CONTRACTUAL EFFECT OF A SLIP

2–07 The legal effect of the slip was explained by Blackburn J. in *Ionides v Pacific Fire and Marine Insurance Co*[26] in the year 1871, when the Customs and Inland Revenue Act of 1867[27] was in force:

> "The slip is in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business."[28]

Even where a stamped policy had been issued the courts recognised the practice of underwriters to consider the agreement complete when the slip was scratched, to the extent of holding that any fact coming to the knowledge of the assured between the time when the slip was scratched and the execution of the policy, however material it might be, need not be communicated to the underwriter, even though the slip was scratched for the agent of the assured, subject to confirmation by his principal; and s.21 of the Marine Insurance Act 1906 declares that for the purpose of showing when the contract was concluded reference may be made to the slip[29] or covering note or other customary memorandum of the contract, although it be unstamped.[30]

[26] (1871) L.R. 6 Q.B. 674, 684, 685; affirmed on appeal (1872) L.R. 7 Q.B. 517.

[27] 30 & 31 Vict c. 23.

[28] So, too, *Morrison v Universal Marine Ins Co* (1873) L.R. 8 Ex. 197; and *Symington & Co v Union Ins Society of Canton (No.2)* (1928) 34 Com. Cas. 233. Compare *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep. 442, where the "cross-slip" was intended to be supplemented by a further document described as a "signing slip" and it was held that the duty of disclosure continued until the latter document was signed. The decision turned on the particular facts, and does not affect the general principle stated in the text.

[29] See to the same effect *Fisher v Liverpool Marine Ins Co* (in the Exchequer Chamber) (1874) L.R. 9 Q.B. 418; and other cases cited in *Arnould*, 13th edn, 2 vols, (London: Stevens & Sons, 1950), para.35, fn.51.

[30] Thus codifying the effect of decisions under the Policies of Marine Insurance Act 1868, such as *Cory v Patton* (1872) L.R. 7 Q.B. 304; (1874) L.R. 9 Q.B. 577.

It is now established that a slip is to be regarded as containing an offer,[31] which each underwriter accepts when writing his line, giving rise then and there to a separate binding contract between those parties.[32] The duty of utmost good faith attaches to the slip, so that it may be set aside if the scratch has been induced by misrepresentation or non-disclosure,[33] and as is the case with any other contract earlier draft wordings of the slip are inadmissible as an aid to its construction.[34]

WHETHER A SLIP IS A POLICY

2–08 The question whether a slip or cover note issued in anticipation of a formal policy was a policy within the scope of the Stamp Act 1891 and earlier revenue enactments was considered in a number of decisions discussed in previous editions of *Arnould*.[35] Those cases suggest that a slip does not amount to a policy for the purposes of that legislation, and it was only under exceptional circumstances that actions in respect of marine losses were successfully maintained when no stamped policy was in existence. Thus, in one case the assured was held entitled to receive the amount of a loss from a mutual insurance association, as on an account stated, where only an unstamped policy had been issued, but a sufficient admission of liability appeared in the books of the association.[36] In another case a member of a mutual insurance association was held by the Court of Appeal to be liable to pay calls (although the association issued no policies), on the ground that he had assented to the payment of the losses in respect of which the calls were made, and was therefore estopped from saying that the payments were improperly made.[37] In *Ionides v Pacific Fire and Marine Insurance Co*[38] Blackburn J. said:

> "The legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose.[39] But all those enactments are repealed by the 30 & 31 Vict. C. 23;[40] and the law is now governed by the 7th and 9th sections of that Act. By section 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by section 9 no policy shall be pleaded or given in evidence in any court unless duly stamped. As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid—that is, not enforceable at law or in equity;[41] but it may be given in evidence wherever it is, though not valid, material."

[31] And not an invitation to treat, as suggested by Donaldson J. in *Jaglom v Excess Insurance Co Ltd* [1972] 2 Q.B. 250 at 257. See also: *Xenos v Wickham* (1867) L.R. 2 H.L. 296; *Ionides v Pacific Fire & Marine* (1871) L.R. 6 Q.B. 674; (1872) L.R. 7 Q.B. 517.

[32] *Morrison v Universal Marine Insurance Co* (1873) L.R. 8 Ex. 197; *Eagle Star Insurance Co Ltd v Spratt* [1971] 2 Lloyd's Rep. 116; *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep. 301; *General Reinsurance Corp v Forsikringsaktiebola get Fennia Patria* [1982] 1 Lloyd's Rep. 87; affirmed [1983] 2 Lloyd's Rep. 287; *General Accident Fire & Life Assurance Corp v Tanter* [1984] 1 Lloyd's Rep. 58; [1985] 2 Lloyd's Rep. 529.

[33] *Abrahams v Mediterranean Insurance and Reinsurance Co* [1991] 1 Lloyd's Rep. 216.

[34] *Brotherton v Aseguradora Colseguros SA* [2002] Lloyd's Rep. I.R. 848.

[35] See *Arnould*, 15th edn, 2 vols, (London: Stevens & Sons, 1961), paras 43–47.

[36] *Barrow Mutual Ship Ins Co v Ashburner* (1885) 54 L.J.Q.B. 377; but this decision is doubtful in view of the cases cited at para.49, fn.58, in 15th edn of this work.

[37] *Re Teignmouth and General Mutual Shipping Association* (1872) L.R. 14 Ex. 148.

[38] (1871) L.R. 6 Q.B. 674. See also: *Cory v Patton* (1872) L.R. 7 Q.B. 304; (1874) L.R. 9 Q.B. 577; *Lishman v Northern Mar Ins Co* (1873) L.R. 8 C.P. 216; (1875) L.R. 10 C.P. 179.

[39] For a note on the decisions under the earlier statutes, see *Arnould*, 13th edn, 2 vols, (London: Stevens & Sons, 1950), para.34, fn.46.

[40] Customs and Inland Revenue Act 1930.

2–09 Strangely enough, in *Ionides v Pacific Fire and Marine Ins Co*, Blackburn J. did not refer to the definition of a policy in s.4 of the Customs and Inland Revenue Act 1867, then in force, which defined a policy as "any instrument whereby a contract or agreement for any sea insurance is made or entered into". The Stamp Act 1891 s.91 was expressed in similarly wide terms and defined the expression "policy of insurance" as including, for the purposes of the Act, every writing whereby any contract of insurance is made or agreed to be made, or is evidenced. Is a slip in writing this kind? There can be no doubt that according to the practice of those engaged in the business of marine insurance, the slip is the writing by which the contract is really made, although the subsequent issue of a formal policy is contemplated. But it is clear that the mere fact that the parties intend that an agreement which they have arrived at shall be subsequently embodied in a more formal document does not prevent the earlier agreement from constituting a binding engagement.[42] Prima facie, therefore, it does seem that on general principles a slip was a policy of insurance within the very wide definition of the Act. The consequences, however, of the adoption of this view, to which it must be conceded that the wording of the Act of Parliament gives great support, are curious; for it seems to follow that every broker who procured the initialling of a slip, and every underwriter who initialled it, broke the law and made himself liable to a penalty.

In *Home Marine Insurance Co v Smith*,[43] Mathew J. held that a certain covering note was a slip, and that a slip is not a policy of sea insurance and therefore cannot be stamped. The Court of Appeal, however, affirmed this decision on the narrow ground that the document before them was invalid because it did not specify "the sum or sums insured",[44] and were careful to say nothing on the general question whether a slip can ever be stamped and sued upon. The decision of Mathew J. on this point was not, therefore, expressly overruled, but it is difficult to see how, in the light of the decision of the Court of Appeal, it could be contended that a cover note which specified the sum insured and otherwise conformed with the requirements of the Stamp Act, was not a policy within the meaning of that Act.[45] Further, it seems difficult to distinguish

[41] Arnould thought that the slip was enforceable in equity—see *Arnould*, 12th edn, 2 vols, (London: Stevens & Sons, 1939), p.52.

[42] For the general principle see *Rossiter v Miller* (1878) 3 App. Cas. 1124, and cases there cited.

[43] [1898] 1 Q.B. 829. cf. *Thompson v Adams* (1889) 23 Q.B.D. 361, where Mathew J. held that, as the statute did not apply, a slip initialled by a Lloyd's underwriter was a valid contract of fire insurance.

[44] [1898] 2 Q.B. 351.

[45] In *Empress Ass Corp v Bowring* (1906) 11 Com. Cas. 107, however, Kennedy J. held that an open cover slip was not a policy of sea insurance.

the covering note either as regards its form or its object from an ordinary slip. Logically, it seems to follow that an ordinary slip was a policy within the definition of the Stamp Act 1891.[46]

2–10 The repeal of the relevant provisions of the Stamp Acts has laid this controversy to rest. However, it remains to consider whether a slip fulfils the requirements of a "policy" for the purposes of s.22 of the Marine Insurance Act 1906.[47] We have already seen that a policy of insurance must specify the name of the assured, or of someone effecting the policy on his behalf, and must be signed by or on behalf of the insurers and that the subject matter insured must be designated therein with reasonable certainty.[48] There are, no doubt, slips or cover notes for floating policies in which some of these particulars are not sufficiently described; but it is submitted that the ordinary slip for a voyage or time policy contains an adequate specification of the necessary particulars. An expert can say with certainty, from a mere perusal of the slip, what the perils insured against and all the terms and conditions of the insurance are intended to be. Evidence is admissible to explain the meaning of abbreviations in the slip, if the court is otherwise unable to determine what the shortened expressions used mean in the market.[49] There can be little doubt that the scratch is a sufficient signature within s.24 of the Marine Insurance Act 1906. It is submitted that, with the repeal of the relevant provisions of the Stamp Acts, an action can now be brought on an ordinary marine slip if necessary.

In the United States, where the restrictions of the revenue law do not interfere, and the great bulk of sea insurance business is carried on by companies, it is very generally the case that a memorandum of the contract, or an agreement to insure, is made out and subscribed before executing the policy: in such case "the usual practice", says Phillips, is "to enter the agreement on the books of the insurance company, subscribed by some officer authorised to bind the company. Such a memorandum is binding on the company to make out a policy if the premium is paid in due time".[50]

[46] Cover notes, slips and other instruments usually made in anticipation of the issue of a formal policy were expressly exempted from stamp duty by s.39(2) of the Finance Act 1959, which also provided that such instruments were not to be taken to be policies of insurance under the Stamp Act 1891.

[47] Actions have been brought on slips in other classes of insurance: *Thompson v Adams* (1889) 24 Q.B.D. 361; *Grover v Mathews* [1910] 2 K.B. 401; (fire insurance); *American Airlines Inc v Hope* [1972] 2 Lloyd's Rep. 253; [1973] 1 Lloyd's Rep. 233; [1974] 2 Lloyd's Rep. 301; *Burrows v Jamaica Private Power Co Ltd* [2002] Lloyd's Rep. I.R. 466.

[48] Marine Insurance Act 1906 ss.23(1), 24(1), 26(1).

[49] *American Airlines Inc v Hope* [1973] 1 Lloyd's Rep. 233 at 245, per Roskill L.J.

[50] 1 Phillips s.13. "It has long since been established that such a binding slip is itself a contract of insurance, and that a direct action at law will lie upon it, as well as a suit in equity": per Holt D.J. in *Kerr v Union Mar Ins Co* 124 Fed.R 835 at 837 (1903). See *Phoenix Ins Co v de Monchy* (1929) 35 Com. Cas. 67, for a claim on an insurance certificate, issued in the United States, partially incorporating a form of policy and stamped as a policy in Great Britain; see, too, *Koskas v Standard Mar Ins Co* (1927) 32 Com. Cas. 160, for a similar certificate and policy: also *MacLeod Ross & Co Ltd v Compagnie d'Assurance Générales d'Helvétie* [1952] 1 Lloyd's Rep. 12.

SIGNIFICANCE OF SLIP ONCE POLICY ISSUED

2–11 The view has been expressed that, although the slip constitutes a contract between the insured and each subscribing insurer, the slip is merely a temporary contract which is superseded when the policy itself is issued.[51] That principle has in turn led to the suggestion that as a matter of law the slip is inadmissible as an aid to the construction of the policy in the event that the words of the two agreements differ.[52] The latter suggestion was rejected by Rix L.J. in *HIH Casualty v New Hampshire Insurance*,[53] who ruled that there is no rule of law "where a prior contract has been followed by a further contract, or where in an insurance context a slip contract has been followed by a policy . . . which makes it inadmissible to consider the terms of the prior contract, or that the parol evidence rule has the same effect", although there was probably a presumption that the policy was intended to replace the slip. Rix L.J. continued[54]:

> "In principle, it would seem to me that it is always admissible to look at prior contracts as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. *Ex hypothesi*, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law.
>
> Where, however, it is not even common ground that the later contract is intended to supersede the earlier contract, I do not see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them. In essence there are, it seems to me, three possibilities. Either the later contract is intended to supersede the earlier, in which case the above principles apply. Or, the later contract is intended to live together with the earlier contract, to the extent that that is possible, but where that is not possible it may well be proper to regard the later contract as superseding the earlier. Or the later contract is intended to be incorporated into the earlier contract, in which case it is prima facie the second contract which may have to give way to the first in the event of inconsistency. I doubt that it is in any event possible to be dogmatic about these matters."

[51] *Morrison v Universal Marine Insurance Co* (1873) L.R. 8 Ex. 197; *Thompson v Adams* (1889) 23 Q.B.D. 361; *Grover & Grover v Matthews* [1910] 2 K.B. 401; *Haase v Evans* (1934) 48 L.l L.R. 131; *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep. 301.

[52] Phillips J. in *Youell v Bland Welch & Co Ltd* [1990] 2 Lloyd's Rep. 423. On appeal, [1992] 2 Lloyd's Rep. 127 Staughton and Fox L.JJ. expressed no concluded view on the matter, and Beldam L.J. (echoing the views of Hobhouse J. in *Punjab National Bank v de Boinville* [1992] 1 Lloyd's Rep. 7) held that the slip was superseded by the policy (given that the slip was in the pre-1906 cases regarded as unenforceable) and that it could be looked to if there was an issue of rectification but not an issue of construction. See also Potter J. in *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1993] 2 Lloyd's Rep. 503.

[53] [2001] Lloyd's Rep. I.R. 596. cf. the comments of Staughton L.J. in *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24.

[54] At [83]–[84]. See also *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] EWHC 222 (Comm).

On this approach, the court may presume that the policy has replaced the slip but unless it is common ground that this has occurred the presumption may be rebutted and the slip remains a contractual document[55] with the policy itself being a mere mechanical act.[56] The matter is not, however, entirely free from doubt and in some recent cases it has been assumed that the slip is deprived of effect following the issue of a policy.[57] In any event, the slip may be referred to in order to ascertain when the contract of insurance was made, on the principle that the assured is not bound to disclose facts coming to his knowledge after the slip is completed.[58] This principle is recognised by s.21 of the Marine Insurance Act 1906 which provides that "for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract".

RECTIFICATION OF POLICY BY REFERENCE TO SLIP

2–12 When there has been a mistake made in drawing up the policy, and its terms do not rightly express the true intention of the parties at the time when they entered into the contract, the court has power to order rectification of the policy.[59] The principles of rectification were restated by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*,[60] where it was held that rectification is possible if four conditions are met: (i) there was a previous common intention as to what was intended to be in the policy, together with some outward expression of the accord; (ii) the common intention continued up to the date that the parties entered into a binding contract; (iii) there was clear evidence that the instrument as executed did not accurately represent the true agreement of the parties at the time of its execution; and (iv) the instrument would, if rectified, accurately represent the true agreement of the parties at that time.

It has become common practice, as it was before the passing of the Marine Insurance Act 1906, to rectify policies which have not been drawn up in accordance with the real agreement between the parties,[61] and to refer to the slip

[55] As was the case in *HIH v New Hampshire* itself.

[56] *Assicurazioni Generali SpA v Ege Sigorta AS* [2002] Lloyd's Rep. I.R. 480; *Kyzuna Investments Ltd v Ocean Marine Mutual Association* [2000] 1 Lloyd's Rep. 505.

[57] *Great North Eastern Railway v Avon Insurance Plc* [2001] Lloyd's Rep. I.R. 793; *Unum Insurance Co of America v Israel Phoenix Assurance Co* [2002] Lloyd's Rep. I.R. 374.

[58] *Ionides v Pacific Fire* (1871) L.R. 6 Q.B. 674; (1872) L.R. 7 Q.B. 517.

[59] The jurisdiction was established in the courts of equity prior to the Stamp Act of 1795: see *Motteux v London Assurance Co* (1739) 1 Atkyns 545; *Henkle v Royal Exch Ass Co* (1749) 1 Ves.Sen. 317; see also *Andrews v Essex Fire and Mar Ins Co* (1822) 3 Mason's Rep. 6. It was stated in previous editions of this work that the existence of the power to rectify was a matter on which there have been conflicting decisions. It is submitted that the point is now free from doubt. The decision in *Mackenzie v Coulson* (1869) L.R. 8 Ex. 368, which prompted such reservations, can no longer be regarded as good law. Although it has not been expressly overruled, none of the grounds of that decision can now be supported.

[60] [2009] UKHL 38.

[61] Rectification is possible only where there is an agreement between the parties which has been incorrectly recorded: *Chartbrook Homes v Persimmon Homes Ltd* [2009] UKHL 38.

for the purpose of ascertaining what such agreement was,[62] and this practice appears to be recognised by s.89 of the Act of 1906, which declares that "where there is a duly stamped policy, reference may be made as heretofore, to the slip or covering note, in any legal proceeding". It has been suggested[63] that it is not open to underwriters to challenge the validity of policies subscribed to at Lloyd's, but this is thought to be incorrect.

Although it is plain that rectification may in appropriate cases be ordered where the slip itself does not accurately record the intentions of the parties, such cases have rarely arisen.[64] This is no doubt in part to be attributed to the manner in which marine insurance business is carried on in this country, which is such as to place considerable difficulties in the way of claims of this nature. Since the terms of the slip are commonly negotiated between the broker and leading underwriter and are reduced to writing before being submitted to the remaining underwriters, each of whom makes a separate contract on the basis of a document already in existence, it would in most cases be difficult to show that the slip did not represent the intentions at any rate of the subsequent underwriters. It is thought that rather than allowing a position to develop where different underwriters are held to have contracted upon differing terms, the attitude of underwriters is generally to stand by the terms of the slip and not to seek rectification of it,[65] and in the converse situation where rectification is sought by the assured, not to take advantage of the defence potentially open to those underwriters whose first involvement in the transaction took place when the slip had already been drawn up.

Although in practice in the majority of cases where rectification is claimed this is on the basis of the slip, it is not necessary in order to obtain rectification to show that there was a concluded and binding contract in different terms between the parties antecedent to the instrument which it is sought to rectify. It is sufficient to show that there was a common continuing intention in regard to the agreement which it is sought to rectify, provided at least that there is some outward expression of accord in relation to the parties' intention,[66] for there must be convincing proof if the court is to order rectification.[67]

[62] *Eagle Star and British Dominion Ins Co v Reiner* (1927) 43 T.L.R. 259; *Symington & Co v Union Ins Society of Canton (No.2)* (1928) 34 Com. Cas. 233. The decision in *Mackenzie v Coulson*, above, that the slip cannot be referred to, cannot easily be reconciled with these cases, or with the Marine Insurance Act 1906 s.89. With the repeal of the stamp laws affecting marine policies, the objection which James V.C. had to looking at the slip as evidence of the contract no longer holds good, and the slip is, as we have seen, properly to be regarded as a concluded contract, as is indeed recognised by s.21 of the Marine Insurance Act 1906.

[63] By Megaw L.J. in *Eagle Star v Spratt* [1971] 2 Lloyd's Rep. 116, 131.

[64] The point may arise where it is asserted that the intention was to contract on the same terms as those of an expiring policy, but the renewal slip or policy are not correctly drawn up: see *N. Queensland Ins Co v Rhenish Westphalian Ins Co*, February 21, 1901; CA, March 21, 1902; see also *American Airlines Inc v Hope* [1972] 1 Lloyd's Rep. 253; [1973] 1 Lloyd's Rep. 233; [1974] 2 Lloyd's Rep. 301 HL.

[65] As the underwriters did in *American Airlines Inc v Hope*, above, in relation to the war risks point arising in that case.

[66] See *Joscelyne v Nissen* [1970] 2 Q.B. 86 CA, following *Crane v Hegeman-Harris Co Inc* [1939] 1 All E.R. 662; [1939] 4 All E.R. 68; (Note) [1971] 1 W.L.R. 1390; *Shipley UDC v Bradford Corp*

14–98 In so far as a "held covered" clause provides for the payment of additional premium, the possibility that the parties may fail to agree the premium is dealt with by s.31(2) of the Marine Insurance Act 1906, which provides that:

> "Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable."[211]

The additional premium ought to be such as it would have been reasonable to charge at the time of the deviation or change of voyage, if the parties had then been aware of it.[212] There is no implied obligation on the assured to make any payment of additional premium on account, pending the determination of the amount due by agreement or by proceedings.[213]

14–99 The position is rather less clear where a "held covered" clause entitles the insurer to make amendments to the terms of cover other than as to premium.[214] This topic is dealt with in the discussion of "held covered" clauses in Ch.19 below.[215]

[211] It is not an invariable rule that such provisions are to be construed as providing immediate cover. See *American Airlines Inc v Hope* [1973] 1 Lloyd's Rep. 233, where it was held by the Court of Appeal that a term in an aviation policy providing for deletion of the War Risks exclusion "only at A.P. and, Geographical Limits tba L/u" did not afford war risks cover until such time as agreement was reached. This provision was contrasted with other terms in the same policy containing the words "held covered". The point did not arise on appeal in the House of Lords, reported at [1974] 2 Lloyd's Rep. 301. See also *Bristol Steamship Corp v London Assurance* [1976] 2 Lloyd's Rep. 741 U.S. Dist.Ct. where a "held covered" provision in a port risk insurance was held to be inapplicable in the event of a deviation in the absence of notice and of agreement as to the amount of premium.

[212] See *Greenock SS Co v Maritime Ins Co* [1903] 1 K.B. at 375; *Mentz, Decker & Co v Maritime Ins Co* [1910] 1 K.B. at 135; *Hewitt v London General Ins Co* (1925) 23 Ll. L.R. 243. It was stated by Donaldson J. in *Liberian Ins. Agency Inc v Mosse*, above, that the parties are not obliged by virtue of the "held covered" clause, to agree to any variation in terms other than as to the rate of premium, and that where no quotation could have been obtained in the market, given full disclosure of the facts, on the policy terms at a reasonable commercial rate of premium, the clause cannot be applied: see [1977] 2 Lloyd's Rep. at 567–568.

[213] *Kirby v Coslindit S.p.A.* [1969] 1 Lloyd's Rep. 75. It was also stated in the same case that even if there were any obligation to make a payment on account of the amount of additional premium which the assured admitted to be due, the underwriters would not be entitled to cancel for non-payment without giving reasonable notice. It may, of course, be possible for an insurer to obtain an order from the court for an interim payment under the court's own procedures, but such a possibility is not an incident of the clause itself.

[214] As is the case, for example, under the Institute Voyage Clauses (Hulls) (October 1, 1983, and November 1, 1995), cl.2 and Institute Voyage Clauses (Freight) (October 1, 1983 and November 1, 1995), cl.3.

[215] At para.19–44.

CHAPTER 15

THE PRE-CONTRACTUAL DUTY OF UTMOST GOOD FAITH: GENERAL PRINCIPLES

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INTRODUCTION

15–01 Section 17 of the Marine Insurance Act 1906 enunciates the general principle that a contract of marine insurance is a contract of utmost good faith. Prior to the seventeenth edition, this work dealt almost exclusively with the duty of utmost good faith only as it applies pre-contractually, specifically with regard to representations and disclosure as expressed in ss.18–20 of the 1906 Act. Scant attention was paid to the post-contractual duty of utmost good faith (although that topic was addressed in Vol.3 of the sixteenth edition). Further, prior to the seventeenth edition this work did not deal specifically with what is (or at least arguably is) a separate common law principle, distinct from the s.17 duty (as well as perhaps part of it), that an insured who engages in fraud in connection with a claim forfeits (at least) its claim.

15–02 The principles set out in ss.17–20 of the 1906 Act are now recognised as being of general application, both in marine and non-marine insurance; these sections embody a partial codification of the common law.[1] The codification was intended to "reproduce as exactly as possible the [then] existing law relating to marine insurance".[2] However, following its initial introduction in 1894 the Bill did not become law for 12 years and went through numerous revisions along the way.[3] That this is so suggests that identifying quite what principles the common law had established was, at least in some respects, a contentious business (as indeed was the whole idea of codification).[4]

15–03 The duties owed by the assured during negotiations and before the contract is made, and duties of agents effecting the insurance, are set out in some detail in ss.18–20. By contrast, s.17 is expressed in broad general terms. The most obvious differences between s.17 and the sections which follow are that s.17 refers to

[1] *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd* [1995] 1 A.C. 501, per Lord Mustill at 518. That the codification is partial only is important and that this is so has enabled the common law to develop principles that co-exist with those enshrined in the 1906 Act. For example, in *Pan Atlantic* itself the House of Lords concluded that actual inducement on the part of the actual underwriter who wrote the policy must be shown if the insurer is to be able to rely on a material non-disclosure or misrepresentation as having given rise to the right to avoid the policy, even though the relevant sections of the 1906 Act only refer to a prudent underwriter. However, that the codification is partial has perhaps not always been recognised in the decided cases, as to which see notably *Economides v Commercial Assurance Co Plc* [1998] Q.B. 587, which is discussed in Ch.17.

[2] Marine Insurance Bill (1894).

[3] Most of the work of revision appears to have taken place in committee (which was especially formed for the purpose and was made up of lawyers and industry representatives). It seems that no record of the committee proceedings survives and the parliamentary debates shed no light on the motivation behind the revisions.

[4] During debate in the Commons the view was expressed that those interested in marine insurance need do no more than read *Arnould* to ascertain the law and that codification would stifle the ability of the common law to adapt to changing circumstances (Hansard May 12, 1903, pp.494-495).

mutual duties, that it contains no express reference to the concept of materiality, and that it is not confined, in terms, to the pre-contract stage.

15–04 Although the broad principle of insurance being a contract based on the utmost good faith was a common theme in cases before the 1906 Act, there was remarkably little authority on the duty, except as one owing by the assured in the context of pre-contract negotiations. The state of the law as at the time of the sixteenth edition of this work (1981) revealed only limited enthusiasm on the part of insurers for taking points related to the duty of utmost good faith. In contrast, in the decades following the sixteenth edition of this work, the duty of utmost good faith, both in its pre- and post-contractual contexts, was the subject of numerous decided cases. However, since the seventeenth edition, whilst cases in this area have continued to be reported, most involve the application of established principles to particular facts and in substance the law is now the same as it was at the time of the last edition, save as regards consumer insurance law, where there has been major legislative reform.[5]

15–05 There is much overlap between the related topics of non-disclosure and misrepresentation and in practice it is rare to plead one without the other. This being so, this chapter considers the areas of overlap between the two together. Matters relating specifically to either non-disclosure or misrepresentation are dealt with separately in the next two chapters respectively. The post-contractual duty of utmost good faith and fraudulent claims are dealt with in Ch.18.

15–06 It is, however, perhaps worth noting at the outset two general themes which run through the decided cases in this area from the last couple of decades. The first theme is that successive decisions have striven to curtail the duty of utmost good faith, in particular in the post-contractual context. This reflects judicial hostility to the remedy of avoidance, which is often seen as disproportionate and unfair and is not infrequently referred to as "draconian" or "drastic".[6] In *Banque Keyser Ullman SA v Skandia (UK) Insurance Co*,[7] the Court of Appeal, in a decision which was subsequently endorsed by the House of Lords,[8] decided that the only remedy for breach of the duty of utmost good faith is avoidance ab initio.[9] That this is so has lent credence to the view that the scope of the duty should be strictly confined, in particular post-contractually. The second theme is that the desire to see to it that insurance fraud or attempted insurance fraud carries with it suitably punitive consequences remains as strong as ever and this, too, is clearly reflected in the case law.

[5] See para.15–07, below.

[6] See, e.g. *Kausar v Eagle Star* [1997] C.L.C. 129, per Staughton L.J. at 132 to 133 expressing the view that avoidance for honest non-disclosure should be confined to "plain cases".

[7] [1990] 1 Q.B. 665.

[8] [1991] 2 A.C. 249.

[9] It has been suggested that there are exceptions to this principle (see in particular *The Mercandian Continent* [2001] 2 Lloyd's Rep. 563, per Longmore L.J. at [32]) although it is highly questionable whether this is so. This is discussed in Ch.18.

REFORM OF CONSUMER INSURANCE LAW AND THE PROPOSALS FOR FURTHER REFORM

15–07 The Law Commission and the Scottish Law Commission have been engaged in a joint review of insurance contract law for some years. That work resulted in the Consumer Insurance (Disclosure and Representations) Act 2012 which will, when it is brought into force,[10] abolish the pre-contractual duty of disclosure (ss.18 and 19 of the 1906 Act) and the duty not to make untrue pre-contractual representations (s.20 of the 1906 Act) in relation to consumer insurance contracts.[11] In their place will be a duty on the consumer to take reasonable care not to make a misrepresentation to the insurer.[12] Where a misrepresentation is made, the remedy available to the insurer will be a function of the state of mind of the insured and the remedy of avoidance will only be available in limited circumstances. The 2012 Act unsurprisingly defines a consumer as an individual and it will not apply to most insureds in the marine insurance context. The detail of the new law is considered at the end of this chapter, at para.15–217 and following.

Outside the consumer sphere, the latest proposals from the Law Commission and the Scottish Law Commission as regards the pre-contractual duty of utmost good faith involve an altogether less radical departure from the existing law.[13] Since the proposals remain at the consultation stage, they are not considered in detail in this work. In short, in large measure what is being proposed is legislation to clarify and partially codify the existing law, with the duty of disclosure and the duty not to make untrue representations remaining essentially intact.[14] However, a new system of remedies is proposed, which would share many features of the new consumer regime contained in the 2012 Act. Avoidance would only be available where the insured has been dishonest, or where the insurer could show that he would not have entered into the contract at all but for the misrepresentation or non-disclosure. Where the insurer could only show that he would have entered into the contract on different terms or at a different premium, what is described as a proportionate remedy would apply. The Law Commission and the Scottish Law Commission have also been examining the post-contractual duty of utmost good faith and fraudulent claims (amongst other topics).[15] Here, too, the legislation being proposed is, in large measure, by way of clarification and partial codification of the existing law. It is also proposed to permit insurers to claim damages for the costs of investigating fraudulent claims, in limited

[10] The 2012 Act is expected to come into force in 2013.

[11] 2012 Act s.11.

[12] 2012 Act s.2.

[13] Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties—Law Commission Consultation Paper No.204 and Scottish Law Commission Discussion Paper No.155, June 2012. The consultation ended in September 2012. A final report and draft bill, on this and the other topics addressed by the Law Commission and Scottish Law Commission joint insurance contract law project, are expected by the end of 2013.

[14] This is a departure from the 2007 proposals of the Law Commission and Scottish Law Commission, which had suggested fundamental reform.

[15] Insurance Contract Law: Post Contract Duties and Other Issues – Law Commission Consultation Paper No. 201 and Scottish Law Commission Discussion Paper No.153, December 2011.

circumstances. Remedies aside, if enacted, the new legislation would be of an evolutionary rather than a revolutionary nature.[16]

THE RELEVANT SECTIONS OF THE MARINE INSURANCE ACT 1906

15–08 The duty of utmost good faith, including in relation to disclosure[17] and representations, is dealt with in ss.17 to 21 of the Marine Insurance Act 1906. Of these, as noted above, s.17 enunciates a general principle[18] applying both to disclosure and to representations. The three following sections deal in more detail with the duties imposed on the assured. Section 21 is supplementary to the preceding sections.

15–09 The provisions of these sections are as follows[19]:

Insurance is uberrimae fidei

17. A Contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party,[20] the contract may be avoided by the other party.[21]

Disclosure by assured

18. (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

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

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:

(a) Any circumstance which diminishes the risk;

[16] Mention should also be made of the Fraud Act 2006, which came into force on January 15, 2007 and which has overhauled the criminal law relating to offences of deception. This is of interest in this context because it contains offences relating to the making of false representations, as well as the failure to speak when there is a legal duty to do so. Failure to declare a pre-existing medical condition in an application for health insurance is cited in the explanatory notes to the Fraud Act as a specific example of the kind of failure to disclose which falls within the Act, always assuming that the requisite mens rea is present. Consideration of that Act (and indeed the offences it replaced) would be out of place in this work.

[17] In former editions of this work the term "concealment" was used. See below, the notes to para.15–48, for the reasons for preferring the term "non-disclosure".

[18] In *Cantiere Meccanico Brindisino v Janson* [1912] 3 K.B. 452 at 463, Vaughan Williams L.J. said that there might be a pre-contractual duty of disclosure under s.17 in respect of peculiarities of the subject matter insured in respect of a "seaworthiness admitted" policy, although in the absence of inquiry there might be no such duty under s.18. The relationship between s.17 and the later sections is discussed below, starting at para.15–27.

[19] These provisions are also repeated insofar as material at the beginning of the next three chapters for ease of reference.

[20] Lord Mansfield in *Carter v Boehm* (1766) 1 W.Bl. 593; 3 Burr. 1905 pointed out that the duty lay not only upon the assured, but also upon the underwriter, who, for instance, would not be allowed to retain a premium in respect of a policy made on a ship which he knew at the time to have arrived safely.

[21] When the Consumer Insurance (Disclosure and Representations) Act 2012 comes into force (expected to be in 2013) s.17 of the 1906 Act will be subject to that Act in respect of consumer contracts of marine insurance (s.2(5)(b) 2012 Act).

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.[22]

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

[(6) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012].[23]

Disclosure by agent effecting insurance

19. [(1)] Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and,

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

[(2) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.][24]

Representations pending negotiation of contract

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded,[25] must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

[(8) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.][26]

When contract is deemed to be concluded

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the

[22] See, e.g. *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] 1 Lloyd's Rep. I.R. 291.

[23] s.18(6) was added by s. 11(2) of the Consumer Insurance (Disclosure and Representations) Act 2012. The provision is not in force at the time of writing and is expected to come into force in 2013.

[24] s.19(2) was added by s.11(2) of the Consumer Insurance (Disclosure and Representations) Act 2012. The provision is not in force at the time of writing and is expected to come into force in 2013.

[25] As to these words, see s.21; and below, starting at para.15–117.

[26] s.20(8) was added by s.11(2) of the Consumer Insurance (Disclosure and Representations) Act 2012. The provision is not in force at the time of writing and is expected to come into force in 2013.

purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

CONSUMERS

15–10 The Consumer Insurance (Disclosure and Representations) Act 2012 will, when it comes into force,[27] add ss.18(6), 19(2) and 20(8) to the 1906 Act and will render s.17 subject to the provisions of the 2012 Act. This will abolish the pre-contractual duty of good faith in consumer insurance contracts. The detail of the 2012 Act is considered at para.15–217 and following, below.

THE ORIGIN OF THE DUTY OF UTMOST GOOD FAITH[28]

15–11 As noted above, the 1906 Act is a partial codification of the common law. Whilst, therefore, the duty of utmost good faith is now on a statutory footing, the origin of it continues to inform both the remedy available for breach of the duty and how it is applied in practice. It is, therefore, of relevance to enquire into the source of the duty.

THE FRAUD ANALYSIS

15–12 In early cases it appears to have been laid down in some cases, and assumed in others, that the ground upon which the misrepresentation or non–disclosure of a material fact rendered the policy voidable was actual fraud or a wilful intention on the part of the assured to deceive the underwriter.[29] This ground, however, has been long since entirely abandoned, and the principle firmly established that the misrepresentation (or non-disclosure) of any material fact, whether arising from mistake, ignorance or accident, and however innocently made, will entitle the underwriter to avoid the policy as surely as though such misrepresentation (or non-disclosure) arose from a wilful intention to deceive.[30] This being so, the decisions cited under this heading are now largely of historical relevance only.

15–13 Later still, the doctrine favoured by the English courts was that in the case supposed, although no pretence existed for alleging actual fraud, yet the policy

[27] This is expected to occur in 2013.

[28] A comprehensive review of this topic can be found in *Good Faith and Insurance Contracts* by Eggars, Foss and Picken 3rd edn (2010).

[29] See the dicta of Lord Mansfield in *Pawson v Watson* (1778) 2 Cowp. 785; and *Bize v Fletcher* (1779) 1 Dougl. 12n.; the dictum of Lord Tenterden in *Flinn v Tobin* (1829) *Moody & Malk.* 367; and the remarks of Duer, "Lecture on Representation", 112, 113, n.3.

[30] The cases that establish this position are the following: *Macdowall v Fraser* (1779) 1 Dougl. 260; *Fillis v Brutton* (1782) 1 Park, *Ins.* 414; *Fitzherbert v Mather* (1785) 1 T.R. 12; *Feise v Parkinson* (1812) 4 Taunt. 640; *Dennistoun v Lillie* (1821) 3 Bligh 202; per Lord Abinger in *Cornfoot v Fowke* (1840) 6 M. & W. at 378. per Willes J.: "There is no doubt that a material representation, though perfectly honest at the time, made with the intent that it should be acted on by the insurer, and which has led to the policy being granted, will defeat the policy . *Anderson v Pacific Fire and Mar Ins Co* (1872) L.T. 7 C.P.65 at 68.

was to be considered void[31] on the ground of constructive or legal fraud—i.e. such conduct on the part of the assured as, though it does not imply any moral turpitude in himself, yet, from the effect it has in fact of misleading the underwriter, is in legal language said to be fraudulent.[32] However, the prospect of such a conclusion being reached today is remote—it is most unlikely that a court would attach the label "fraud" to conduct falling short of actual fraud.

15–14 This doctrine was questioned by Judge Duer,[33] who contended that the true ground on which the falsity of a material representation avoids the contract, in cases where no actual fraud can be imputed, is that a positive representation on a material point is an essential part of the contract of insurance, though not inserted in the policy; and this appeared to Arnould to be the sounder view.[34]

15–15 In *Blackburn v Vigors*,[35] Lord Esher took exception to Duer's theory on the ground that if it be correct "the contract should never be set aside, or treated as void on the ground of concealment (or misrepresentation); the contract should stand and be treated as broken by the assured". Duer's view, said Lord Esher, would raise new complications. Phillips explained the effect of a misrepresentation or concealment in the contract on the ground of a condition, implied by the fact of entering into the contract, that there is no misrepresentation or concealment, and his proposition was in that case adopted by all the judges in the Court of Appeal and by Lord Watson in the House of Lords.[36]

THE IMPLIED TERM ANALYSIS

15–16 The view expressed in *Arnould* at paras 595 and 627 of the sixteenth edition was that the basis for the rules as to non-disclosure and misrepresentation is to be found in an implied condition of the contract, that there is no misrepresentation or concealment. *Blackburn v Vigors*[37] was cited in these paragraphs as supporting this analysis and the proposition that it is an implied condition precedent to the right of the assured to insist on performance of the contract that he has made full disclosure of all facts materially affecting the risk. The Court of Appeal in *Banque Financiere de la Cie v Westgate Insurance Co*[38] did not find it necessary to decide whether *Blackburn v Vigors* is binding authority for the view that there is a contingent condition of this nature; on any view, *Blackburn v Vigors* did not support the existence of a promissory condition, indeed was regarded as an authority against there being such a condition.

[31] i.e. voidable.

[32] See the judgment of Lord Abinger in *Cornfoot v Fowke* (1840) 6 M. & W. 358; and the dicta of Baron Parke in *Elkin v Janson* (1845) 13 M. & W. 655 at 658.

[33] 2 Duer, *Ins.*, 648-655, x. xiv.; and 3 Kent, Corn. 282.

[34] 2nd edn, Vol.1, p.549.

[35] (1886) 17 Q.B.D. 554 at 561.

[36] (1886) 17 Q.B.D. 553 at 562, 583; 12 App. Cas. 535 at 539; 1 Phillips, *Ins.*, s.537. See also *Pickersgill v London & Prov Mar & General Ins Co Ltd* [1912] 3 K.B. 614.

[37] (1886) 17 Q.B.D. 553; (1887) 12 App. Cas. 535. See para.595, 16th edn, at n.70.

[38] *Banque Keyser Ullmann SA v Skandia (UK) Ins Co Ltd* [1990] 1 Q.B. 665 (Steyn J. and CA); CA decn. affirmed sub nom. *Banque Financiere de la Cite v Westgate Ins Co Ltd* [1991] 2 A.C. 249.

15–17 The Court of Appeal's analysis in *Banque Financiere* thus appears to be that there *may* be such a contingent condition (which must necessarily be contractual), but that the *duty* to observe good faith arises outside the contract, and derives from principles of equity.

15–18 However, in the opinion of the present Editors the contingent condition analysis must now be regarded as having been disapproved.[39] Although it was suggested in *Pan Atlantic*[40] that the point was then still controversial, the matter was arguably determined by the House of Lords in *The Star Sea*[41] and in particular by the judgment of Lord Hobhouse, whose reasoning was premised on the duty of good faith deriving from a rule of law as opposed to being contractual in origin.

THE RULE OF LAW ANALYSIS

15–18 There is no clear historical evidence to support any of the theories subsequently advanced as to the legal basis and origins of the good faith doctrine in insurance law. *Carter v Boehm*[42] was not the earliest case on the subject.[43] Lord Mansfield did not define the precise basis for the doctrine. Lord Mansfield's view was that the principle applied to all contracts.[44] This view did not prevail,[45] but marine insurance continued thereafter to be treated "as an exceptional case in which non-disclosure and misrepresentation would ordinarily vitiate the contract even though they would not have had that effect at common law. What was never spelt out was how that result was achieved".[46]

15–20 The view which now has most prevalence and which was firmly endorsed by Lord Hobhouse in *The Star Sea* is that the duty of utmost good faith is a separate

[39] The duty of disclosure may, however, be given contractual expression by an express contractual term-see *Svenska Hendelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 Lloyd's Rep. 519, a case concerning a commercial mortgage indemnity policy.

[40] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501.

[41] [2001] 1 Lloyd's Rep. I.R. 247, per Lord Hobhouse at paras 45-46.

[42] (1766) 3 Burr. 1905.

[43] The earliest case on non-disclosure (as opposed to misrepresentation) appears to be a decision in equity, where delivery up of the policy was ordered on the basis that the assured's concealing what intelligence he had of the ship's being in danger was a fraud; *De Costa v Scandret* (1723) 2 P.Wms. 169. *De Costa v Scandret* was not referred to as a precedent in common law cases which followed. For other cases on non-disclosure prior to *Carter v Boehm*, see *Seaman v Fonerau* (1743) 2 St. 1183; and *Hodgson v Richardson* (1764) 1 Wm. B1.463 (which was also a decision of Lord Mansfield's). The principle as recognised in these early cases in the Common Law Courts was that concealment of material facts renders the policy void, as a matter of law. If this principle was derived from cases in equity, the fact was not acknowledged. This may have been one of those instances where competition between courts led to parallel developments; rescission was not an available remedy at common law; the courts may have developed the principle of the contract being treated as void, partly to dispense with any need to go to Chancery to obtain rescission. It does appear, however, that an equitable origin cannot be a complete explanation. The early textbooks (Park, Marshall) refer to principles of "natural law" or "natural justice" and there are references in Marshall, 3rd edn, (1823, pp.464-465) to similar principles in the leading French texts written in the 18th century.

[44] The same view was also expressed by Yates J. in *Hodgson v Richardson*, above.

[45] For a modern discussion of the hypothesis that insurance law is an illustration of a general proposition of good faith rather than an anomaly see "Information Asymmetry and the Myth of Good Faith: Back to Basics" by FD Rose, [2007] L.M.C.L.Q. 181.

[46] *Pan Atlantic Ins Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501, per Lord Mustill (at 543).

rule of law, although its precise origin may never be ascertained, at least insofar as it applies pre-contractually. Post-contractually, however, the implied term analysis has persisted.[47]

RELEVANCE OF THE ORIGIN OF THE DUTY OF UTMOST GOOD FAITH

15–21 As stated above, the origin of the duty of utmost good faith is of relevance to the issue of remedies for breach and as to how the duty is given effect to in practice. This is the principal reason why it is important to understand where the duty comes from. Under this heading, we note other, subsidiary, reasons why this is of more than academic interest.

15–22 First, the Court of Appeal in *Banque Financiere* appear to have considered that, if the duty were founded on an implied term, there would be no reason in principle why breach of it should not give rise to a claim for damages.[48] However, even if there is still some room for controversy as to the source of the duty (as suggested in *Pan Atlantic*), the alternative analysis of a condition precedent (suggested by *Blackburn v Vigors*) would not appear to afford a basis for claims for damages. The *Banque Financiere* case has closed the door on damages as a remedy for pre-contractual non-disclosure or misrepresentation, except where the conditions for a claim in tort can be established; any reopening of questions as to the origin and source of the duty should not affect the position as regards the recoverability of damages, which is now settled law.

15–23 Secondly, in the *Banque Financiere* case at first instance Steyn J. focused on this issue, as affecting the position of the following market where the point at issue is one of breach of good faith on the part of underwriters.[49] It is suggested, however, that it should make no difference whether the duty is contractual, so far as following underwriters are concerned. Where there are several assureds insured under composite cover, non-disclosure by one assured will not make the contract voidable as against other assureds, who are not in breach of duty[50]; on the same principle, non-disclosure by or on behalf of one insurer or syndicate of underwriters would not affect the other insurers (at least where there is no complication of a leading underwriter clause). As each underwriter makes a separate contract, it should equally make no difference to the position of the following market, whether duties of disclosure arise outside or under the contracts.

15–24 Thirdly, the basis for the duty may affect the position when there is an assignment of the policy, because of the wording of s.50(2) of the 1906 Act ("… any defence arising out of the contract"). In *Pickersgill v London & Prov. Mar. & General Ins Co Ltd*[51] it was argued unsuccessfully that the effect of this section was that non-disclosure by the original assured did not give rise to a defence in an action

[47] Wrongly, in the opinion of the present Editors. See Ch.18 paras 18–14 to 18–18.

[48] [1990] 1 Q.B. 665 at 778B.

[49] [1990] 1 Q.B. 702.

[50] See, e.g. *General Accident Fire & Life Ass Corp v Midland Bank Ltd* [1940] 2 K.B. 388; *New Hampshire Ins Co v MGN Ltd* [1997] L.R.L.R. 24.

[51] [1912] 3 K.B. 614.

brought by an assignee of the policy.[52] It is submitted that a defence to a claim by an assignee based on avoidance on the ground of non-disclosure or other breach of utmost good faith by the original assured (the assignor) is still to be viewed as a "defence arising out of the contract" within s.50(2); the point was not addressed in *Banque Financiere*, which should not be regarded as an authority enabling assignees to claim in such circumstances.

15–25 Fourthly, now that the decision of the House of Lords in *IRC v Sempra*[53] has focused the minds of many practitioners on the question of recovery of interest as damages, the issue may arise as to whether, where avoidance has occurred, the insurer is obliged to pay back the premium with interest. This is an interesting question which has yet to be considered by the Courts.

15–26 Finally, this issue is of relevance to questions of territorial jurisdiction, in particular as regards whether a pre-contractual breach of the duty of utmost good faith falls within the provisions relating to contracts in both (what is now) the Judgments Regulation[54] and CPR 6 PD 6B.[55]

THE RELEVANCE OF THE S.17 DUTY OF UTMOST GOOD FAITH AT THE PRE-CONTRACTUAL STAGE

THE RELATIONSHIP BETWEEN S.17 AND SS.18 TO 20

15–27 Section 17 attracted very little attention in cases following the 1906 Act. A passing reference was made to it in *Cantiere Meccanico Brindisino v Janson*[56] where Vaughan-Williams L.J. suggested that avoidance on the ground of non-disclosure of a vessel's unseaworthiness, under a policy containing a "seaworthiness admitted" clause, might be based on s.17 of the Act, rather than s.18.

15–28 The first case in which much significance was attached to s.17 was the *CTI* case (*Container Transport International Inc v Oceanus Mutual Indemnity Association (Bermuda) Ltd*).[57] Although this decision attracted a great deal of criticism in other respects, and has since been overruled[58] on the main issue of whether a breach of good faith, non-disclosure or misrepresentation which did not induce the contract can afford grounds for avoidance, this does not affect the importance of the dicta contained in the judgments, which are mentioned below.

[52] Both in *Pickersgill v London & Provincial Marine & General Ins Co* [1912] 3 K.B. 614 (assignee's claim defeated by pre-contractual non-disclosure on the part of the assignor); and *The Litsion Pride* [1985] 1 Lloyd's Rep. 437 (assignee's claim defeated by post-contractual breach of good faith on the part of the assignor) the duty was regarded as being contractual.

[53] [2007] 3 W.L.R. 354, [2008] 1 A.C. 561.

[54] Council Regulation 44/2001.

[55] See, e.g. *Agnew v Lisfors* [2001] 1 A.C. 223, per Lord Woolf M.R. at 240. As to jurisdiction issues generally see Ch.5, above.

[56] [1912] 3 K.B. 452 at 463.

[57] [1984] 1 Lloyd's Rep. 476 CA.

[58] By the decision in *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd* [1995] 1 A.C. 501; see the discussion at paras 15–65 et seq. below.

15–29 All three judgments in the *CTI* case discuss s.17. Kerr L.J. referred[59] to the duty of disclosure, as defined or circumscribed by ss.18 and 19, as "one aspect of the overriding duty of the utmost good faith mentioned in section 17"; and in a later passage,[60] stated that when ss.17–20 are read together, one way of formulating the test as to the duty of disclosure and representation is whether the presentation in summary form to underwriters was fair and substantially accurate, so that a prudent insurer could form a proper judgment.

15–30 Parker L.J. suggested[61] a specific role for s.17 in the pre–contractual context and said that it goes further than merely to require fulfilment of the duties under the succeeding sections; if the insurer shows interest in circumstances which are not material within s.18, s.17 requires the assured to disclose them fully and fairly; again, if the assured or his broker realises in the course of negotiations that the insurer is proceeding on a mistaken basis the assured must draw attention to the matter; not to do so would be the plainest breach of the duty under s.17.

15–31 Stephenson L.J. agreed[62] with this last example, and with the statement in Chalmers, *Marine Insurance Act 1906*, 9th edn (1983), p.24 that: "The general principle is stated in this section because the special sections which follow are not exhaustive". He also concluded that "the special sections which follow section 17 must be read in the light of this leading section, and all their references to insurer and assured follow the imposition of the statutory duty of utmost good faith on each party". Towards the end of his judgment,[63] Stephenson L.J. also made the point (in fact echoing remarks of Lord Mansfield in *Carter v Boehm*)[64] that the underwriter must not turn the duty into a means of avoiding a contractual liability which he ought in fairness to honour: "this the statute recognises by making the duty to observe the utmost good faith mutual in section 17".

15–32 Thus it appears to be the position that s.17 may in some circumstances extend the scope of the right of avoidance for breach of good faith by the assured during the negotiations for the contract, but how far it does so has yet to be worked out in decided cases. Sections 18 and 20 have been described as "illustrations or consequences" of the rule set out in s.17 that insurance is a contract of utmost good faith, by Lord Lloyd in *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd*[65] but it is clear that in cases involving a question of pre-contractual non-disclosure or misrepresentation by the assured the requirements of materiality and inducement and other requirements of ss.18 and 20 (as interpreted in the *Pan Atlantic* case) generally[66] have to be met. Although the "fair presentation" test suggested by

[59] [1984] 1 Lloyd's Rep. 476 at 492.

[60] [1984] 1 Lloyd's Rep. 476 at 496.

[61] [1984] 1 Lloyd's Rep. 476 at 512.

[62] [1984] 1 Lloyd's Rep. 476 at 525.

[63] [1984] 1 Lloyd's Rep. 476 at 529.

[64] (1766) 3 Burr. 1905 at 1918–1919. See also, per Lord Lloyd in *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd* [1995] 1 A.C. 501 at 555.

[65] [1995] 1 A.C. 501 at 554.

[66] Materiality does not have to be shown, but inducement is still essential, in cases involving fraud. This is confirmed by the *Pan Atlantic* case, above. In such circumstances, s.17 should no doubt be regarded as the relevant statutory provision; it appears not to be confined by a test of materiality, see the dicta in *CTI v Oceanus* cited above and *The Star Sea* [1995] 1 Lloyd's Rep. 651, per Tuckey J. at 667.

Kerr L.J. in *CTI* has been accepted in subsequent cases,[67] this is not a substitute for the requirements in the ensuing sections. Indeed, in the *Banque Financiere* case the Court of Appeal rejected a formulation of the test for materiality seemingly derived from the *CTI* case, and the use of "broad concepts of good faith and fair dealing" as a guide to the scope of the reciprocal duty owed by insurers.

15–33 However, in a subsequent Court of Appeal case a rather different approach has been taken. In *Drake Insurance Plc v Provident Insurance Plc*[68] all three members of the Court of Appeal (Rix and Clarke L.JJ. obiter and without deciding the point, Pill L.J. in the minority as to the main ground on which the appeal was decided but coming to an express conclusion on this point) were prepared to find that the exercise by an insurer of its right to avoid a policy had to be carried out in good faith, such that bad faith would prevent its exercise.[69] A differently constituted Court of Appeal, which delivered its judgment only a short time before the judgment in *Drake*, came to the opposite conclusion (again, obiter).[70] These cases are discussed in detail below,[71] in connection with the exercise of the right of avoidance and are technically examples of the post-contractual duty of utmost good faith. However, what these cases serve to illustrate for present purposes is that there is now a willingness, on the part of some members of the Court of Appeal at least, to give s.17 teeth as far as insured's are concerned by using it as a mechanism to curtail an otherwise unrestricted right on the part of the insurer to avoid the policy where there has been a breach by the insured of the pre-contractual duty of utmost good faith.

15–34 Another perspective on the relationship between these sections is contained in the judgment of Hoffmann L.J. in *Societe Anonyme d'Intermediaries Luxembourgeois v Farex Gie*.[72] Hoffmann L.J. states that "the obligations in sections 18 and 19, although derived from the basic principle in section 17, go a good deal further". The rules as to the imputation of knowledge may entitle an insurer to repudiate in circumstances "which are far from any ordinary understanding of lack of good faith".[73] Section 17, in Hoffmann L.J.'s view, is adequate to deal with cases of "genuine bad faith".

[67] See, e.g. *Iron Trades v Imperio* [1992] 1 Re. L.R. 213, where Hobhouse J. states "the duty is essentially a duty to make a fair presentation of the risk to the insurer", citing the *CTI* case for this proposition. See also *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep. 430. A further argument was advanced in this case based on s.17 of the Act as affording an independent ground of avoidance. Longmore J. did not find it necessary to decide this point (see [1996] 1 Lloyd's Rep. 430 at 445) but observed that while s.17 can in an unusual case have an operation independent of ss.18-20, such cases will be rare. That point did not arise on appeal in that case.

[68] [2004] 2 All E.R. (Comm) 65.

[69] See also *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] Lloyd's Rep. I.R. 764 where Rix L.J. came to his (minority) decision on the question of whether there had been waiver of information by the insurer by reference to questions of fairness.

[70] *Brotherton v Aseguradora Colseguros SA* [2003] 1 Lloyd's Rep. I.R. 746, Ward, Buxton and Mance L.JJ.

[71] Paras 15–160 to 15–164.

[72] [1995] L.R.L.R. 116 at 149.

[73] "Non-disclosure will in a substantial proportion of cases be the result of innocent mistake"; per Lord Mustill in *Pan Atlantic v Pine Top*, above, at 549.

15–35 It is suggested that the general description of the contract as being based on utmost good faith cannot of itself be taken as restricting the application of s.17 to what in ordinary language would be described as "bad faith" or "genuine bad faith"; a description of a contract as being uberrimae fidei primarily connotes that it is one where there is a duty of disclosure, to which caveat emptor does not apply.[74] Section 17 must be seen as stating a wider rule, not confined to "genuine bad faith", not least because it is the only provision in the Act dealing with the insurer's duty and (to the extent that the duty continues) with any duty owing at subsequent stages after the contract is made. It may, however, be appropriate to regard s.17 as having only a limited role in relation to the pre-contractual duties of the assured, and as supplementing ss.18–20 in cases of pre-contractual non-disclosure and misrepresentation where there is genuine bad faith in some respect not falling precisely within those ensuing sections.

THE PRE-CONTRACTUAL DUTY OF THE INSURER

Reciprocal duties on insured and insurer

15–36 As noted above, the first notable feature of s.17 is that it expressly applies to both insured and insurer. The principle that reciprocal duties of disclosure are owed by both parties was recognised by Lord Mansfield in *Carter v Boehm*,[75] and has never since been questioned. The subject was discussed exclusively in the context of the pre-contract stage in *Carter v Boehm* where Lord Mansfield gives as an example the position of an underwriter who insurers a ship for a voyage, which he privately knows to be arrived.

15–37 Despite this very early recognition of mutual duties, there appear to have been no cases in the English Courts[76] where it was necessary to examine the scope of the duty owing by an insurer or where breach of the duty of utmost good faith by insurers was invoked[77] by an assured, until the 1980s when breach of good faith was put forward as one of the grounds for claiming damages in the *Banque Financiere*[78] case. The claim to damages failed, it being held that the only remedy for breach of the duty of utmost good faith is avoidance. That remedy will only

[74] See, e.g. *Seaton v Burnand* [1899] 1 Q.B. 782; [1900] A.C. 135. See also *CTI v Oceanus*, above, per Stephenson L.J. at 525: "s.17 of the Act restates the long established duty of the utmost good faith in contracts of marine insurance … much more than an absence of bad faith is required of both parties".

[75] (1766) 3 Burr. 1905 at 1909-1910.

[76] The development of the law in the United States, and in some other jurisdictions, has taken a very different path. In many parts of the United States, breach of good faith is treated as giving rise to liability for damages, either in contract or in tort or on both bases. This has become a potent weapon against insurers, when refusal to pay a claim, or to undertake the defence of third party claims under a liability policy, may often expose them to claims for punitive damages. Full discussion of the doctrine of good faith in other jurisdictions is beyond the scope of this work.

[77] There are isolated examples of cases involving misrepresentation by insurers, or agents of insurers, but the specific doctrine of insurance law, of utmost good faith, does not appear to have featured in these cases. See, e.g. *Kettlewell v Refuge Assurance Co* [1908] 1 K.B. 544.

[78] *Banque Keyser Ullmann SA v Skandia (UK) Ins Co Ltd* [1990] 1 Q.B. 665. (Steyn J. and CA); CA decn. affirmed sub nom. *Banque Financiere de la Cite v Westgate Ins Co Ltd* [1991] 2 A.C. 249.

very rarely be of benefit to an insured, at least as far as direct insurance is concerned[79] and at least as regards the pre-contractual stage, therefore, the duty of utmost good faith is essentially a one sided affair, benefiting insurers but not insureds. The result is that there is no reported case in which a breach by an insurer of its pre-contractual duty of utmost good faith has been invoked by an insured to the benefit of the insured.

The ambit of the duty

15–38 The plaintiffs in the *Banque Financiere*[80] case attempted to break new ground, in two very important respects. There had been no previous case in the English Courts where an assured sought specifically to invoke breach by the insurer of the mutual duty of utmost good faith; and there had been no previous case where damages were claimed for breach of the duty.[81] The facts of the case were complex, and need not be set out here; it is sufficient to note what were its essential features for present purposes, namely that it concerned non-disclosure on behalf of the insurers of facts known to them concerning the dishonesty of the plaintiffs' broker, prior to the placing of an insurance and the grant of a loan by the plaintiffs who were unable either to recover the amount advanced from the debtor or to recover indemnity for their loss due to the debtor's fraud under the terms of the policy.[82] The plaintiffs claimed damages on several different bases; the principal ground on which the House of Lords ultimately rejected the claim was one of causation; the claim based on breach of utmost good faith was also rejected for reasons of principle examined in detail by the Court of Appeal,[83] whose judgment was affirmed generally on this issue.[84]

15–39 The *Banque Financiere* case establishes the important rule that damages are not an available remedy for breach of the duty of utmost good faith, in the

[79] In reinsurance, different considerations may arise.

[80] Banque Financiere de la Cite v Westgate Ins Co Ltd [1991] 2 A.C. 249.

[81] *Glasgow Assurance Corp v Symondson* (1911) 16 Com. Cas. 109 contains a dictum of Scrutton J. (at 121) that "non-disclosure is not a breach of contract giving rise to a claim for damages, but a ground for avoiding the contract". This was said to be "a very familiar and well-established rule" in *Spencer Bower* on *Actionable Non-Disclosure* (1915), p.196; the legal position as stated in *Spencer Bower* was that damages could be recovered in cases of fraud, but not for non-disclosure as such. The possibility of claiming premiums paid in reliance on a fraudulent misrepresentation by the insurers' agent, in the tort of deceit, was recognised in *Kettlewell v Refuge Assurance Co* [1908] 1 K.B. 545; affirmed without opinion, [1909] A.C. 243. In *London Assurance Co v Clare* (1937) 57 Ll. L.R. 254, a claim was made by insurers to recover (a) the amount paid in respect of a fraudulent claim and (b) expenditure in investigating a second fraudulent claim which the insurers rejected. It appears to have been common ground that the insurers could recover the first amount, once the jury found the claim to have been fraudulently exaggerated. But Goddard J. rejected the argument that the wasted costs could be recovered as damages for breach of an implied term that the assured should not put in a fraudulent claim; the insurers might have been in a stronger position if they had put their claim as one for damages for fraud. The duty of utmost good faith was not put forward in either of these cases as giving rise to a cause of action. For a fuller discussion of the basis of the fraudulent claims rule see Ch.18 starting at para.18-46.

[82] See [1990] 1 Q.B. 665 at 772H.

[83] [1990] 1 Q.B. 665 at 769-781.

[84] [1991] 2 A.C. 249 at 280D (per Lord Templeman), 281F (per Lord Jauncey). Lord Brandon and Lord Ackner concurred in those reasons.

pre-contractual context. The duty (at least at the pre-contractual stage) has its source in positive rules of law, not in an implied term.[85] The Court of Appeal held that in adapting the principles relating to the insured's duty to the situation of the reciprocal duty owing by the insurer, due account must be taken of the rather different reasons for which the insured and the insurer require the protection of disclosure, but rejected the test proposed by Steyn J. at first instance, of asking the simple question whether good faith and fair dealing require disclosure.[86] The insurer cannot be obliged to tell the assured that he could obtain cover more cheaply elsewhere. He must at least disclose facts known to him[87] which are material either to the nature of the risk or the recoverability of a claim, which a prudent insured would want to take into account in deciding whether to place the risk with that insurer.[88] Thus the duty was summarised in this way[89]:

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

15–40 This statement of the ambit of the duty was accepted in the House of Lords; but both Lord Bridge[90] and Lord Jauncey[91] held (applying this test) that disclosure of the broker's dishonesty would not have been material, per Lord Bridge because it did not affect recoverability of a claim under the policy, and per Lord Jauncey because it did not affect the nature of the risk to be insured. Lord Jauncey said[92]:

> "The duty is, however, limited to facts which are material to the risk insured, that is to say, facts which would influence ... a prudent insured in entering into the contract on the terms proposed by the insurer. Thus any facts... known to the insurer but not the insured, which reduce the risk should be disclosed by the insurer."

15–41 As regards the basis of the duty, the Court of Appeal held that the powers of the courts to grant relief where there has been a breach of the pre-contractual duty[93] of disclosure stem from the jurisdiction originally exercised by courts of equity to prevent imposition; the powers of the courts to grant relief by way of rescission

[85] The topic of the legal basis of the pre-contractual duty of utmost good faith is discussed in detail above at paras 15–10 to 15–19.

[86] [1990] 1 Q.B. 665 at 772.

[87] [1990] 1 Q.B. 665 at 703 (Steyn J.), 772 CA. The Court of Appeal rejected "broad concepts of honesty and fair dealing" as a guide to the scope of the duty. The test could perhaps now be restated so as to reflect the language of "influence" and "inducement" used in the *Pan Atlantic* case, [1995] 1 A.C. 501, but it is submitted that *Pan Atlantic* does not affect the validity of this passage in the *Banque Financiere* judgment in any substantive sense.

[88] [1990] 1 Q.B. 665 at 772F.

[89] [1990] 1 Q.B. 665 at 772.

[90] [1991] 2 A.C. 249 at 268–269.

[91] [1991] 2 A.C. 249 at 282. Both in the *Banque Financiere* case and in *The Good Luck* disclosure would have influenced the plaintiffs' decisions to grant loans, rather than any decision in relation to the insurance. Although the claim for damages for breach of utmost good faith made in *The Good Luck* failed for other reasons, the Court of Appeal appear to have accepted that *materiality* would not have been a stumbling block, in that case; [1990] 1 Q.B. 890F.

[92] [1991] 2 A.C. 249 at 281.

[93] Slade L.J., who delivered the judgment of the court, reserved the position with regard to the post-contractual duty, stating (at 777) that "it may be that on the particular facts of some cases (though

where there has been duress or undue influence stem from the same jurisdiction.[94] This analysis, combined with other reasons set out in the judgment, led to the conclusion[95] that damages are not an available remedy for non-disclosure by insurers in breach of the duty of utmost good faith; to establish a right to damages, the conditions for a claim in tort, for deceit or for negligence, must be fulfilled[96]; the mere fact of the parties being in a relationship where a duty of disclosure arises from a contract under negotiation being one which is uberrimae fidei does not suffice to give rise to a tortious duty to speak,[97] where failure to make adequate disclosure can give rise to liability in damages.

15–42 In *Aldrich v Norwich Union Life Assurance Co Ltd*[98] a co-joined appeal from two first instance decisions, certain Lloyd's Names had participated in one form or another of a plan which involved a guarantee of their liabilities as names which was backed by the security of an endowment policy in favour of the insurer giving the guarantee and a charge on real or other property. In most instances, the insurer paid out on the guarantees. In those cases, the Names sought to be discharged from their obligations to pay back those sums and damages for breach of the duty of utmost good faith by the insurer. In other instances, the Names sought to restrain the insurer from paying out under the guarantee. The essential ground of complaint by the Names was that the insurer (through other companies in its group) knew, but had concealed, that it was likely that the Names would suffer losses because other companies in its group had suffered losses which would later escalate to catastrophic effect for Lloyd's syndicates. It was said that the insurer, in the exercise of its duty of utmost good faith, ought to have disclosed that. The cases were struck out at first instance. In the Court of Appeal, the appeals were dismissed. The only matter that was material to the endowment policies which were written was the life of the Name. The propensity for losses, which would bring the plans as a whole into play, was not material to that issue and there was no duty of disclosure which extended to contracts related to the

by no means necessarily all) the duty of post-contractual disclosure can be said to arise under the terms of the preceding contract". The legal basis of the post-contractual duty of utmost good faith is discussed in paras 18-14 to 18-18 in Ch.18.

[94] [1990] 1 Q.B. 665 at 780D. The same view of the origins of the duty, at least as regards representations, was put forward in an earlier case referred to by Slade L.J., [1990] 1 Q.B. 665 at 799. See *Merchants & Manufacturers Ins Co Ltd v Hunt* [1941] 1 K.B. 295.

[95] [1990] 1 Q.B. 665 at 780–781. In confirming the analysis and conclusions of the Court of Appeal on this aspect of the case, Lord Templeman stated categorically that: "I agree with the Court of Appeal that a breach of the obligation does not sound in damages. The only remedy open to the insured is to rescind the policy and recover the premium"; [1991] 2 A.C. 280. To the extent that there is a continuing duty of utmost good faith in post-contractual contexts, it is also the position that damages are not an available remedy for breach of that duty; *The Good Luck*, above, at 888 E-G.

[96] The Misrepresentation Act 1967 s.2(1) does not apply to non-disclosure; see the *Banque Financiere* case, above at 790. For further discussion of this point, see the comments under para.17-116.

[97] Discussion of the circumstances in which such a tortious duty might arise is beyond the scope of this work. The reader should refer to the textbooks on the Law of Torts. So far as we are aware, there is not a single case where a plaintiff has succeeded in recovering damages in tort on the basis that a duty to speak was owed and breached by pure omission. The attempts to establish such a tort, in the *Banque Financiere* case, *The Good Luck* and *Aldrich v Norwich Union* (below) all failed.

[98] [2000] Lloyd's Rep. I.R. 1.

insurance policies but which were separate contracts.[99] Evans L.J. said that the "law was unattractive" if it restricted the scope of the duty of utmost good faith to one part only of a composite transaction, but it was not open to the court to hold that the duty of disclosure went beyond facts which were relevant to the insurance contract.[100]

The Court of Appeal thus applied the *Banque Keyser* case to conclude that the **15–43** duty of disclosure does not require the disclosure of *any* fact which would or might induce the insured to enter into the contract of insurance, or which was relevant to that decision. It was not sufficient, therefore, for the Names to prove that they would not have taken out the policies if the facts relied on as material had been disclosed to them.[101]

The Names in those cases had also claimed damages for breach of the duty of **15–44** utmost good faith. Mummery L.J. said that, in the absence of fraud (which was not pleaded) avoidance was the only remedy.[102] Evans L.J. expressly left open the question of whether damages could have been recovered if "dishonest concealment" (which was not pleaded) had been made out but said that in principle they could be.[103] Evans L.J.'s remarks in that respect should not be read as supporting the view that damages can be recovered for a fraudulent breach of the duty of disclosure absent the ingredients of a tortious claim being made out. That issue was settled by the *Banque Financiere* case and leaving aside *Aldrich* in which the claims were struck out as disclosing no reasonable cause of action, there has been no other attempt to reopen it.

THE PRE-CONTRACTUAL DUTY OF THE INSURED

Whilst there may be instances in which an insured can breach its pre-contractual **15–45** duty of utmost good faith other than by breach of the duty to make disclosure and only to make representations that are true (as expressed by ss.18 to 20 of the 1906 Act),[104] in practical terms non-disclosure and misrepresentation are the most important aspects of the pre-contractual duty of utmost good faith as it applies to insureds. The balance of this chapter and the next two chapters are devoted to those topics.

NON-DISCLOSURE AND MISREPRESENTATION: GENERAL

GENERAL STATEMENT OF THE DUTY ON THE INSURED

In almost every instance in which a policy of marine insurance is effected, the **15–46** underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and

[99] [2000] Lloyd's Rep. I.R. 1, per Mummery L.J. at 7 and Evans L.J. at 11.

[100] [2000] Lloyd's Rep. I.R. 1 at 11.

[101] [2000] Lloyd's Rep. I.R. 1, per Mummery L.J, at 7 and Evans L.J. at 11.

[102] [2000] Lloyd's Rep. I.R. 1 at 8.

[103] [2000] Lloyd's Rep. I.R. 1 at 11.

[104] See the discussion at paras 15–26 to 15–34 above.

CHAPTER 20

IMPLIED WARRANTIES: SEAWORTHINESS

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MARINE INSURANCE ACT 1906

20–01 The sections of the Marine Insurance Act 1906 which deal with implied warranties[1] in particular are ss.37, 39, 40 and 41. These are as follows:

> 37. There is no implied warranty as to the nationality of a ship or that her nationality shall not be changed during the risk.[2]Warranty of seaworthiness of ship
>
> 39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
>
> (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
>
> (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
>
> (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
>
> (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.
>
> No implied warranty that goods are seaworthy
>
> 40.—(1) In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.
>
> (2) In a voyage policy on goods or other movables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy.
>
> Warranty of legality
>
> 41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in lawful manner.

In addition, s.36(2) provides, as we have seen in the previous chapter, that there is an implied condition that the ship will be properly documented where there is an express warranty of her neutrality.

[1] As to warranties in general, whether express or implied, see Marine Insurance Act 1906 ss.33, 34; para.19–01, above.

[2] See *Clapham v Cologan* (1813) 3 Camp. 382; *Dent v Smith* (1869) L.R. 4 Q.B. 414. The law in America appears to be the same, in the absence of any statutory provision: see *Navegacion Goya SA v Mutual Boiler & Machinery Ins Co*, 1972 A.M.C. 650. But nationality may be a fact material to the risk and therefore requiring disclosure: *The Spathari*, 1924 S.C. 182; affirmed 1925 S.C. (H.L.) 6.

GENERAL DOCTRINE OF WARRANTY OF SEAWORTHINESS

20–02 By far the most important of the implied warranties is that of seaworthiness, and it is unnecessary to discuss further in this chapter the provisions in the Act relating to other classes of implied warranty.[3] In theory, it is of course open to the courts to find that other warranties not mentioned in the Marine Insurance Act 1906 are to be implied, on the general principles which govern the implication of terms in a policy, but in view of the stringent consequences which ensue from construing a term as a warranty in the insurance sense, and the absence of any recognised usage to support the implication of any other warranties in marine policies, the point seems to be academic.[4]

Unless the policy otherwise expressly provides,[5] every voyage policy[6] on hull or on goods contains an implied warranty that the ship shall be seaworthy for the voyage when she sails, by which is meant that she shall be in a reasonably fit state as to repairs, equipment, crew, and all other respects to encounter the ordinary perils of the voyage insured at the time of sailing on it.[7]

[3] See as to nationality, fn.2, above; as to documentation, para.19–29, above; as to legality, Ch.21 below.

[4] The possibility of a strict warranty being implied seems inconceivable against the background of what has now become the general consensus that the doctrines of English law concerning promissory warranties are unduly stringent and need to be reformed. See the Law Commissions' proposals referred to in para.19–01 above. Under these proposals, the Sections of the 1906 Act which deal specifically with implied warranties (quoted above) would not be amended. But if the current proposals are implemented, breaches of warranty (whether express or implied) would generally operate as suspending the cover, not as resulting in the insurer being discharged from all liability for losses occurring after the date of breach, and the rule contained in s.34(2) of the Act (that the assured cannot avail himself of the defence that the breach has been remedied before loss) would be abrogated. See para.19–01, above, for a fuller account of the proposed reforms.

[5] Prior to the revision of these clauses in 1982, the effect of the implied warranty was negatived by the Seaworthiness Admitted Clause in the Institute Cargo Clauses. Under cl.5 of the 1982 Clauses, the underwriters waive any breach of the implied warranty unless the assured or their servants are privy to the unseaworthiness of the vessel. Cl.5 in the 2009 Clauses contains an unqualified waiver of the implied warranty (see App 2 below). The subject of unseaworthiness of the vessel and unfitness of the vessel for carriage of the cargo are dealt with instead by carefully circumscribed exclusions under this Clause. These provisions are discussed at paras 20–39 to 20–42 below.

[6] There is no implied warranty of seaworthiness in *time policies*. See s.39(5) of the 1906 Act, which is quoted above at para.20–01. The interpretation of s.39(5) is discussed at paras 20–30 to 20–33 below. Since most policies on hulls and machinery and on freight nowadays are written on a time basis, and since cargo policies although these are voyage policies are almost always written on the terms of the Institute Cargo Clauses, under which breach of the implied warranty is waived, the main subject of this Chapter is of diminished importance in modern-day practice.

[7] Marine Insurance Act 1906 s.39(4); per cur. *Dixon v Sadler* (1839) 5 M. & W. 405 at 414. The principle stated in the text, reflected also in s.39(4) of the Act, was accepted in *Garnat Training & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp* [2011] 1 Lloyd's Rep 589 at [160] (Christopher Clarke J.), [2011] 2 Lloyd's Rep, 492, [61]–[2] (C.A.). The relevant passage in the judgment of Christopher Clarke J. contains a summary of the principles applying to the warranty of seaworthiness, in a series of numbered propositions. These propositions were agreed between the parties, and apparently approved both at first instance and in the Court of Appeal. Several of them are referred to at later points in this Chapter. While the principles themselves may be uncontroversial, their restatement in *Garnat Trading* is particularly welcome as there are hardly any modern decisions in the English Courts on the warranty of seaworthiness in marine policies.

There is nothing in the law of marine insurance more important to commerce and the preservation of human life than a strict compliance with this warranty.[8] In voyage policies on hull it is an implied condition precedent to the underwriter's liability for any loss incurred in the course of the voyage,[9] and the reported cases in point suggest that stipulations contained in the policy are unlikely to be construed as having the effect of excluding the implied warranty or mitigating the consequences of its breach unless the language used clearly demonstrates that such an effect was intended or is clearly inconsistent with the warranty being implied or given its full scope.[10] For example, in *Quebec Marine Insurance Co v Commercial Bank of Canada*,[11] where the policy contained an exception of losses from "rottenness, inherent defects, and other unseaworthiness", the Privy Council held that the implied warranty of seaworthiness was not thereby excluded. Consequently, the boiler being defective at starting, the plaintiff did not recover, although the defect had been made good before the loss. Similarly in *Sleigh v Tyser*[12] where a policy on cattle provided that the fittings of the ship were to be approved by Lloyd's surveyor, and they were approved by him, Bigham J. held that as regards the sufficiency of the fittings, the warranty of seaworthiness was not excluded by the express provision as to the approval of the fittings.

INNOCENCE OF ASSURED IMMATERIAL

20–03 As seaworthiness is a condition of the contract of insurance, breach of the condition discharges the insurer from liability from the date of the breach and deprives the assured of any recourse against the insurer, whether his loss can be traced to such breach or not, and even though the unseaworthiness was remedied before the loss.[13]

[8] See the observations of Lord Eldon in *Douglas v Scougall* (1816) 4 Dow at 276; and of Lord Redesdale in *Wilkie v Geddes* (1815) 3 Dow at 60. Although the implied warranty now has less significance in current insurance practice (see fn.6 above), the principle underlying these observations remains valid and as we have seen in the previous chapter there have been significant moves in recent years in the direction of ensuring improved standards of seaworthiness and of ships' maintenance by the use of Classification Clauses. One of the propositions accepted in *Garnat Trading* (above) is that the fact that a vessel is in Class at the time of sailing is of significant weight (albeit not of course determinative) when considering whether she was seaworthy, particularly when the vessel has been surveyed and approved by Class shortly before sailing.

[9] per Lawrence J., *Christie v Secretan* (1799) 8 T.R. at 198; per Lord Ellenborough, *Wedderburn v Bell* (1807) 1 Camp. at 2.

[10] The most prominent example of wording which has been construed as being designed to exclude the implied warranty is the "seaworthiness admitted" formula, discussed at para.20–39 below. This formula is no longer in common use. It should be noted that it is not current practice for the "held covered" formula discussed in the previous chapter to be employed to mitigate the effect of the implied warranty of seaworthiness.

[11] (1870) L.R. 3 P.C. 234.

[12] [1900] 2 Q.B. 333; approved in CA, *Petrofina SA of Brussels v Compagnia Olii Minerali of Genoa* (1937) 42 Com. Cas. 286.

[13] Marine Insurance Act 1906 ss.33(4), 34(2). The legal effect of a breach of the implied warranty is the same as that of a breach of express warranty. The relevant principles are clearly set out in Lord Goff's judgment in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233. See the passage quoted at para.19–09 above. In previous editions of this work, it was suggested at this point that breach of the warranty of seaworthiness would avoid the

Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he consequently can never be bound thereby against his will. Hence, as Lord Eldon said: "It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions of the owner may be, if he is mistaken in the fact, and the vessel is, in fact, not seaworthy, the underwriter is not liable".[14]

Thus, where an owner had procured his ship to be surveyed and fully repaired, as the ship-builder thought, before sailing, but she proved to be unseaworthy from a latent defect (the unsoundness of some timbers near her keel), not discovered during the survey or repair, Lord Mansfield held the underwriter discharged from his liability by the mere fact of unseaworthiness.[15]

WARRANTY OF SEAWORTHINESS IN POLICIES ON GOODS.

The warranty of seaworthiness applies only to the ship,[16] but it applies equally, whatever be the subject of insurance.[17] **20–04**

There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage, but there is an implied warranty that the ship, in addition to being seaworthy as a ship, is also reasonably fit to carry the goods to their destination.[18]

The implied warranty can rarely be invoked under a cargo policy, however, because of express provisions in the Institute Cargo Clauses. Until recently, these clauses incorporated what was known as the Seaworthiness Admitted Clause[19]

policy or give the insurers a right to avoid from the time of breach. It is now clear that passages here and elsewhere in previous editions which referred to avoidance in connection with breaches of warranty did not accurately state the law.

[14] per Lord Eldon in *Douglas v Scougall* (1816) 4 Dow at 276.

[15] *Lee v Beach* (1762) 1 Park, *Ins.*, p.468; see also *The Glenfruin* (1885) 10 P.D. 103; *The Caledonia* 157 U.S. (50 Davis) 124 (1894). Latent defect is now one of the perils insured against under voyage policies on hulls and machinery, under the standard Institute Clauses and the International Hull Clauses, which was not of course the case at the time of Lord Mansfield's decision. The question of how express cover in respect of a latent defect is to be reconciled with the implied warranty of seaworthiness is discussed at para.20–38 below.

[16] It does not apply to lighters employed to land the cargo: *Lane v Nixon* (1866) L.R. 1 C.P. 412.

[17] See *Oliver v Cowley* (1765) 1 Park, *Ins.*, p.470. The law is the same in the United States. See *The Caledonia* above; and 1 Phillips, s.695. For a recent case on the application of the implied warranty under a freight policy, see *The Pride of Donegal* [2002] 1 Lloyd's Rep. 659. The shipment of dangerous cargo may of course give rise to liabilities as between ship-owner and shipper, but that is a subject outside the scope of this work.

[18] Marine Insurance Act 1906 s.40; see *Koebel v Saunders* (1864) 17 C.B.(n.s.) 71 and below, para.20–19.

[19] Even before the general adoption of this clause in the Institute Cargo Clauses it had for some time been the practice of underwriters on cargo not to set up the defence of unseaworthiness of the ship, but to pay the loss and avail themselves by subrogation of the assured's remedies against the ship-owner. This practice did not, of course, modify the rule of law stated in the text. See, per Stirling J. in *Brooking v Maudslay* (1888) 38 Ch.D. at 642; per Bigham J. in *Sleigh v Tyser* [1900] 2 Q.B. at 336.

providing, in one form or another, that the seaworthiness of the vessel was admitted as between the assured and the underwriters. One of the main effects of this clause was that it precluded the underwriter from relying on unseaworthiness of the vessel as a breach of warranty. The seaworthiness admitted clause was replaced, under the Institute Cargo Clauses (January 1, 1982), by the Unseaworthiness and Unfitness Exclusion Clause (cl.5) which provides (in part) that the underwriters waive any breach of the implied warranties unless the assured or their servants are privy to the unseaworthiness or unfitness of the vessel. This exclusion has been revised, at cl.5 in the Institute Cargo Clauses (1 January 2009), which now contains an unqualified waiver of the implied warranties. These provisions are discussed at paras 20–39 to 20–42 below.

THE SCHEME OF THE 1906 ACT

20–05 The scheme of the 1906 Act with regard to seaworthiness is brought into focus by the judgments delivered in the Supreme Court in *The Cendor Mopu.*[20] The insurers' arguments, if correct, would have meant that there is a loss by inherent vice affording a defence to the assured's claim where loss or damage is caused by inability of an insured cargo to withstand ordinary perils of the sea, or in other words by its unseaworthness. The provisions in the 1906 Act do not fit easily with that approach.

In circumstances where the Act addresses the subject of initial unseaworthiness or unfitness of both the goods and the carrying vessel, in the manner provided in ss.39 and 40, it might be thought odd if such unseaworthiness or unfitness could also be a direct test of insurers' liability, under the separate heading of inherent vice, dealt with in another part of the Act, at s.55(2)(c)[21].

The effect of that proposition, as was pointed out by Lord Saville,[22] would be that whereas a shipowner under a time policy would be covered against loss attributable to unseaworthiness of the vessel to which he was not privy[23], the cargo owner would not be covered against loss attributable to unseaworthiness of the cargo, whether or not he was privy to the fact of such unseaworthiness. Lord Mance, similarly, noted[24] that the express treatment of the subject of seaworthiness in hull insurance in s.39(5) highlights the absence of any like provision in respect of cargo insurance, and hence the oddity of treating s.55(2)(c) as in effect containing such provision, when it refers to inherent vice.

[20] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] 1 Lloyd's Rep. 560. See especially per Lord Saville at [38]–[43]; per Lord Mance, at [54]–[57]; and per Lord Clarke, at [135].
[21] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] 1 Lloyd's Rep. 560 per Lord Mance at [56].
[22] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] 1 Lloyd's Rep. 560 at [43].
[23] Under the 1982 Cargo Clauses, which were incorporated in the policy in *The Cendor Mopu*, the Unseaworthiness and Unfitness Exclusion Clause (Cl.5) carefully restricted the implied warranties of seaworthiness and fitness of the vessel to circumstances where the assured was privy to such breaches. See per Lord Mance, at [55], [57]. This treatment of seaworthiness of the vessel, under a separate exclusion clause, and the absence of any express exclusion referring to unseaworthiness of the cargo, further reinforce what Lord Mance described as the "oddity" of treating s.55(2)(c) in the manner suggested. The insurers' arguments were, in other words, at odds with the scheme of the Institute Cargo Clauses, as well as the scheme of the 1906 Act.
[24] [2011] 1 Lloyd's Rep. 560, at [57].

The provisions in s.40 might have been framed in a reverse sense, to provide for a warranty of the seaworthiness of the goods not the vessel, but they were not.[25]

The insurers' approach in *The Cendor Mopu,* which was rejected by the Supreme Court, came close to seeking to introduce a warranty of seaworthiness of the cargo by the back door, under the guise of inherent vice. The decision raises important issues with regard to causation, perils of the seas, and the doctrine of inherent vice, which are discussed in later Chapters (Chs 22 and 23 below). At this point, it suffices to note that *The Cendor Mopu* placed it beyond doubt that unseaworthiness, in the broader sense of inability to withstand the ordinary perils of the seas on the voyage, which may or may not be encountered, is not inherent vice. The doctrine of inherent vice operates at a different level, in cases where inherent characteristics of or defects in the insured vessel or cargo lead to it causing loss or damage to itself, without any fortuitous external accident or casualty.[26] In such cases, the insured property might equally be described, in a narrower sense, as unseaworthy but the implied warranties with which this Chapter is principally concerned, and which relate only to voyage policies and to seaworthiness and fitness of the vessel, are not directed simply to the general debility of a vessel. They are concerned, as we have seen, with the seaworthiness of the vessel in the sense of reasonable fitness to encounter the ordinary perils of the seas—and as we have also seen, there is no implied warranty in a cargo policy that the insured goods are seaworthy.

The insurers' arguments in *The Cendor Mopu* in short, ran contrary to the scheme of the 1906 Act, as reflected in ss.39 and 40. It is unnecessary to deal further at this point with the subject of inherent vice. The subject is for discussion in later Chapters.

NO IMPLIED WARRANTY THAT THE SHIP SHALL CONTINUE SEAWORTHY

20–06 It is enough to satisfy the implied warranties in s.39 and s.40(2) of the 1906 Act that the ship be originally seaworthy for the voyage insured when she sails on it; the assured makes no warranty that the ship shall continue seaworthy in the course of it. "Every ship", said Lord Mansfield, "must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage".[27] On this ground it has been frequently held that under a policy on a voyage out and home, the risk being entire and indivisible, it is sufficient to satisfy the warranty if the ship be seaworthy for the entire voyage when she first sails from the home port of loading; and it is not necessary that she should be in a seaworthy condition on sailing from the outport on her homeward passage, or from any intermediate port.

[25] [2011] 1 Lloyd's Rep. 560, per Lord Mance, at [54].
[26] Lord Mance's formulation at [81] in *The Cendor Mopu*. See also Lord Diplock's formulation in *Soya v White* [1983] 1 Lloyd's Rep. 122, considered and applied in *The Cendor Mopu*, which is discussed in detail in Ch.22 below.
[27] per Lord Mansfield in *Bermon v Woodbridge* (1781) 2 Dougl. 781 at 788; and in *Eden v Parkinson* (1781) 2 Dougl. 781 at 735; per Lord Eldon in *Watson v Clark* (1813) 1 Dow at 344; so per cur, in *Dixon v Sadler* (1839) 5 M. & W. at 414, 415.

Thus, in *Bermon v Woodbridge*[28] where the voyage insured was "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur", Lord Mansfield said, that if this was one entire risk (which, as the premium was entire, he held it to be), the underwriters were liable if the ship was seaworthy when she left Honfleur, though she had not been so at Angola, or any of the subsequent stages of the voyage.

So, in *Holdsworth v Wise*[29] where a ship was insured "at and from Belfast to her port or ports of loading in British America, during her stay there, and back to a port of discharge in the United Kingdom", etc. and the evidence showed that she was seaworthy when she sailed from Belfast, but unseaworthy when she left St. Andrew's on the homeward passage, counsel for the defendants admitted that the implied warranty was satisfied.

The decision of the Privy Council in *Biccard v Shepherd*[30] seems at first sight to conflict with the cases just cited. In that case the policy was on goods "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea", from the loading of the goods on board the ship. She took part of her cargo at Hondeklip Bay, and was seaworthy when she sailed thence; but was overloaded at Port Nolloth, and thus became unseaworthy. The cargo was lost on the voyage, and the Privy Council held that the assured could recover in respect of the cargo shipped at Hondeklip Bay, but not in respect of that shipped at Port Nolloth. The ground of the decision seems, however, to have been that under the words of the policy two separate risks were insured, one on the parcel of goods shipped at Hondeklip Bay, the other on the parcel shipped at Port Nolloth, and that as to these parcels the voyage began, and therefore the warranty attached, at different times.[31]

IMPLIED WARRANTY AS TO CREW DOES NOT EXTEND TO THEIR CONDUCT DURING VOYAGE

20–07 The preceding cases establish the principle that no warranty is implied that the ship, in point of staunchness and repair, shall continue seaworthy throughout the voyage; it is equally certain that the assured makes no warranty for the continued good conduct of the master and crew in the course of the voyage.[32] If the vessel, crew and equipment be originally sufficient, and the master and crew are persons of competent skill, all has been done that the assured warranted should be done; and although such master and crew should by their acts or omissions have brought the ship in the course of the voyage, and at the time of loss, into an unseaworthy state, yet the underwriter is liable for all loss which, though

[28] (1781) 2 Dougl. 781.

[29] (1828) 7 B. & Cr. 794. See also SP, *Redman v Wilson* (1845) 14 M. & W. 476. These old cases were decided before the doctrine of seaworthiness by stages had been developed, and it may sometime become necessary to consider whether this doctrine should not be applied to such round voyages: cf. also *Anglo-Saxon Petroleum Co v Adamastos* [1957] 2 Q.B. 255 (reversed on another ground [1959] A.C. 183), where it was held that the warranty of seaworthiness in a consecutive voyage charter applies at the commencement of each voyage.

[30] (1861) 14 Moo. P.C. 471.

[31] (1861) 14 Moo. P.C. 496.

[32] *Trinder, Anderson & Co v Thames & Mersey Mar Ins Co* [1898] 2 Q.B. 114, per Smith L.J., at 123.

remotely occasioned by such superinduced state of unseaworthiness, is yet proximately caused by the perils insured against.[33]

"It is the duty of the owner", said Bayley J., "to have the ship properly equipped, and, for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done this he has discharged his duty".[34] "The assured makes no warranty", said Parke B., "that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage; and their negligence and misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. Nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire, which causes a loss, be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which makes a vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of slipping it or cutting it away; nor could it make any difference, whether any other part of the equipment were lost by mere neglect, or thrown away and destroyed in the exercise of an improper discretion by those on board".[35]

20–08 It makes no difference whether a state of unseaworthiness arising during the voyage which occasions the loss be caused by the negligence of the master and crew, or of other parties employed by the assured upon the business of the ship in the usual course of trade. In *Redman v. Wilson*[36] a ship insured "from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom", was loaded with teak at an island in the Sierra Leone river and having completed her loading, began dropping down the river on her passage home; it was soon found, however, that, owing in all probability to unskilful loading, she had become so leaky as to be unfit to put to sea, and having, on examination, been pronounced unseaworthy, she was voluntarily run on shore to prevent her sinking in the river, and ultimately sold where she lay, as not being fit for repair. The plaintiff claimed a total loss by the perils of the sea; and, the ship having been seaworthy when she sailed from London, the court held the underwriters liable, as the loss, though remotely arising from negligence, was proximately caused by a peril of the sea.

[33] Marine Insurance Act 1906 s.55(2)(a); *Busk v Royal Exch Assurance Co* (1818) 2 B. & Ald. 73; *Walker v Maitland* (1821) 5 B. & Ald. 171; *Bishop v Pentland* (1827) 7 B. & Cr. 219; *Holdsworth v Wise* (1828) 7 B. & Cr. 794; and see especially *Phillips v Headlam* (1831) 2 B. & Ad. 380; *Dixon v Sadler* (1839) 5 M. & W. 405; *Dixon v Sadler* in error (1841) 8 M. & W. 895; *Redman v Wilson* (1845) 14 M. & W. 476; *Phillips v Nairne* (1847) 4 C.B. 343; *Biccard v Shepherd* (1861) 14 Moo. P.C. 471; *Dudgeon v Pembroke* (1877) 2 App. Cas. 284.

[34] per Bayley J. in *Walker v Maitland* (1821) 5 B. & Ald. at 175.

[35] per Parke B. in *Dixon v Sadler* (1839) 5 M. & W. at 414.

[36] (1845) 14 M. & W. 476. See also *Dixon v Sadler* (1839) 5 M. & W. 405; in error (1841) 8 M. & W. 895; and *Dudgeon v Pembroke* (1877) 2 App. Cas. 284, in both of which cases this question, apart from that of seaworthiness, was raised, and decided in accordance with the cases mentioned in the text.

The assured cannot, of course, recover for a loss brought about by his own wilful act or default.[37]

THE DOCTRINE OF STAGES

20–09 We have already seen that the underwriter on a voyage policy is liable for no loss after the ship sails, unless at that time she was seaworthy for the voyage; although, however, seaworthiness for the voyage at the time of sailing is a condition precedent to the underwriter's liability for loss in the course of the voyage, yet it is not necessarily a condition precedent to the policy's attaching.

There are, in fact, degrees of seaworthiness; seaworthiness for the voyage is one thing; and seaworthiness in port, or for an inland navigation, etc. quite another.[38]

As Alderson B. expressed it in the case of *Gibson v Small*,[39] "on a voyage policy, 'from' a port, the ship must be able, if seaworthy, to sustain the ordinary risk on that voyage. If insured 'at and from,' the ship must be seaworthy 'at,' i.e. sufficient for ordinary risks in port, and seaworthy 'from,' i.e. fit for the voyage at the time of sailing". "The term 'seaworthy'", said Erle J.[40] "when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in dock till it has reached the end of its voyage; but it expresses a relation between the state of the ship and the perils it has to meet in the situation it is in".

Thus it is quite certain that a ship under a policy "at and from" would be seaworthy in harbour while undergoing repairs, though it is equally clear that she would not be seaworthy for the voyage if she sailed in that condition.[41]

Thus the Marine Insurance Act 1906, provides that *at the commencement of the voyage* the ship must be seaworthy for the purpose of the particular adventure insured, i.e. the voyage insured, and that where the policy attaches while the ship is in port, the ship must also be, at the commencement *of the risk*, reasonably fit to encounter the ordinary perils of the port.[42]

What that degree of seaworthiness is which is requisite to make a policy "at and from" attach upon a ship while in port has nowhere been very accurately laid down. Generally speaking, it may be said that under such a policy a ship will be sufficiently seaworthy to give an inception to the risk if she "be in such a

[37] Marine Insurance Act 1906 s.55(2)(a). See *Thompson v Hopper* (1856) 6 E. & B. 172; *Dudgeon v Pembroke* (1877) 2 App. Cas. 284; *Trinder, Anderson & Co v Thames & Mersey Mar Ins Co* [1898] 2 Q.B. 114 CA.

[38] *Forbes v Wilson* (1800) 1 Park, Ins., p.472; Marshall, Ins., p.111; *Hibbert v Martin* (1808) 1 Park, Ins., p.473; *Smith v Surridge* (1801) 4 Esp. 25; *Parmeter v Cousins* (1809) 2 Camp. 235; *Annen v Woodman* (1810) 3 Taunt. 299; and see Parke B. in *Dixon v Sadler* (1839) 5 M. & W. 405 at 414—afterwards cited by himself in the judgment of the PC in *Biccard v Shepherd* (1861) 14 Moo. P.C. 471 at 491; and by Willes J. in *Bouillon v Lupton* (1863) 33 L.J.C.P. 37 at 42; *Quebec Mar Ins Co v Commercial Bank of Canada* (1870) L.R. 3 P.C. 234.

[39] (1852) 4 H.L.Cas. 353 at 393.

[40] (1852) 4 H.L.Cas. 353 at 384.

[41] *Forbes v Wilson* (1800) 1 Park 472; *Smith v Surridge* (1801) 4 Esp. 25, before Lord Kenyon. Lord Ellenborough ruled the same point in *Hibbert v Martin* (1808) 1 Park, Ins., p.473; and in *Parmeter v Cousins* (1809) 2 Camp. 235.

[42] 1906 Act s.39(1), (2). See para.20–01, above.

condition while in port as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage". On the other hand, if she arrives so shattered as to be a mere wreck, the policy never attaches.[43] Thus, if a ship be capable while "at" the port of being moved from one part of the harbour to another for the purpose of repair, and of being moored alongside its wharves or quays there in order to take in her cargo, the policy attaches. Consequently the assured is not entitled to a return of premium, as on a risk that never commenced, because the ship afterwards sailed from the port in a state of unseaworthiness for the voyage.[44] "The condition that she shall be seaworthy for her voyage", said Lawrence J., "does not attach till she sails".[45]

Of course, if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriter from all liability for loss on the voyage, although the policy may have attached on her while "at" the port, owing to her having been there seaworthy for her then risk.[46] In such a case, the underwriter is only discharged from liability from the date of breach, in accordance with the general principle laid down in s.33(3) of the 1906 Act which is discussed in the previous chapter, at para.19–12. It follows that where the risk attaches before sailing, as it does in policies "at and from", and the ship while in the port is in a state of seaworthiness commensurate with her then risk, her subsequent sailing in a state of unseaworthiness for the voyage will neither relieve the underwriters from liability for any loss sustained when she was at the port nor entitle to the assured to a return of premium.

20–10 The rule, thus established in the case of policies "at and from" a place, is in reality a particular instance of a more general principle suggested by Patteson J., in *Hollingworth v Brodrick*,[47] and for the first time distinctly enunciated in 1839 by Parke B. in the case of *Dixon v Sadler*.[48] The principle, which is now enshrined in the Marine Insurance Act 1906,[49] is, that if the voyage insured consists of different stages requiring different states of seaworthiness, the warranty is satisfied if the ship be at the commencement of each stage in a fit condition for that stage, though not fit for a subsequent one. Thus, as was laid down in *Dixon v Sadler*,[50] "if the voyage be such as to require a different complement of men or a different state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were in each stage of navigation properly manned and equipped for it". "The case of *Dixon v Sadler*, and the other cases which have

[43] *Parmeter v Cousins* (1809) 2 Camp. 235; *Buchanan v Faber* (1899) 4 Com. Cas. 223. The law is the same in the United States. See cases cited in 1 Phillips, Ins., ss.695 et seq. 3 Kent, Com. 289.

[44] *Annen v Woodman* (1810) 3 Taunt. 299.

[45] *Annen v Woodman* (1810) 3 Taunt. 299 at 300. See also, for a discussion of seaworthiness on and before sailing, *Reed v Page, Son & East* [1927] 1 K.B. 743 CA.

[46] Marine Insurance Act 1906 s.39(2); *Watson v Clark* (1813) 1 Dow. 336.

[47] (1837) 7 A. & E. 40 at 47.

[48] (1839) 5 M. & W. 405 at 414.

[49] 1906 Act s.39(3). The principle is not of course confined to contracts of marine insurance. See *Scrutton on Charterparties* (21st edn), art.51 at p.91 and cases there cited.

[50] (1839) 5 M. & W. 405; accord. Erle J. in *Thompson v Hopper* (1856) 6 E. & B. 172; *Biccard v Shepherd* (1861) 14 Moore P.C. 471 at 491; *Bouillon v Lupton* (1863) 33 L.J.C.P. 37; *Quebec Mar Ins Co v Commercial Bank of Canada* (1870) L.R. 3 P.C. 234 at 241. The doctrine as stated in the text hardly covers bunkering stages, as to which see para.20–14, below.

been cited", said Lord Penzance,[51] "leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well–recognised and distinctly separate stage of the voyage". The principle now being considered is itself a modification, in favour of the assured, of the rule that the warranty of seaworthiness is not satisfied, and the policy does not attach, until the ship is seaworthy for the whole voyage insured.[52] But it must be clearly understood that where the voyage is not divisible into stages, a breach of warranty may be established by the vessel being unfit to withstand those perils which she can ordinarily be expected to encounter only on one part of the adventure in which she engages.[53]

The doctrine of stages was addressed in the list of agreed principles set out by Christopher Clarke J. in his judgment in *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp*[54] in the follow proposition:

> "By reason of the 'doctrine of stages' it is sufficient if the ship is seaworthy for some definite, well–recognised and separate stage of the voyage, even though some work, or change, to the vessel, her equipment, supplies or crew is required before she is fit for a second or later stage of the voyage. Different parts of a sea voyage can be separated into distinct stages. Indeed, in many cases the circumstances of the voyage are such that it will be necessary to introduce an intermediate stage before the commencement of the open sea voyage."

The vessel in *Garnet Trading* (above) was a floating dock, insured for a voyage under tow from Vladivostok to a port in Vietnam. The vessel's draft was increased on the advice of the Port Authority in order to reduce windage during the towage out of Vladivostok through Golden Horn Bay. The insured dock was then linked to two tugs for the ocean voyage proper, and her draft was reduced (as planned) for the ocean voyage. Although he did not base his decision on this ground, Christopher Clarke J. expressed the view[55] that it was legitimate to regard the voyage as having at least two stages, which were sufficiently definite, well-recognised and separate. The first was from leaving berth to the

[51] *Quebec Mar Ins Co v Commercial Bank of Canada* (1870) L.R. 3 P.C. 241.

[52] See *Greenock SS Co v Maritime Ins Co* [1903] 2 K.B., per Vaughan Williams and Romer L.JJ. at 661, 663, 664.

[53] If the vessel is fit to withstand the perils ordinarily to be expected in the earlier part of the voyage and she would in the normal course of events at some later stage be put into a state of readiness to encounter the perils to be anticipated later in the voyage, the warranty is fulfilled. This does not result from the doctrine of stages as such, but from the more general principle that the standard of seaworthiness required is that which a careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of it: the example given by Lord Tenterden in *Weir v Aberdein* (fn.60, below) is perhaps better regarded as illustrating this principle than as an application of the doctrine of stages. See also *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp* [2011] 1 Lloyd's Rep. 589; [2011] 2 Lloyd's Rep. 492 where this principle, which is more fully discussed at para.20–25 below, was applied. Christopher Clarke J. also considered that the doctrine of stages applied to the voyage (see below) but did not base his decision on that ground. The Court of Appeal did not consider the doctrine of stages: see [249] and [85] in the respective judgments.

[54] [2011] 1 Lloyd's Rep 589, at [160]. The agreed statement of principles was apparently accepted both by Christopher Clarke J. and the Court of Appeal, see para.20–02, fn.7 above.

[55] [2011] 1 Lloyd's Rep 589, at [249]. The Court of Appeal did not express any view on the applicability of the doctrine of stages; [2011] 2 Lloyd's Rep 492, at [85]; fn.54 above. The agreed proposition appears however to have been accepted, see [2011] 2 Lloyd's Rep 492, at [61].

commencement of ocean towage proper, when the dock was linked to two tugs and began her transit of the ocean, when the second stage began. It did not matter that the Towcon contract did not divide the voyage into stages or that the two tugs began their tow outside the port limits.[56] "It is sufficient", as Christopher Clarke J. states, "that the voyage can properly be regarded as dividable into two definable stages that are distinct because they call for or justify distinctly different treatment of the vessel"[57].

APPLICATION OF DOCTRINE OF STAGES

20–11 It follows from the doctrine of stages that if the ship were lost in one stage of the voyage, it would be no defence that she was not then seaworthy for a stage which she had not commenced.[58]

Thus, in *Oliverson v Loughman*[59] where a ship insured "at and from New Orleans to Liverpool" was so much injured by worms whilst she lay in the mud of the River Mississippi that she would have been in an unfit state for her sea voyage. Lord Ellenborough held that, as she was then sufficiently seaworthy for the purposes of lying in the mud and being in the river, and the defect had been discovered and repaired before she sailed on her sea voyage, her prior state of unfitness for the sea did not avoid the policy.

So, to take a case put by Lord Tenterden,[60] suppose a ship would be unseaworthy unless she had two anchors, being destined for a long voyage, and she sails from London to Gravesend with only one, shall it be said that if no loss happens between London and Gravesend, and the vessel at Gravesend takes on board her second anchor, and then proceeds on her voyage, that the underwriters are not liable for her subsequent loss? His lordship, as might be supposed, answers this question in the negative.

RIVER AND SEA VOYAGE

20–12 The rule that there are different degrees of seaworthiness for different stages of the voyage is well illustrated as regards a river and sea voyage by the case of *Bouillon v Lupton*,[61] in which a steamer insured "at and from Lyons to Galatz"

[56] Also, the application of the doctrine of stages would not be definitively determined by the wording of the design document for the ocean towage (the Assessment) and the Instructions to the captains of the tugboats; but those documents, and seafaring prudence, called for a greater draft to protect against windage during the passage out from the berth followed by a reduced draft once ocean towage was under way. See *ibid*, [250]–[252].

[57] *Ibid*, [249].

[58] But a breach of the warranty of seaworthiness at any stage will discharge the insurer altogether from the time of the breach, even though the ship be made seaworthy for a subsequent stage.

[59] (1815) cited in *Weir v Aberdein* (1819) 2 B. & Ald. at 322. The case is reported, on a different point, in 4 M. & S. 346. The law is the same in the United States. See *Treadwell v Union Ins Co*, 6 Cowen's R. 270 (1826); and *Bell v Reed*, 4 Binn.R. 127 (1811); 1 Phillips, Ins., s.720.

[60] In *Weir v Aberdein* (1819) 2 B. & Ald. at 324. It might, however, be a deviation to call at a place lower down a river than the terminus a quo to complete the equipment unless necessity required or usage allowed this to be done. See *Forshaw v Chaber* (1821) 3 Brod. & B. 158.

[61] (1863) 33 L.J.C.P. 37.

sailed from Lyons with a river crew and captain, and without her masts, anchors and other heavy articles which it was impossible for her to carry on her river voyage. At Arles she took on board her sea captain and some of her seagoing crew, and was otherwise fitted for the voyage to Marseilles, where she had to call for a licence. At Marseilles she was fully equipped for the sea voyage, as was usual in similar adventures, and she was subsequently lost in the Black Sea. The court held that, looking to the nature of the adventure and to mercantile usage, the ship had complied with the implied warranty of seaworthiness.

The division of a voyage into stages in relation to the warranty of seaworthiness may take place even in different parts of a sea voyage, as for instance, in the Greenland whale fishery, where it was customary to take on board extra hands on arriving at Shetland. There can be no doubt that the ship in sailing from Hull to Shetland would, by reason of such a usage, be seaworthy with a different equipment from that which would be required to make her so, on sailing from Shetland to the whaling grounds.[62]

STAGE OF VOYAGE FOR WHICH A PILOT IS REQUIRED

20–13 If usage requires that at a particular stage of the voyage the ship should take a pilot on board, either before leaving or before entering a port, it may be said that the part of the voyage on which it is usual to have the pilot is a separate stage, requiring a crew differing from the usual one in that it ought to include a pilot. It has not been laid down in terms that such part of the voyage is to be treated as a separate stage for the purpose of the warranty of seaworthiness, although there is a suggestion to that effect in Patteson J.'s judgment in *Hollingworth v Brodrick*.[63] It was stated in the second edition of this work[64] that "generally speaking, no ship is seaworthy at the outset of the risk, unless she have on board a pilot where requisite by law or usage for her safe navigation". It was further stated that "in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it will be unseaworthiness not to take one, for it is in such cases always in his power to do so".[65]

It is not clear whether a failure to take a pilot on board before entering an intermediate port or that of the ship's destination, may amount to a breach of the implied warranty.

The position established by the English cases seemed, in Arnould's opinion,[66] to be that except where required by the positive regulations of an Act of

[62] See, per Collins L.J. in *The Vortigern* [1899] P. at 159; per Lord Penzance in *Quebec Mar Ins Co v Commercial Bank of Canada* (1870) L.R. 3 P.C. at 241.

[63] (1837) 7 A.&E. 40 at 48.

[64] (2nd edn), p.723. See also, per Parke J. in *Phillips v Headlam* (1831) 2 B. & Ad. at 383. It is submitted that a ship is unseaworthy if she commences her voyage without a pilot when there are pilots available and the nature of the navigation requires one.

[65] (2nd edn), p.724, citing Lord Tenterden in *Phillips v Headlam* (above) at 382; see also 2nd edn, p.703. Parke B., however, in *Gibson v Small* in the House of Lords (1853) 4 H.L.C. at 398, stated in general terms that there is no warranty "that pilots shall be taken on board at proper places if the voyage has already commenced, unless, perhaps, when required by Act of Parliament".

[66] 2nd edn, Vol.1, p.700.

Parliament (which according to Patteson J. have the effect of creating an intermediate voyage on which the ship is not seaworthy without a pilot),[67] the negligence of the master in not taking a pilot on board in entering a port at any intermediate stage of the voyage, where usage requires him to do so, will not discharge the underwriters from their liability, provided the ship be seaworthy when she sails, the master and crew originally competent, and the loss though remotely occasioned by the want of a pilot, be proximately caused by the perils insured against.[68]

Thus, in *Phillips v Headlam*[69] the captain of a ship insured "from Liverpool to Sierra Leone, and back to her ports of discharge in the United Kingdom", on arriving off Sierra Leone (where there was an establishment of pilots, and where it was usual for all ships going in or out of the river to take one), made signals for a pilot to come off; but as none did so, after waiting some hours, he took his ship in without one, in doing which he struck the ground and was lost by the perils of the seas. The jury found that the master had acted with a wise discretion and as a prudent man ought under the circumstances: the court, while agreeing with this verdict, intimated that even had the facts been otherwise and the loss had been remotely occasioned by the negligence or mistake of the master, yet, assuming him to have been originally a person of competent skill, the underwriters would have been liable, for the loss was proximately caused by the perils insured against.

It is unnecessary to review the authorities in more detail,[70] on the vexed question of whether failure to take a pilot on board before entering intermediate ports or before entering the port of destination where such pilotage is customary or where it is compulsory amounts to a breach of the implied warranty. For practical purposes, the problem is resolved by the terms of the Institute Voyage Clauses and International Hull Clauses, which provide that the vessel may sail or navigate with or without pilots. It is submitted that the effect of those provisions is to preclude the underwriters from being discharged from liability under the policy merely on the ground that the vessel was unseaworthy by reason of her lack of a pilot.[71] The warranty may still be relevant, however, if the vessel has a pilot on board at the start of the voyage who is incompetent.[72]

[67] In *Hollingworth v Brodrick* (1837) 7 A. & E. 40. Cohen submitted that the suggestion of Patteson J. is inconsistent with later cases and the provisions of the Marine Insurance Act 1906: Halsbury's Laws of England, 5th edn, Vol.60, para.261, n.2 (unaltered from 1st edn).

[68] *Phillips v Headlam* (1831) 2 B. & Ad. 380; *Law v Hollingworth* (1797) 7 T.R. 160, as commented upon by Patteson J. in *Hollingworth v Brodrick* (above) at 48, and by Tindal C.J. in *Dixon v Sadler*, 8 M. & W. 895 at 900. The decision in *Law v Hollingworth* appears to be unsound, see 16th edn, para.726.

[69] (1831) 2 B. & Ad. 380.

[70] For a fuller discussion on this subject, see the 16th edition at paras 724–726, and at para.741.

[71] But if the ship-owner were to send the vessel to sea without a pilot, where one was needed at the start of the voyage, knowing that this rendered her unseaworthy, it is submitted that the underwriters would not be liable.

[72] The fact that the vessel has leave to sail or navigate with or without pilots, under the standard clauses in current use, arguably should not affect the position under a voyage policy where a pilot is in fact employed. Just as the vessel must have a competent master and crew, if she is to be considered seaworthy, so also it is submitted, where her navigation is in the hands of a pilot, his being incompetent may make her unseaworthy. It has been held in the United States that the mere fact that

STAGES FOR COALING OR BUNKERING

20–14 In the cases already considered, where the voyage has been divided into stages in relation to the warranty of seaworthiness, the different stages have required different equipment or crews. The principle of stages has also been applied in another class of cases, where the nature of the risk does not change in passing from one stage to another.

It is commercially impossible for cargo steamers on long voyages to take on board at the beginning a sufficient supply of fuel to last the whole voyage. The rule, which applies both to contracts of affreightment and to insurance policies, is that when a ship starts on a long voyage with only enough fuel for part of the voyage, the intention being to take on board a fresh supply at one or more intermediate ports, the voyage is considered as divided into stages for the purpose of coaling or bunkering, and the warranty of seaworthiness attaches at each coaling or bunkering port for the stage which ends at the next coaling or bunkering port.[73] "In my judgment", said Smith L.J.,[74] "when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the ship-owner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency[75] of coal for that stage–in other words, was seaworthy for that stage". The ship-owner has the right to decide what the bunkering stages are to be, provided that they are usual and reasonable.[76] Even if the vessel could carry enough fuel for the whole voyage, it appears that the ship-owner may still fix reasonable stages for bunkering.[77] But once the stages have been fixed, it is not open to the ship-owner to say that the vessel was seaworthy because of the presence of an intermediate bunkering port at which she could, but was not intended to call.[78]

a ship has an unlicensed pilot on board is not prima facie proof of unseaworthiness; see *Hathaway v St Paul Fire & Mar Ins Co*, 1 Fed R. 197 (1880). And conversely, a pilot appointed by authority is presumed to be competent: 1 Phillips. s.712.

[73] *Thin v Richards* [1892] 2 Q.B. 141; *The Vortigern* [1899] P. 140; *Greenock SS Co v Maritime Ins Co* [1903] 2 K.B. 657; *Northumbrian Shipping Co v Timm* [1939] A.C. 397.

[74] In *The Vortigern* [1899] P. at 155.

[75] A sufficiency of bunkers means a supply which is sufficient for the passage to the intended port with a proper reserve for contingencies. See e.g. *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659, per Andrew Smith J. at [56], p.669 ("a necessary reserve for contingencies that must be carried by a seaworthy ship").

[76] *Northumbrian Shipping Co v Timm*, above.

[77] See *Noemijulia SS Co v Minister of Food* [1951] 1 K.B. 223 at 234, where Tucker L.J. states that the ship-owner is under no obligation to use bunkering stages and is entitled at his election to carry fuel for the whole voyage: this plainly implies the converse proposition that the ship-owner may elect to bunker in stages even if he could carry fuel for the whole voyage.

[78] See *Northumbrian Shipping Co v Timm*, above.

In *Thin v Richards*,[79] the voyage was from Oran to Garston, with liberty to call at Huelva. The ship left Oran with a supply of coal insufficient for the voyage to Garston, but sufficient to take her to Huelva, and through a mistake of the engineer, who overestimated the quantity still on board at Huelva, sailed thence without taking a fresh supply. Day J. held that the voyage was an entire voyage from Oran to Garston, and that the warranty of seaworthiness was broken when the ship sailed from Oran. The Court of Appeal did not decide whether the voyage was entire or was divisible into two stages—i.e. one from Oran to Huelva and the other from Huelva to Garston—but held that in either view of the case the warranty was broken. If the voyage was entire, they said, the ship should on starting have had enough coal to take her to Garston; if it was a voyage in stages, the ship ought to have been properly equipped at Huelva for the later stage. **20–15**

In *The Vortigern*,[80] the facts were that a steamer left Cebu in the Philippine Islands for Liverpool. She coaled at Labuan, and again at Colombo, intending to coal again at Suez.[81] A reasonably sufficient quantity of coal was not, however, taken on board at Colombo for the stage ending at Suez, and when passing Perim, a coaling station in the Red Sea, the master did not call there owing to the negligence of the engineer in not telling him in answer to his inquiries that the coal was running short. The consequence was that some of the cargo had to be used as fuel to enable the ship to reach Suez. The Court of Appeal held, affirming the decision of Barnes J. that the voyage was as regards the supply of coal to be treated as one in stages, that the ship was not seaworthy for the stage from Colombo to Suez, and that the charterer could recover from the ship-owner the value of the cargo burned in consequence of the breach of the warranty of seaworthiness.

The language of Barnes J. in this case suggests that it is for the master to determine how the voyage is to be divided into stages[82]; but the Court of Appeal considered that whether or not the voyage can be divided into stages must depend on its length, not on the will of the assured; and according to Smith L.J., "in each case it is a matter for proof as to where the necessity of the case requires that each stage should be".[83]

A question which may arise is whether the warranty imposed by the Marine Insurance Act 1906 s.39(3),[84] is satisfied once and for all in a case where a steamship, though intended to call at one or more ports on the voyage, starts with a reasonably sufficient supply of fuel for the whole voyage insured and owing to unforeseen events finds herself at an intermediate port without enough fuel for the rest of the voyage, or whether it operates anew at this port? In the opinion of

[79] [1892] 2 Q.B. 141.

[80] [1899] P. 140.

[81] The original intention was to coal again at Port Said, but the case was treated by both parties on the footing of an intention to coal at Suez.

[82] [1899] P. 147.

[83] [1899] P. 147 at 155. But in the light of subsequent cases, the question whether the vessel is seaworthy when she has on board insufficient fuel for the whole voyage turns on whether the owner or master has determined to bunker at stages which are usual and reasonable. It is not a question of necessity, but the assured cannot rely on arrangements which were unreasonable: see *Northumbrian Shipping Co v Timm* [1939] A.C. 397; *Noemijulia SS Co v Minister of Food* [1957] 1 K.B. 223 at 234.

[84] See para.20–01, above.

the present Editors,[85] whether or not the voyage can be divided into stages is a question of fact which must in such circumstances be decided in the light of what actually happens, not what is in the assured's mind before the voyage started. If the voyage is in fact performed in stages, then the ship must be seaworthy at the beginning of each stage. This view receives some support from the opinion of Lord Wright in *Northumbrian Shipping Co Ltd v Timm* (above).

SHIP AT SEA WHEN RISK COMMENCES

20–16 The ship may of course be at sea at the time when the policy is effected. In that case it is usually most satisfactory to take out a time policy, and in regard to this it has been abundantly clear since *Gibson v Small*[86] that there is no warranty of seaworthiness. It may, however, well be, when a ship is insured for a part of a voyage described in the policy (e.g. from A to B for 30 days, or "from January 1 at and from A to B") that the warranty of seaworthiness implied in a voyage policy exists, and that the ship must therefore be seaworthy on sailing, though the risk only attaches subsequently. This question is still open.[87]

With regard to voyage policies taken out in such circumstances the position appears to the present Editors to be clear.[88] In *Gibson v Small*,[89] Parke B. and Pollock C.B. in advising the House of Lords both took the view that the vessel must have been seaworthy when she sailed upon the voyage upon which she was engaged when she was insured; Parke B. asserting that it is "undoubted law that there is an implied warranty with respect to a policy for a voyage that the ship.., has been seaworthy for the voyage when the voyage insured had been commenced if the insurance is on a vessel already at sea". The warranty can hardly go beyond this to include a warranty that the vessel is still seaworthy at the

[85] In earlier editions, it was suggested, albeit tentatively, that the warranty would in such circumstances be satisfied by the vessel's having started with sufficient fuel for the entire voyage.

[86] (1853) 4 H.L.C. 353. In *Hucks v Thornton* (1815) Holt N.P.Cas. 30, Gibbs C.J. held that on a policy for time being taken out while a vessel was at sea she must be in such a state of repair and equipment that she might be safely navigated home, or was competent to pursue any part of her adventure, and this ruling led to some American authorities laying down a further rule, viz. that when the risk attaches after a long voyage, at a distant port, where proper facilities for repairs may not exist, the warranty must be construed with regard to the means of repair and equipment at hand. See, per Shaw C.J. in *Paddock v Franklin Ins Co* 11 Pick. 227 at 231; 1 Phillips, s.227; 1 Parsons, 387 (1831). But this rule, even if it is still regarded as sound in America, has not met with any favour in this country, and receives no support from the Marine Insurance Act 1906.

[87] There is a guarded passage in Pollock C.B.'s opinion in *Gibson v Small* (4 H.L.C. at 410) which supports this view, and an equally guarded expression of opinion to the contrary by Parke B. (at 407).

[88] The former practice of insuring "lost or not lost" depended on such insurances being effective, and the contrary argument based upon the fact that since the vessel's position at the time of effecting insurance is not known the terminus a quo is equally not known which is based upon the peculiar circumstances of *Royal Exchange Corp v Sjoforakrings Vega* [1902] 2 K.B. 384, seems to be quite unsound. The insurance will be effected on the basis of the port from which she commenced her voyage being the *terminus a quo*.

[89] (1853) 4 H.L.C. 353.

time when the policy is effected: as Lord Campbell said in *Gibson v Small*,[90] it is not "at all likely that either party would contract with respect to the actual state of the ship at that time".

WHAT CONSTITUTES SEAWORTHINESS

20–17 It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. "The ship", said Lord Cairns, "should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter" on the voyage.[91] That state of repair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another; a ship seaworthy for the coasting or West Indian trade might be unseaworthy for a voyage to the Greenland Seas or the North-West Passage. Moreover, the extent of the warranty may be different for the same voyage at different seasons, or for the same voyage at the same season according to whether the ship is in ballast or loaded with one kind of cargo or another.[92] And, as we have seen, the ship, though not fit to go to sea, may be fit for port or river risks, and it suffices that her state of seaworthiness is commensurate with the risk.[93]

Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably

[90] Above at 420. Similar reasoning was applied in *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659, where it was argued that as the relevant risk under a freight policy attached when the contract of carriage was concluded, the implied warranty had to be complied with at that time rather than at the commencement of the voyage. In the event nothing turned on this point which affected only some of a number of grounds of unseaworthiness alleged by the insurers. In remarks which were therefore obiter, Andrew Smith J. rejected this argument pointing out at [43], p.667 in the report that it is one thing to say that conclusion of a contract of carriage is when the warranty is given under a freight policy written on a voyage basis, and it is another thing to say that the warranty is about the vessel's condition at that time; s.39 stipulates that the warranty is directed to seaworthiness of the vessel at the commencement of the voyage not at the time the warranty is given.

[91] *Steel v State Line SS Co* (1877) 3 App. Cas. 72 at 77. It has been held in the United States that "it is not the best and most skilful form of construction that is required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged": per Hammond D.J. in *Moores v Louisville Underwriters*, 14 Fed.R. 226 (1882).

[92] per cur. *Daniels v Harris* (1874) L.R. 10 C.P. 1 at 6. See also *Stanton v Richardson* (1874–1875) L.R. 9 C.P. 390 Exch.Ch.; 45 L.J.C.P. 78 HL.

[93] *Annen v Woodman* (1810) 3 Taunt. 299; *Bouillon v Lupton* (1863) 33 L.J.C.P. 37; per cur. *Dixon v Sadler* (1839) 5 M. & W. 405 at 414; per Alderson B. *in Gibson v Small* (1853) 4 H.L.C. at 393.

CHAPTER 26

GENERAL AVERAGE

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DEFINITION OF GENERAL AVERAGE

26–01 The term "general average" is used indiscriminately, sometimes to denote the kind of loss which gives a claim to general average contribution, and sometimes to denote such contribution itself; in order to avoid confusion, it would have been better to use the term "general average loss"[1] when speaking of the former, and "general average contribution" when speaking of the latter. A general average loss is defined in the following terms in s.66 of the Marine Insurance Act 1906:

(1) A general average loss is a loss caused by or directly consequential on a general average act.[2] It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.[3]

In all general average acts there is in reality a sacrifice; but whereas in some cases the sacrifice is itself an immediate loss, in others it does not involve present loss, but only expenditure in the future.[4] A loss of the former kind is usually called a general average sacrifice; a loss of the latter kind is usually called a general average loss or expenditure. It is true to say that a general average sacrifice must be made at a moment of peril in order to secure safety. When, however, this is said of a general average expenditure, it must be remembered that the expenditure itself is usually not made until after all danger is over. It is not necessary that the actual expenditure of the money should be made at a moment of peril; it is only necessary that the ship and cargo should have been in peril at the time when the extraordinary measures were adopted which subsequently entailed the extraordinary expense.

Marine insurance and general average are of course closely linked, since the usual marine policy provides cover against general average losses in accordance with the rules discussed later in this chapter, hence the definition of a general average loss in the Marine Insurance Act. However, general average is an independent part of the law of carriage by sea, and not a mere division of the law of marine insurance, which it antedates by many centuries. It operates directly between the co-adventurers, that is to say the owners of the ship, the cargo, and the freight, whether or not their interests are insured. It is therefore essential in any case involving a question of general average to determine first the rights of

[1] This phrase itself is tautologous. See *Arnould* (6th edn), p.828, for an account of the origin of the word "average".

[2] See *Australian Coastal Shipping Commission v Green* [1971] 1 Q.B. 456; *Federal Commerce & Navigation Co Ltd v Eisenerz GmbH* [1975] 1 Lloyd's Rep. 105; York–Antwerp Rules, r.C; see further paras 26–37 et seq. below.

[3] See also York–Antwerp Rules, r.A. There may be a general average act, although it may give rise to no claim for contribution because all the property engaged in the adventure belongs to one owner; see below, para.26–104.

[4] The sacrificial element in this case was clearly apprehended by Lopes J. in *Svendsen v Wallace* (1883) 11 Q.B.D. 616 at 617: "The putting into a port of refuge… is an act of voluntary sacrifice". So, also, throughout the judgment of Bowen L.J 13 Q.B.D. 69 at 83–95, and, per Baggallay L.J. at 81.

the parties to the adventure among themselves, and only then to consider each party's position vis-à-vis his underwriters.[5]

This chapter is therefore divided into two sections. The first deals with the English law of general average as it operates between the co-adventurers. In practice, most contracts of carriage between the co-adventurers provide that general average shall be adjusted according to the York-Antwerp Rules, which differ from English law in many respects. This section therefore also contains a description of the most important features of the Rules.[6] The second section deals with the rights of the co-adventurers against their insurers when general average losses have been incurred.

(1) LAW OF GENERAL AVERAGE AND THE YORK–ANTWERP RULES

26–02 General average losses are customarily divided into two classes, namely: (1) those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save both from perishing; and (2) those which consist in expenses incurred owing to extraordinary measures undertaken for the preservation of both ship and cargo.

Losses of the first class are alone mentioned in the text of that Rhodian law which is generally regarded as the foundation of the whole doctrine of general average,[7] but it is evident that expenses incurred by the owner of a part, owing to extraordinary measures adopted for the preservation[8] of the whole, give just as valid a claim to contribution in general average as any other species of loss intentionally incurred for the same purpose; and they have been accordingly admitted to give such a claim by the law and practice of all maritime states.

There is no difference in principle between these two classes of losses; but the application of the principle, as we shall see in the sequel, may lead to different results in the two cases: and upon this ground it becomes of practical importance to bear the distinction in mind.

Moreover, not only have differences in the application of the principle developed in English law in these two types of case, but in foreign systems of maritime law numerous important divergences have grown up, so that the law varies from country to country. The practical inconveniences of this were already

[5] See *The Brigella* [1893] P. 189, 195: see also, per Lord Porter in *Morrison Steamship Co Ltd v SS Greystoke Castle (Cargo Owners) (The Cheldale)* [1947] A.C. 265.

[6] For a detailed commentary on the Rules reference may be made to another volume of British Shipping Laws, Lowndes and Rudolf on *General Average and the York–Antwerp Rules* References here to that work are to the 13th edn (2008) unless otherwise stated.

[7] The bare text of that law, in fact, does not extend to the sacrifice even of part of the ship, and is confined in terms solely to the case of jettison: *Jactus factus levandae navis gratia*.

[8] Instead of "preservation," earlier editions of this work had "joint benefit," or some such expression. See 2nd edn, p.895. Throughout this chapter, in accordance with the view of the Court of Appeal expressed in *Svendsen v Wallace* (1884) 13 Q.B.D. 69 (which is confirmed by the language of s.66(2) of the Marine Insurance Act 1906, above), the word "preservation" or "safety" has been substituted. Corresponding alterations have also been made in order to make it clear that, although the expenses need not be incurred at a time when the interests are in peril, yet they must be necessitated by measures taken at a time of peril for the common safety.

becoming apparent in the eighteenth century, and with the enormous development of international commerce which followed the Napoleonic wars they became serious.

Origin of the York–Antwerp Rules

26–03 Accordingly, in the middle years of the nineteenth century a movement commenced for a uniform international system of rules for the ascertainment of what losses were properly to be regarded as coming within the doctrine of general average, for determining the method of calculating them, and for deciding the manner in which they were to be borne. After a good deal of preliminary work the sponsors of this movement came to the conclusion that it was more feasible to secure the desired uniformity of rules in the first instance by means of incorporating an agreed set of rules in contracts of affreightment, leaving the attempt to bring about a common rule in the twenty-odd legal systems involved to a latter period, which has never in fact arrived.

A conference was held at York in 1864 at which the "International General Average Rules" were framed and accepted. The practical results which at first followed from this beginning were not encouraging, but in 1877 after another conference held at Antwerp at which the earlier set of rules was considerably modified and somewhat extended a determined effort was made in England to give currency to the rules, which came to be called the York–Antwerp Rules.

As from that time the rules have been more and more frequently incorporated in contracts of affreightment, and also in policies of marine insurance, until now it is the usual practice to adopt them. At the same time they have been revised from time to time, that is in 1890, 1924, 1950, 1974 (amended in 1990), 1994 and 2004, the edition now current being known as the York–Antwerp Rules, 2004.[9] The Rules expressly provide that they shall apply to the exclusion of any law and practice inconsistent therewith.[10] The result is that the English law relating to general average is normally applied only so far as it corresponds with the requirements of the Rules, and to cases where the Rules make no provision on a particular question, and in some respects there is considerable divergence between the two systems. It must be borne in mind that this chapter deals only with general average according to the common law, except where the rules are specifically mentioned. In studying any case in which the rules have been applied it must be borne in mind that the decision given relates to the wording of the particular rule in the edition then current.

[9] References are to the 2004 Rules, except where otherwise stated. However, any difference of significance between the 2004 and the 1994 Rules is pointed out in the text. The history and development of the Rules are described in detail in Lowndes and Rudolf, para.00.70 et seq.

[10] Rule of Interpretation. On this ground an attempt to adduce evidence of English practice with regard to temporary repairs was rejected in *Marida Ltd v Oswal Steel (The Bijela)* [1992] 1 Lloyd's Rep. 637, the judge holding that the issue was to be determined solely by reference to the relevant provisions of the Rules.

Interpretation and Main Features of the York–Antwerp Rules

26–04 Since 1924 the Rules have consisted of a number of lettered rules, which deal with matters of general principle, followed by numbered rules which provide for specific points in more detail. The Rule of Interpretation, which was introduced in 1950 in order to reverse the effect of the decision in *Vlassopoulos v British and Foreign Marine Insurance Co*[11] has the effect that, in the event of inconsistency, the numbered rules will prevail. Thus the expenses allowed as general average at a port of refuge under rr.X and XI, which are far more extensive than those allowed under English law, are not confined by the principles set out in r.A, which defines a general average act in terms which are very similar in language and effect to the definition contained in the Marine Insurance Act 1906. However, one unwelcome result of the introduction of the Rule of Interpretation was that the requirement of reasonableness, which is part of the definition of a general average act under r.A, was not to be implied into the numbered rules, with the result that in *Corfu Navigation v Mobil Shipping*[12] an allowance in general average was given under r.V for machinery damage suffered during attempts to re-float which were wholly unreasonable. Under the 1994 and 2004 Rules this situation has been remedied by a new Rule Paramount which excludes from general average any sacrifice or expenditure which is not reasonably made or incurred, whether claimed under the lettered or numbered rules.

Many of the more specific provisions of the Rules will be dealt with throughout the remainder of this section when discussing the English law on the questions to which they are relevant, but it is appropriate at the outset to refer to the definitions of a general average act and general average losses contained in r.A and r.C. These are as follows:

> A. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure.
>
> C. Only such losses damages and expenses which are the direct consequence of the general average act shall be allowed as general average…[13]

The similarity with the corresponding provisions of the Marine Insurance Act, namely ss.66(2) and 66(1) will be noted. The one difference of potential significance is that r.A does not contain the words "in time of peril", and it is arguably the case that there may be a general average act under the Rules where a peril is reasonably believed to exist but does not actually exist, a rare situation in practice.[14] It follows that the main differences between the Rules and English law are brought about by the numbered rules, particularly those relating to port of refuge expenses, since, as already observed, in the event of inconsistency the

[11] [1929] 1 K.B. 187. The decision was to the effect that there could be no allowance of port expenses under rr.X and XI where neither the ship nor cargo had been at any time in peril.

[12] [1991] 2 Lloyd's Rep. 52 (York–Antwerp Rules 1974). The decision, although unpopular, is generally regarded as correct on the wording of the 1974 Rules.

[13] Rule C contains two further paragraphs which specifically exclude from allowance losses in respect of damage to the environment and losses caused by delay; see below paras 26–38 and 26–41.

[14] The question is discussed at para.26–10 below.

directly effected by the agency and will of man, not accidentally caused by the agency of the wind and waves.[23] A storm arises, the ship is making water with every sea, or is drifting in upon rocks and breakers, and in imminent danger of being lost; if goods are thrown overboard to lighten her, or masts cut away to bring her up, the damage so sustained by the owner of the goods or of the ship is a loss which gives him a claim to general average contribution—in other words, is a general average loss. If, under similar circumstances, instead of being thus sacrificed for the common safety, the goods are washed out by the waves, or the mast snapped asunder by the wind, the loss falls entirely upon the party whose property was thus damaged—in other words, is a particular average loss.

No general average where sacrifice made for one interest only

26–07 In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general safety of the ship, cargo and any freight at risk.[24] The principle of the Rhodian law, is, *ut omnium*

general average, who hold the view that as the doctrine of general average is based on the highest principle of equity, the proper question by which to test a general average sacrifice should be, not Who authorised the act? but Was the sacrifice for the *benefit* or *safety* of the adventure?": see Lowndes and Rudolf, *General Average*, para.A.10 et seq. The little authority there is in this country on the point does not support the decision in *Ralli v Troop*. In *Mouse's Case* (1609) 12 Co. Rep. 63, the court said that it was lawful even for a passenger to throw merchandise overboard for the salvation of the lives of men; but it is by no means clear that they had the question of general average in mind. In *Price v Noble* (1811) 4 Taunt. 123, a jettison was held by the Court of Common Pleas to be general average, which was made when the ship was in the possession of a prizemaster and crew, though made with the assistance and on the advice of the mate, who had been retained on board at the time of the capture. Where a ship on fire had been scuttled by the captain of the port, Mathew J. held in *Papayanni v Grampian SS Co* (1896) 1 Com. Cas. 448, that the loss was general average. In both cases the point was taken that the sacrifice was not ordered by the master, but by strangers to the adventure. In both the ratio decidendi seems to have been that the test whether the sacrifice was general average was simply whether it was made for the general safety. Carver (13th edn), para.1379, Benecke (p.172), and Baily *(General Average*, p.21; quoted with approval by *Arnould*, see the 15th edition, para.919) expressed the opinion that a sacrifice necessary for the general safety is general average, even though made against the will of the master. Maclachlan (*Arnould*, 16th edn), p.856) seemed to think that the master alone can order a sacrifice. Phillips said (s.1269): "The act should be that of the master or person in command. As a general rule, the crew have no authority, without orders, to make a jettison". The matter was further discussed but not decided in *Athel Line Ltd v Liverpool & London War Risks Assoc Ltd* [1944] 1 K.B. 87. See also *Australian Coastal Shipping Commission v Green* [1971] 1 Q.B. 456. where the hiring of tugs by the plaintiffs' shore officers was treated as a general average act; it was not argued that the fact of the engagement not having been made by the masters of the two vessels would deprive the act of its character as one of general average.

[23] 1 Emerigon, c.12, s.39, p.588. Although the act must be deliberate and it may according to the circumstances be desirable that it should be resorted to only after due deliberation and consultation among those on board the vessel, it is not a rule of law that the act must result from a measured decision in order to give rise to a claim in general average. para.919 in the 15th edition (headed "the sacrifice must be resorted to after due deliberation") has accordingly been omitted from subsequent editions.

[24] Phillips, however (*Ins.*, Vol.2, s.1273), is probably correct in pointing out that though the sacrifice must usually be on account of the entire interest at risk in ship, freight and cargo, yet contribution may be due from a part only of those interests when only a part is in peril so as to be benefited by the expenses or sacrifices. cf. *Hingston v Wendt* (1876) 1 Q.B.D. at 372. And a sacrifice or expenditure

contributione sarciatur quod pro omnibus datum est.[25] The loss, which is to entitle one of the co-adventurers to a contribution from all, must be suffered for the sake of all; and accordingly we find that the sea laws of the Middle Ages invariably required that the master, before he could claim a general average contribution, should swear that the sacrifice was made to save the ship, the cargo, and the lives and liberties of the crew.[26]

So it has been held in this country that where the general safety is not imperilled, a loss incurred for the safety of a part thereof cannot give a claim to contribution in general average. Thus, where a mob in Ireland boarded a ship partly laden with corn, and would not leave her till they had compelled the captain to sell them the corn at a certain low rate, it was contended, on the part of the assured, that as the captain was thus obliged to let the people take the corn, in order to induce them to spare the rest of the cargo, this was a general average loss; but Lord Kenyon held that this was not so, because the other interests never were in jeopardy: for the persons who took the corn intended no injury to the ship, or any other part of the cargo, but the corn.[27] Upon the same principle Benecke maintained that if the master of a neutral ship, who had secretly taken enemy's goods on board, should, from fear of having those goods confiscated, slip his anchor or throw those particular goods overboard, neither he nor the owners of these goods would have any claim to contribution upon the other parties to the adventure, because such sacrifice was made not to save the whole, but only a part.[28] In the same way, where expenditures appear to have been made not on behalf of both ship and cargo but on behalf either of the ship alone, or of the cargo alone, they can give no claim to general average contribution, but will be a charge on the owner[29] of the particular interest preserved by the adoption of the course which necessitated such expenditures.

The general safety must be the object of the sacrifice

The general safety must also be the motive for the sacrifice; and if made with any other object, it can give no claim to a general average contribution. Thus, no claim could be allowed in a case where the captain of a ship which was just on the point of capture threw overboard a quantity of dollars, not to save the ship and **26–08**

may, for some purposes at least, be treated as a matter of general as distinct from particular average, though the safety of some portion may never have been imperilled. See *Oppenheim v Fry* (1864) 3 B. & S. 873; 5 B. & S. 348; Phillips, s.1274.

[25] Dig. lib.14, tit.2 f.1.

[26] "*Pour saufver leurs corps, la neef, et les darrees*." Jugemens d'Oleron, art.8: Pardessus, *Lois Mar.*, Vol.1, p.328. "Tho beholden ihr Luff, Schiff und Gut"; Laws of Wisby, art.22; Pardessus, *Lois Mar.*, Vol.1, p.476. "*Les personnes, et le haver, et tot quant aci ha*"; Consolato del Mare, c.54, of the original Catalan; Pardessus, *Lois Mar.*, Vol.2, p.104; c.97 of the Italian translation.

[27] *Nesbitt v Lushington* (1792) 4 T.R. 783. This was also a case where there was no deliberate act of sacrifice but merely an involuntary submission to loss; in the opinion of the present editors, the position is, in all probability, different where goods are voluntarily given up to pirates, etc. by way of composition, to preserve other interests from the same fate; see also the 15th edn, para.931; and *Hicks v Palington* (1590) Moore (K. B.) 297.

[28] Benecke, *Pr. of Indem* 223.

[29] As to the position where two or more interests are in the same ownership, see para.26–104 below.

cargo but merely to prevent the dollars from falling into the enemy's hands.[30] Although there was certainly more than one interest in peril, the sacrifice could have no effect on the safety of the ship or other cargo.

This rule was laid down with great emphasis in the Supreme Court of the United States in the case of *Ralli v Troop*.[31] The cargo in the hold of the *J W Parker* took fire while the vessel was moored in port at Calcutta, near other vessels. She was taken possession of by the port authorities, who eventually—in spite of the protests of the master, who believed it to be possible to save part at least of the cargo before taking any extreme measure—extinguished the fire by scuttling the vessel. The Circuit Court had found as a fact that the measures taken by the port authorities were the best available to extinguish the fire and to save greater loss on the cargo, but did not find whether their purpose was to save this vessel and her cargo, or to save other vessels and property in the port; and the Supreme Court drew the inference that inasmuch as their sole office and duty was to protect the shipping generally, such had been their object in this particular case. It was held, therefore, that as the object of the sacrifice had not been to save this particular vessel and cargo, there could be no right to a general average contribution.

Need the sacrifice have been successful in averting the peril?

26–09 A question that has been much discussed is whether the peril must be averted by the sacrifice, in order to give a claim to general average contribution. In other words, must the sacrifice have been successful? The point may be raised under two different sets of circumstances. First, a sacrifice may be properly and judiciously made and the remaining interests may be subsequently preserved, but such preservation may be in no sense due to the sacrifice, but to the intervention of other causes, post hoc, and not propter hoc. In such a case it is confidently submitted that though the sacrifice has produced no good results, and cannot therefore be called successful, it nevertheless gives claim to a general average contribution. The second case is where the peril has, in spite of the sacrifice, had its full effect, and the loss, which it was intended by the sacrifice to avert, has nevertheless been sustained. It is clear that if both ship and cargo entirely perish in spite of the sacrifice, there can be no contribution, because there is nothing left

[30] The case of *Butler v Wildman* (1820) 3 B. & Ald. 398 contains an obiter dictum to this effect by Holroyd J. which was adopted by Shee J. in the 8th edn of Abbot, *Shipping* (p.479); and see 5th edn (p.344) to the same effect. See also *Royal Mail Steam Packet Co v English Bank of Rio* (1887) 19 Q.B.D. at 373, per Wills J.; and *Job v Langton* (1857) 26 L.J.Q.B. 97; *Walthew v Mavrojani* (1870) L.R. 5 Exch. 116; *Kemp v Halliday* (1865) 34 L.J.Q.B. 233; L.R. 1 Q.B. 520—which cases are more particularly noticed in paras 26–62 et seq. below.

[31] 157 U.S. 386 (1894). The case was also decided on the ground that the sacrifice was not a voluntary act of the master, but a compulsory one by the port authorities (see above, para.26–06); and the court seems also to have considered that the general safety must not only be an object but the sole object of the sacrifice. On this point, however, the same court in *McAndrews v Thatcher* (1865) 3 Wall. at 370, seems to have taken a different view. See *Royal Mail Steam Packet Co v English Bank of Rio* (1887) 19 Q.B.D. at 374, per Wills J., and contrast *Papayanni v Grampian SS Co Ltd* [1944] 1 K.B. 87, below para.26–14.

to contribute. The situation where the ship is lost but the goods or part of them are saved is discussed in a later part of this chapter.[32]

Loss must be reasonably incurred under the pressure of real danger

26–10 It is an undoubted requisite of a general average loss that it should have been incurred under the pressure of a real[33] danger. The sacrifice may have been bona fide made with a view to the general safety; but it can give no claim to contribution unless that safety was really endangered.[34] There is no decision on the point under the York–Antwerp Rules, r.A of which is possibly open to the interpretation that a reasonable apprehension of peril is sufficient. It is submitted, however, that the position under the Rules is the same as under English law.[35] Where a real peril does exist, a mistake as to its cause, or the action necessary to avoid it, will not itself not deprive the act of its general average character.[36]

The sacrifice or expenditure must also have been reasonably made.[37] I am not bound to make good to another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. The sacrifice must have been made under the urgent pressure of some real, not but not necessarily immediate,[38] impending danger, and must have been resorted to as the

[32] A saving of the imperilled property through the sacrifice is given as one of the requirements of a claim for general average contribution in *Scrutton* (20th edn), at art.134 (citing *Pirie v Middle Dock Co* (1881) 44 L.T. 426; and *Chellew v Royal Commission on the Sugar Supply* [1922] 1 K.B. 12). Clause 11.5 of the Institute Time Clauses (Hulls) makes provision for a general average claim against underwriters in certain cases where there are no proceeds.

[33] Earlier editions also included the words "and imminent" but whilst the danger must be real, it need not be immediate : see fn.38, below.

[34] See *Watson v Firemen's Fund Ins Co* [1922] 2 K.B. 355, where the master reasonably but mistakenly believed that there was fire in the hold and injected steam which damaged the claimant's goods. The law is the same in the US: see *The West Imboden*, (1936) A.M.C. 696. Carver (para.1361, n.47) treats the ruling in *Watson* as applicable only to claims under insurance policies, and not necessarily to claims between the co-adventurers.

[35] The wording of r.A follows very closely and is based on s.66(2) of the Marine Insurance Act 1906, and there is no reason to believe that it was intended to produce a different result in this situation. See also Lowndes and Rudolf para.A.30, A.100–103.

[36] *Corry v Coulthard* Exch. D. December 12, 1876; CA January 17, 1877. See 3 Asp. M.L.C. 546n.; *The Wordsworth*, 88 Fed.R. 313 (1898) as explained in *The West Imboden* (above).

[37] Marine Insurance Act 1906 s.66(2); r.A of the York–Antwerp Rules See also *Corry v Coulthard* (above); *Anderson Tritton v Ocean SS Co* (1884) 10 A.C. 107; *Australian Coastal Shipping Commission v Green* [1971] 1 K.B. 456; *Anglo–Grecian Steam Trading Co Ltd v Beynon & Co* (1926) 24 LL. L. Rep. 122; *Federal Steam Nov Co v Eisenerz GmbH (The Oak Hill)* [1975] 1 Lloyd's Rep. 105; para.26–39 below.

[38] Earlier editions contained the words "and immediately"; but see, per Roche J. in *Vlassopoulos v British & Foreign Mar Ins Co* [1929] 1 K.B. 187 at 200 : "The phrase is not "immediate peril or danger." It is sufficient to say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary, that it must be substantial and not merely slight or nugatory. In short, it must be a real danger." Roche J.'s formulation was approved by the Court of Appeal in *Daniolos v Bunge Co Ltd* (1938) 62 Ll L Rep 65 per Slesser L.J. at 68, with whom the other judges agreed. Having regard to the fact that the peril must be real but does not have to be immediate, in the opinion of the present Editors the relevant question