2–048 These fall-back positions will therefore be of limited use. Reinsurers will continue to rely on better drafted "pay as may be paid" provisions; cut-through clauses do not work; and the PPA/FSCS Fund is only available to private policyholders.

The following items may be relevant in any assessment of an insurer:

(a) Its country of incorporation:
  (i) the degree of supervision by regulating authorities;
  (ii) the viability of its national economy;
  (iii) the political stability of the country;
  (iv) whether any foreign exchange problems exist; and
  (v) inflation.
(b) Its capital:
  (i) whether it is fully or partly paid; and
  (ii) whether it is adequate in relation to premium income.
(c) The quality of its assets:
  (i) whether its capital should be discounted for any intangible assets, such as goodwill;
  (ii) its liquidity;
  (iii) the debts of its parent company (if any);
  (iv) whether there is any shortfall in the market values of its security; and
  (v) any involvement in liability insurance.
(d) The adequacy of its annual report:
  (i) the existence of an auditor's certificate, any audit qualification or notes to the accounts;
  (ii) the frequency of changes of directors;
  (iii) any significant change of management; and
  (iv) its overall impression.
(e) Its premium income:
  (i) its rate of increase, and whether it has been a natural or sudden growth;
  (ii) whether it has been writing for income;
  (iii) the nature of the business, and in particular whether it is long- or short-tail;
  (iv) the amount of gross written premium income that is retained;
  (v) the quality of its reinsurance programme; and
  (vi) nature and extent of agents capable of binding it.
(f) Its technical reserves or provisions:
  (i) the adequacy of the claims provisions;
  (ii) the provision for claims which are incurred but not reported ("IBNR") and IBNR as a percentage of premium income;
  (iii) possible over-reliance on reinsurance; and
  (iv) percentage of long-tail business of portfolio.
(g) The profitability of the insurer:
  (i) the extent of any underwriting profit in the absence of investment income;

  (ii) the amount of investment income in comparison with previous years; and
  (iii) the size of the dividends, and whether they are paid out of reserves.
(h) The immediate/ultimate ownership of the insurer:
  (i) the extent of the owner's long-term commitments to the insurance industry;
  (ii) any connections with cash-consuming companies;
  (iii) the domicile of the parent; and
  (iv) the ultimate control of the insurer.
(i) The management:
  (i) the experience, character and integrity of the insurer;
  (ii) its reputation; and
  (iii) recent changes.
(j) Date of incorporation and authorisation.
(k) Other brokers' attitude to it.
(l) Pending legal disputes.

A duty not to disclose any confidential information

2–049 The broker is under a duty not to disclose any information to any other party which is confidential to his principal. However, when he becomes aware that his principal is using his services for a fraudulent purpose, such as the placing of an insurance in which the subject matter does not exist or the collection of a claim which the broker knows to be fraudulent (as was alleged by the broker in the *Savonita Affair*), he must take any necessary steps to disassociate himself from the fraud. Failure to do so may result in civil and criminal liability, the latter under s.17(1) of the Theft Act 1968, the Consumer Protection from Unfair Trading Regulations 2008 (repealing s.14(1) of the Trade Descriptions Act 1968), the Fraud Act 2006 and the Bribery Act 2010 (repealing s.1 of the Prevention of Corruption Act 1906), breach of which can give rise to prison sentences. Clearly the broker cannot be required by the principal to incriminate himself in the course of his employment.

The *Savonita Report*[70] stated that:

> "In the board's view there is a continuing duty of disclosure on a broker in the presentation and negotiation of a claim. In the event of a broker becoming aware of circumstances which give rise to suspicions of fraud, that duty requires him to report his suspicions both to his client and to the underwriter. Thereafter he should pursue the claim against the underwriters, or inform his client that he is not prepared to continue to act and withdraw. Instead of taking one of the above two courses, [the broker] forebore from pursuing the matter and, indeed, actively mounted investigations for the purpose of persuading the reinsuring underwriters that the claim was fraudulent .... the board deeply regrets that a client should be effectively deserted by his Lloyd's broker without explanation."

[70] *The Savonita Report, Lloyd's List*, 8 December 1978, pp.2–3. This is an extreme case, as the Report goes on to point out that "After [the broker] had correctly reported his suspicions to the reinsuring underwriters and without notifying his client, he embarked upon a course of conduct . . . without regard for his responsibility to his client, . . . Instead of ensuring that his company either pursued the claim or withdrew, he set about collecting evidence to prove the alleged fraud, thereby acting contrary to the duty he owed to his client."

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The *Fisher Report*[71] concluded to the contrary (at para.13.33):

> "If the Assured instructs the Broker to put forward a claim which the Broker knows or suspects to be fraudulent, it will be for the Broker to decide whether to comply with those instructions or to inform the Assured that he cannot do so (or cannot do so without disclosing his knowledge or suspicions to Underwriters)."

However, in *Weld-Blundell v Stephens*,[72] Viscount Finlay stated in the House of Lords that "Danger to the State or public duty may supersede the duty of the agent to his principal." This was a comment warmly endorsed by Bankes LJ in *Tournier v National Provincial and Union Bank of England*.[73]

2–050 In *Initial Services Ltd v Putterill*,[74] Lord Denning MR confirmed that the duty of confidence is subject to exceptions, not only "where the master has 'been guilty of a crime or fraud'". It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. Wood VC put it in a vivid phrase: "There is no confidence as to the disclosure of iniquity". Lord Denning MR extended the exception beyond the proposed or contemplated commission of a crime or civil wrong to "crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always … that the disclosure is justified in the public interest". The reason is that "no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare". A crime may properly be disclosed to the police, to the relevant regulatory body[75] and to the party upon whom it is to be perpetrated.

The public interest was defined by Ungoed-Thomas J in *Beloff v Pressdram Ltd*[76] as including any matter in breach of national security, or in breach of law, including statutory duty, fraud or matters otherwise destructive of the country or its people. Thus the exposure of fraud will operate to override any individual's rights and constitutes a good defence to any claim for breach of the duty of confidence. This is not to say, however, that there is any duty to expose fraud or disclose any suspicion, merely that to do so properly will not render the agent liable to the principal. May LJ confirmed in *The Good Luck*[77] that "Silence without a duty to speak creates no rights against the silent party."[78] The law imposes no duty upon a person to report to the victim of fraudulent conduct that the fraud is being committed merely because that person has acquired knowledge

[71] *Fisher Report* (1980).
[72] *Weld-Blundell v Stephens* [1920] A.C. 956 HL at 965.
[73] *Tournier v National Provincial and Union Bank of England* [1923] 1 K.B. 473 CA.
[74] *Initial Services v Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032 CA (Civ Div).
[75] *Company's Application, Re* [1989] 2 All E.R. 248 at 252; [1989] 3 W.L.R. 265 where it was held that an injunction would not be granted to prevent disclosure to the Inland Revenue or FIMBRA of matters within their province, even though such disclosure may have been motivated by malice. Disclosure of confidential matters to the Inland Revenue which did not relate to fiscal matters would "be as much a breach of the duty of confidentiality as the disclosure of that information to any third party".
[76] *Clearbrook Property Holdings Ltd v Verrier* [1974] 1 W.L.R. 243; [1973] 1 All E.R. 243 Ch.
[77] *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1990] 1 Q.B. 818; [1989] 2 Lloyd's Rep. 238 CA (Civ Div) at 265, 268.
[78] *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] A.C. 287 Privy Council (India).

of the fraudulent conduct. The law does not enforce any moral duty to inform the victim (in the absence of another duty, e.g. owed as a senior employee to his employer, where the obligation of confidence does not override a duty to "blow the whistle"[79]).

To speak improperly may render the agent liable for breach of duty and possibly for defamation or malicious falsehood for any damage caused.[80] The *Fisher Report* acknowledged this by commenting (at para.13.33) that:

> "Where the *Broker* knows that the claim is fraudulent his duty will be clear; but where he merely *suspects* and cannot, despite all proper investigations, discover for certain whether or not his suspicions are well founded, he will be in a dilemma to which we see no easy answer. What is quite clear is that he has no duty or right to disclose his dilemma to Underwriters although they may draw certain conclusions if they hear that he has withdrawn."

At Lloyd's the position is clear, as a result of Enforcement Byelaw (No.6 of 2005), which under Pt D imposes a duty on every person to whom it applies to report any misconduct (as identified in Pt C in wide ranging terms).

A duty to execute the contract personally, and not to delegate

2–051 The broker must perform his role personally, since the relationship of principal and agent is confidential and fiduciary. The employment of a sub-agent by the agent will be in breach of this duty, unless permitted by statute, express agreement, or in the ordinary course of business. For example, a non-Lloyd's broker wishing to obtain insurance at Lloyd's must use a Lloyd's broker pursuant to s.8(3) of the Lloyd's Act 1982.

However, for practical purposes this general rule is of limited application because the authority of the principal to delegate can in many cases be implied, in particular where the principal is aware (or it may be presumed from the parties' conduct) that the broker intends to delegate his authority, where the performance of the contract cannot occur without delegation (such as to a Lloyd's broker, or in unforeseen circumstances as a result of business exigencies, or where the principal was a party to the appointment of the sub-agent, thus establishing privity of contract[81]), where the sub-agent's involvement is administrative and does not involve him in confidential matters or the exercise of judgement or discretion, e.g. where he merely signs the policy,[82] or where delegation is normal and acceptable in the ordinary course of business.[83] It would be apparent, for example, that the appointment of a large firm of brokers would necessitate one or more employees within the firm carrying out the work, and this does not constitute "delegation" in breach of duty. The specific appointment of an employee within a larger organisation does not preclude delegation by that person to others within the organisation, since that person would have accepted any task in his capacity as employee rather than on his own behalf, and the insured must

[79] *RBG Resources Plc v Rastogi* [2002] EWHC 2782 (Ch) (Laddie J).
[80] *Re A Company's Application* [1989] Ch. 477; [1989] 2 All E.R. 248 Ch at 252.
[81] *De Bussche v Alt* (1878) 8 Ch. D. 286 (310) CA.
[82] *Mason v Joseph* [1804] 1 K.B. 406.
[83] *Coolee Ltd v Wing Heath & Co* (1930) 38 Ll. L. Rep. 157 KB: see para.2–049 fn.76.

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be taken to have known that delegation would be likely to occur. Further, delegation may be ratified by the principal.

As an extended example, the chain of agency could run from the US insured to the Lloyd's syndicates via a US local broker, US wholesale broker, London correspondent broker, specialist placing broker, and UK insurer, and thence through a reinsurance agent for a reinsurance pool, a treaty reinsurance broker and a Lloyd's broker.

Effects of delegation

2–052 The dominant presumption is that the sub-agent is responsible to the broker and not to the principal, and that the authorisation of the creation of a sub-agency by the principal does not automatically create privity of contract. In *Calico Printers' Association v Barclays Bank*,[84] Wright J commented that:

> "The agent does not as a rule escape liability to the principal merely because employment of the sub-agent is contemplated. To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof."

Privity of contract between a sub-agent and principal can therefore be created in two ways: by the principal conferring express or implied authority to do so upon the broker, or by ratification of the principal-sub-agent relationship. If privity can be established, it is unlikely that a court would hold a broker liable for the inadequate performance of obligations owed directly by the sub-agent to the principal, and directly enforceable by that principal against the sub-agent. However, even in cases of such privity, the broker could still be liable for his separate breaches of those obligations to the principal which survive the appointment of the sub-agency, e.g. allowing the sub-agent to set off sums due from him to the principal against sums due from the broker to the sub-agent.

Liability of broker to insured (principal) for acts of sub-agent in the absence of privity

2–053 If privity between principal and sub-agent does not exist, then the broker should be liable for the sub-agent's breach of duty or failure to account, even if the appointment of the sub-agent was authorised by the principal.[85] "... it is trite law that for the purpose of accountability in respect of the receipt of money, receipt by a sub-agent is the same as receipt by the agent himself".[86]

[84] *Calico Printers Association Ltd v Barclays Bank Ltd* (1931) 145 S.L.T. 51 at 55; (1931) 39 Ll. L. Rep. 51 CA.

[85] *Calico Printers' Association v Barclays Bank* (1931) 145 S.L.T. 51 CA.

[86] Per Walton J in *Balsamo v Medici* [1984] 1 W.L.R. 951 at 957; (1984) 81 L.S.G. 2700 Ch.

Liability of sub-agent to insured (principal) in the absence of privity

2–054 The principal cannot (without more) sue the sub-agent for breach of obligations inherent in the sub-agency, since these are owed to the broker, and the principal need not remunerate or indemnify the sub-agent.[87] Nor can the sub-agent be held responsible to the principal for monies had and received, even though these are ultimately intended to reach the principal. In *Balsamo v Medici,* Walton J commented that an action for account by the principal against the sub-agent "could not possibly have succeeded" owing to "the fundamental principle that the action in account is one in contract". *Youell v Bland Welch (No.2)*[88] confirmed that an insurance broker can be concurrently liable to his insured in tort and contract, but that a sub-broker would not liable to the insured in either. In fact the broker and sub-broker were independent at the time of the facts giving rise to the litigation, but had subsequently merged. No issue arose as to the devolution of liability after their merger, since they constituted one entity and would be liable for post-merger breaches of duty as such, but an issue did arise as to which company would be liable prior to the merger. Phillips J summarised the position as being that the sub-broker was a sub-contractor whom the broker, as the client's primary reinsurance broker, employed to perform certain of its functions and the broker accordingly remained liable for any breach of its duties as that primary reinsurance broker, whether the fault was its own or that of the sub-broker, an "analysis based upon well-established principles of English law of agency applicable in the situation where an agent employs a sub-agent to perform part of his duty to his principal".

In *Macmillan v AW Knott Becker Scott Ltd*[89] the court refused to extend to a third party the contractual liability of an insurance broker to the insured, limiting the obligations owed to those contained within in the contract of agency. An intended beneficiary of Broker A's Professional Indemnity insurance policy failed in its claim against Broker B, who had negligently placed the Professional Indemnity insurance of Broker A. Broker B was contractually liable to Broker A in respect of Broker B's failure to place Broker A's insurance properly, but had no contractual link with the intended beneficiary. The "beneficiary" had a good case against Broker A and would have been able to obtain the benefit of Broker A's insurance had it been properly placed and in force. He therefore sued Broker B for its negligent placement. The judge stated that "Insurance brokers, I am sure, would accept professional instructions on the basis that their liability for financial or economic loss arising from negligence in the performance of those instructions was restricted to their clients". He found that the intended beneficiary had the benefit of a claim against Broker A, despite its liquidation, and that justice did not require him to disturb the contractual structure of the parties (notwithstanding the

[87] *Schmaling v Thomlinson* 128 E.R. 989; (1815) 6 Taunt. 147 Court of Common Pleas. This must remain a valid proposition even in the face of *BP Plc v AON Ltd (No.2)* [2006] EWHC 424 (Comm); [2006] 1 All E.R. (Comm) 789, as to which see below. See also *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep. 289 where the sub-broker was not held liable to the insured because the insured had not relied on his expertise and there had therefore been no assumption of liability.

[88] *Youell v Bland Welch (No.2)* [1990] 2 Lloyd's Rep. 431 at 445.

[89] *Macmillan v AW Knott Becker Scott Ltd* [1990] 1 Lloyd's Rep. 98 QBD (Comm).

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severely limited value of the claim). The claim against Broker B failed. Although this case did not involve a sub-broker, it does indicate the courts' aversion to extending the liability of brokers where the contractual structure is already agreed and effected by the parties. The sub-broker does have a duty of care in tort, but this is owed to the broker and is the same as his obligation in contract.

Henderson v Merrett[90] gave rise to the possibility that a sub-broker could owe duties to the insured. A Lloyd's Name had a contract with a Lloyd's member's agent, who advised the Name as to those syndicates in which he should participate, and who then placed the Name on those syndicates. The member's agent in turn had a contract with a managing agent, which managed and underwrote for the relevant syndicates. The Name did not have any contractual link with the managing agent. Following loss the Name sued the managing agent in tort for negligent underwriting and the question was whether there could be any concurrent liability in tort between the Name (principal) and the managing agent (sub-agent).

2–055 The House of Lords found in favour of the Name and of the argument that the managing agent owed a duty of care to the Names in tort. Lord Goff reviewed a number of cases and in particular that of *Hedley Byrne v Heller*[91] where the House of Lords found that a bank could be liable in tort for the economic consequences of its negligent mis-statement concerning a customer, owing to the parties' "*special*" relationship, arising from the exercise of professional skills, or an assumption of responsibility.[92]

In subsequent cases the principle set out in *Hedley Byrne v Heller* has been applied to extend the liability of professional people in tort concurrently with their liability in contract and in particular to bankers, solicitors, surveyors, accountants and insurance brokers. None of these cases, however, involved a sub-agent and Lord Goff specifically stated in *Henderson v Merrett* that "It cannot be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort". Further, the duty was extended by the courts in some of the cases only because the plaintiff would otherwise be unable to recover at all. Thus the intended beneficiaries of wills, who would not recover under the estate owing to the poor drafting of the will by the deceased's solicitor, can sue him for negligence, even though the only contract was between the deceased and the solicitor.Nevertheless, for five years it was thought that a sub-broker could be liable to the insured in tort concurrently for breaches of its contract of agency with the broker, until this canard was firmly slapped down by the Court of Appeal in *Pangood Ltd v Barclay Brown & Co Ltd and Bradstock Blunt & Thompson Ltd*.[93]

A sub-broker had obtained a quotation for fire insurance at a nightclub from Lloyd's underwriters, which contained an "auditorium warranty" requiring certain daily precautions to be carried out, and had sent it to the broker, who confirmed that the cover should be obtained as quoted. A claim for fire damage

[90] *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 A.C. 145; [1994] 3 W.L.R. 761 HL.
[91] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; [1963] 3 W.L.R. 101 HL.
[92] *BP Plc v AON Ltd (No.2)* [2006] EWHC 424 (Comm); [2006] 1 All E.R. (Comm) 789.
[93] *Pangood Ltd v Barclay Brown & Co Ltd* [1999] 1 All E.R. (Comm) 460; [1999] Lloyd's Rep. I.R. 405 CA (Civ Div).

was later made but rejected because underwriters alleged that it had been caused by a lighted cigarette which had not been cleared away in breach of the warranty. The insured sued the broker for failing to alert it to the existence of the auditorium warranty, who alleged in its defence that it had so informed the insured.

2–056 The broker also claimed a contribution from the sub-broker in the event that the insured was successful against the broker, on the basis that the sub-broker should have explained the requirement of the auditorium warranty to the insured and that its failure to do so was negligent, a breach of contract and a breach of statutory duty. The court rejected the possibility that there was any privity of contract or assumption of responsibility between the insured and sub-broker. The insured relied on the broker to receive notice of the terms of the insurance on the insured's behalf and to inform it of any onerous or material clauses. The sub-broker dealt with his principal, the broker, on the basis that the broker was knowledgeable and would communicate with the insured as necessary. There was no duty of care between the sub-broker and insured and therefore no breach. Beldam LJ considered that there were two requirements for such liability. The first was an assumption of responsibility by the placing broker to the insured, and the second that the cause of loss had to be the insured's reliance on the placing broker either exclusively or in combination with reliance on the producing broker (and indeed whether such reliance was reasonable in the circumstances).

Would the position change, however, if the sub-broker knew that the broker was incompetent and had not or would not inform the insured of any important clause? The Lloyd's Minimum Standards MS11 Conduct Risk[94] states that "The assessment of the Customer Risk of a Product shall be made having careful regard to the financial sophistication and expertise of the Lloyd's Customer to whom it is intended the Product will be sold". A Lloyd's broker should take into account his client's awareness of risk and insurance, and if the facts were different it is arguable that the sub-broker could owe a duty of care to the insured, on the basis that the insured is in reality relying on the sub-broker, who knows it; a fact clearly reflected in Lloyd's Minimum Standards in "Assessing Product Risk".

Another reason submitted by the broker for holding the sub-broker liable was that he had delayed in producing the policy wording, which meant that the insured was not made aware of the auditorium warranty. The problem was that the broker's defence to the insured's claim was that the broker had informed the insured of the auditorium warranty, and even if untrue, the broker in any event was clearly aware of the provisions of the auditorium warranty. The broker said that upon receipt of the policy it would have forwarded it to the insured with a reminder or a re-explanation, but the court considered it unlikely that either step would have been taken. The delay in producing a policy wording had no effect and did not render the sub-broker liable.

2–057 Prior to *Pangood* there was a Court of Appeal decision in which the broker and sub-broker both appeared to be liable to the insured: *Tudor Jones v Crowley*

[94] CR 5.2, July 2014.

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Colosso[95] which was not cited in *Pangood*.[96] In this case the broker failed to notice that the sub-broker had obtained insurance which contained an exclusion clause rendering the policy largely useless, in respect of which the Commercial Court held the broker one third liable and the sub-broker two thirds. The Court of Appeal amended the apportionment to one half each. The value of this case in establishing that a sub-broker owes an independent duty of care to the insured is severely diminished on reading that the insured had assigned his rights against the sub-broker to the broker, and that it was conceded that both sets of brokers owed the insured a duty. Although the Court of Appeal summarised the claim of the broker in terms that the sub-broker owed a duty of care both to the broker and the insured, such an allegation is likely to have been a pleading point for the sake of completeness, required only by the fact of assignment by the insured of his rights against the sub-broker. The court made it clear that "the battle has therefore been joined between the brokers with each blaming the other" and that it was the sum not paid by insurers to the insured "which, in effect [the brokers] claim from the [sub-brokers] in these proceedings".[97] The court also felt it unnecessary to determine whether it was dealing with contributory negligence or contribution between the same parties liable for the damage. The case is not authority for the proposition that the sub-broker will owe duties to the insured.[98]

These cases still hold good but there are signs of an increasing judicial tendency to find a sub-broker liable to the principal on the basis of an assumption of liability and therefore in damages for breach in tort. The best known example is *BP Plc v AON Ltd (No.2)*.[99]

[95] *Tudor Jones v Crowley Colosso Ltd* [1996] 2 Lloyd's Rep. 619 QBD (Comm).

[96] In fact there is also a similar finding in *Coolee Ltd v Wing Heath & Co* (1930) 38 Ll. L. Rep. 157 KB, but it contains no substantive reasoning as to why a sub-broker may be liable. The judge comments that *De Bussche v Alt* ((1878) 8 Ch. D. 286 (310) CA) does not apply, so that the broker has not put the sub-broker into a contractual relationship with the insured, and considers that a broker can only discharge its obligations to the insured by using a sub-agent which is a "proper broker" provided that it is adequately instructed, in this case drawing the sub-broker's attention to new information relevant to the renewal. Thus the judge thought that the broker can be liable for its failure to instruct the sub-broker properly, and the sub-broker, who has no contract with the insured, may also be liable for any failure to use reasonable skill and care. The authority does not establish the proposition that a sub-broker who is not contractually bound to the insured can be individually or jointly liable with the broker to the insured; and to the extent that it ever did it has been overruled by the above case law.

[97] *Tudor Jones v Crowley Colosso Ltd* [1996] 2 Lloyd's Rep. 619 QBD (Comm) at 621.

[98] Digressing slightly, the claim against the sub-broker in *Pangood* was also predicated on breach of statutory duty, which was then and probably always will be generally misconceived. It presumably arose out of the fact that the IBRC Code of Conduct was framed in a statutory instrument, pursuant to s.10 of the Insurance Brokers (Registration) Act 1977, or that the Lloyd's Code of Practice was made pursuant to the Lloyd's Brokers Byelaw (5.88) and back again to the Lloyd's Act 1982. The only sanction lies in damages payable to the wronged party where the broker's conduct is in breach of contract or in tort. No regulatory body can enforce these Codes unless breach of one aspect can be considered to be unprofessional or (at Lloyd's) unfit and improper, sufficient to merit expulsion. The possibility that a broker has a *statutory* duty in addition to a contractual obligation or to his duty of care is therefore difficult to accept. One can only assume that this head of action was included in an attempt to establish the sub-broker's liability where it would not otherwise exist in tort or contract. In these post-Woolfian days such a claim should be eradicated by the costs penalty imposed by the courts on unarguable claims.

[99] *BP Plc v AON Ltd (No.2)* [2006] EWHC 424 (Comm); [2006] 1 All E.R. (Comm) 789.

One other canard relating to sub-brokers can also be emasculated. Section 1(1) of the Contracts (Rights of Third Parties) Act 1999 provides that:

> "... a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—
> (s) the contract expressly provides that he may, or
> (t) subject to subsection (2), the term purports to confer a benefit on him.
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

2–058 Can an insured sue a sub-broker under the Act? The Law Commission, in its Report No.242, looked specifically at the issue of sub-agency in the context of the construction industry (paras 7.18 (iii) and 7.38). It did not see the second limb of enforceability as cutting across the chain of sub-contracts that have traditionally been a feature of that industry, so that an owner would not be able to sue a sub-contractor for breach of the sub-contractor's contract with the head contractor. The reasoning behind this is that the parties have deliberately set up a chain of contracts which are well understood in the construction industry as retaining the independence of the party's remedies against each other. The Law Commission made the assumption that a deliberately created chain of liability would continue independently of its proposed reform of privity because on a proper construction of the contract it would be the case that the contracting parties did not intend the third party to have any right of enforceability. The same is true of insurance. Further, the benefit purported to be conferred by the sub-agent—that of the placement of a contract of insurance as requested by the insured—is exactly the same as the benefit which the broker has contracted to provide.

The liability of the sub-agent matters mainly when the financial position of the broker has deteriorated, because the insured may recover nothing even though the sub-broker may have sufficient funds to meet any claim. The insured could prevail upon the liquidator to sue the sub-broker, but any recoveries would be for the benefit of all creditors, and the insured may only receive a small share. The ability to sue the sub-broker direct is therefore potentially valuable and will no doubt (on the appropriate facts) make further appearances in the courts in due course.

There are, however, three possible methods by which redress could be sought from the sub-agent:

(a) an action for monies had and received if the sub-agent acknowledges that he is holding monies on behalf of or to the account of the principal, on the basis of *Griffin v Weatherby*,[100] *Shamia v Joory*[101] and *IGI v Kirkland Timms*[102];

[100] *Griffin v Weatherby* (1867–68) L.R. 3 Q.B. 753.

[101] *Shamia v Joory* [1958] 1 Q.B. 448; [1958] 2 W.L.R. 84 QBD.

[102] *IGI v Kirkland Timms* unreported 5 December 1985 QBD (Comm).

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(b) an action for secret profits made during the sub-agency, such as commission or brokerage, on the basis of the fiduciary relationship between principal and sub-broker, under the principle established in *Powell & Thomas v Evan Jones & Co.*[103] However, the Court of Appeal based their decision on the alternative ground of privity of contract and it is capable of criticism on other grounds. Nevertheless, it may still be argued that secret profits cannot be earned by sub-agents, whether or not any fiduciary duty exists;

(c) an action in tort on the basis that it is just and reasonable that a sub-agent should owe the principal a duty of care and that their relationship is sufficiently proximate. Although the courts are now seeking to enforce liabilities in contract in preference to those which may lie concurrently in tort, and may see no reason to allow the principal any alternative rights against the sub-agent to those which he may have in contract against the broker, an action in tort could fall within the current criteria. It is, for example, clearly within a sub-agent's reasonable contemplation that the principal will suffer the consequences of the sub-agent's negligence or breath of duty to the broker, and public policy does not appear to stand in the way; the extent of any liability will be known to the sub-agent at the outset, and since it is the sub-agent who has actually caused the loss, why should the principal be forced to sue his broker, who may have acted reasonably, or, more importantly, may have less errors and omissions insurance?

2–059 Against this argument lie the facts that the broker should be able effectively to pass on his liability to the sub-agent so that the broker does not suffer, that the broker had contracted with both parties in the knowledge that he would be liable to his principal (in any event) and that the sub-agent would be liable to him (which is simply a commercial risk that he could reasonably be expected to bear), and that the sub-agent would have to duplicate and perhaps exceed the broker's efforts in placing the insurance, e.g. in preparing the presentation to the insurer, which might involve checking the information provided by the broker with the principal, thereby undermining the broker's commercial relationship with his principal.

Duty to account

2–060 **Declare monies received.** A broker must pay his principal any sum obtained on the principal's behalf without delay. Any sums collected must be in a form authorised by or acceptable to the principal; cash and goods, or cash and set-off in another account will not be acceptable without the principal's consent.

It is anomalous that the broker need not disclose his commission to the insured, unless specifically requested to do so.[104] This lack of necessity to disclose the commission is curious because the insurer may have increased his

[103] *Powell v Evan Jones & Co* [1905] 1 K.B. 11 CA.

[104] *Great Western Insurance Company of New York v Cunliffe* (1873–74) L.R. 9 Ch. App CA (Ch). *Hobbins v Royal Skandia Life Assurance Ltd* [2012] HKCFI 10.

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rate of premium to reflect the broker's higher rate of commission, in which case the broker will make a profit at the insured's expense. It therefore runs contrary to the principles of agency law which state that the agent must make full disclosure of any personal interest to the principal and must account for all sums received from any other party, unless specifically released from doing so by the insured.

There may also be some blurring as to the nature and extent of the commission. Pure brokerage clearly falls within this category. However, case law exists which indicates that items such as a discount for prompt payment, if usual in the market, need not be disclosed by the broker unless specifically requested. In *Baring v Stanton*,[105] the broker was held entitled to retain 10 per cent discount for "ready money" in addition to 5 per cent brokerage. This case did not follow *Turnbull v Garden*[106] or *Queen of Spain v Parr*,[107] which stated that discounts for prompt payment should be disclosed, but rather endorsed the comments of Mellish LJ in *Great Western Insurance Company of New York v Cunliffe* (above) who stated that:

> "… it is quite obvious that they must have known, and they do not deny that they did know, that [the brokers] were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging. That really seems to me to govern this case. It is quite clear that it was known to everybody connected with insurances that the insurance offices were in the habit of making allowances, by way of brokerage and otherwise, of 12 per cent of the profits, or 10 per cent discount, and also 5 per cent brokerage; so much so, that some of the documents produced actually contain the thing printed as common form. It is quite obvious that this is a recognised practice of the offices. That being so, it is very difficult to believe that [the insured] must not have known that [the brokers] were receiving from the offices such allowances as the offices were in the habit of making. Their dealings go on for years."

2–061 Both *Baring* and *Cunliffe* proceed on the basis that the insured in question must have been aware that allowances or discounts were obtained from the insurers, and that such allowances were both usual in the trade and reasonable. Both insureds are criticised for failing to make proper enquiries. Mellish LJ in *Baring* found that the discount for prompt payment was not a fraud on anyone and that the American insured should have become acquainted with the rules of the London market and could not later refuse to pay on the basis that he was unaware of its peculiar features. Nevertheless, he did not overrule *Turnbull v Garden*. In *Cunliffe* he also found that the 12 per cent gratuity paid by the insurer to the broker on the profits of a favourable year was an "established remuneration" and perfectly proper. It is submitted that the discounts in these cases would today be held to constitute secret profits, for which the brokers would have to account; the gratuity in *Cunliffe* is an incentive to place either more business with the insurer, or more profitable work with the insurer, and clearly conflicts with the broker's

[105] *Baring v Stanton* (1876) 3 Ch. D. 502.

[106] *Turnbull v Garden* (1869) 38 L.J. Ch. 331.

[107] *Queen of Spain v Parr* (1869) L.J. Ch. 73.

duty to his client.[108] Certain aspects of these cases have already been overruled[109] and *Cunliffe* was partly decided on the insured's lack of objection for two years after the gratuity was discovered. Further, these old cases were often decided in a framework of the law then applying to factors, which were a prevalent part of the commercial scene, but are less relevant today. The solution to these divergent cases is that commission need not be disclosed unless requested by the insured, providing it consists of normal brokerage only, and that all other sums (however characterised) must be itemised. The propriety of the insured's claim to the sum alleged by the broker to be commission will rest on the knowledge that he had or should have had as to the nature of the broker's commission or reward, and the size of the commission; if substantially above market rates it should be disclosed.[110] Putting the insured on notice in any way is insufficient; he must be properly informed.

2–062 **Secret profits.** The broker will be entitled to receive as payment for his services either an amount agreed with the principal or a reasonable commission. He is not entitled to make any profit above this sum and any additional sums must be disclosed to his principal. Failure to do so will be a clear breach of his contract of agency and, if fraudulent, will prevent him from receiving his commission and may render him liable in the tort of deceit.

Profit commissions, whereby repayments to the insured are linked to the insurers' profit on the insured's account, may be made for two reasons. The first is to encourage the insured to improve his loss record by exercising greater diligence. This incentive is clearly restricted to contracts of insurance where the limitation of claims is within the insured's control, both as to frequency and severity, e.g. better protection for goods in transit, but it can apply to quota share or surplus treaty reinsurance where the underwriting philosophy of the reinsured can be tempered by the prospect of what amounts to cheaper reinsurance, as a result of the imposition of better risk-management on the reinsured or by providing him with an incentive to refuse higher risk business. The second reason reflects this latter aspect, and is simply to discount the costs of the reinsurance. Profit commission clauses do not usually appear in non-proportional business such as excess of loss because such business is placed as a matter of protection

[108] It could still be argued that *Cunliffe's* case is authority for the proposition that a purely consensual agent who is not party to any contract need not disclose any remuneration whatsoever, unless requested, on the basis that the agent is not being paid and is entitled to obtain and retain any benefit available, provided he keeps intact his fiduciary duties to the insured. James J stated that the agents "were not paid servants to do the work, receiving remuneration for it, and they were left to make the profit which was incidental to the business itself. That was the character of their employment, otherwise it would have not been a profitable employment. The profit was not to come from the [insured] in the shape of any direct payment: it was to be profit which should enure to [the brokers] in the ordinary course of that kind of business. That was, the business of going to underwriters and getting the underwriters to accept the risks, paying them the premiums".

[109] The custom of a market cannot form part of a contract unless the party against whom it operates is aware of it and assents to it: *Stolos Compania SA v Ajax Insurance Co (The Admiral C)* [1981] 1 Lloyd's Rep. 9; [1980] Com. L.R. 4 CA (Civ Div). See *IHC (A Firm) v Amtrust Europe Ltd* [2015] EWHC 257 (QB) at 25.

[110] *Green & Son (Ltd) v Tunghan & Co* (1913) 30 T.L.R. 64; and certainly must be disclosed upon request under s.16 of the GISC Commercial Code.

against major casualties or aggregations which are beyond the reinsured's control, rather than being "actively" ceded to the insurer.

However, it is also common for profit commission clauses to appear in slips whereby it is the broker who benefits from any profits which the insurer may make. The best example is an open cover through which the broker makes declarations to the insurer from various sources. The lack of a single client makes it administratively difficult for a conventional profit commission clause (which benefits the client) to apply, and the clause can therefore only be a specific inducement for the broker to place his clients' business with that insurer. Such clauses are rarely included in policy wordings and the possibility that the broker may receive an additional payment from the "opposing" party over and above the standard brokerage is therefore concealed from the insured. On its face this amounts to a secret profit.

2–063 A secret profit is any sum above the amount he is entitled to receive from his principal, which he is paid as a result of the exercise of his authority. There need be no dishonesty or fraud, merely a financial advantage to the broker which accrues by virtue of his position. It does not matter that the principal would not have been able to obtain the same benefit, or even that the act occasioning the profit was not done strictly within the course of the broker's "employment"[111]; the broker must account for all benefits or monies received, including gifts and any payment which the broker receives as a result of securing any additional related services.

A secret profit becomes a bribe, and therefore capable of attracting civil and criminal liabilities,[112] if it has come to the broker via a third party in order to ensure that the agent advises or takes action which is no longer impartial or disinterested, and may not necessarily be in his principal's best interests. There is an irrebuttable presumption that the agent is influenced by any bribe, and the motive for payment is irrelevant.[113] Millett J held in *Logicrose Ltd v Southend United Football Club Ltd*,[114] that the principal, upon discovering the proposed bribe, could elect to rescind the contract with the third party ab initio or, if it was too late to do so, to terminate it from that point onwards.[115]

However, rescission is not confined to cases where a bribe or secret commission is agreed to be paid. It extends to any situation in which the agent puts himself in a position where his interest and duty may conflict,[116] so that his principal does not necessarily obtain disinterested advice, and the other party to the transaction is aware of this. However, that other party must be aware either by actual knowledge or wilful blindness that the agent intended to conceal his conflict of interest from his principal. Constructive notice is insufficient since

[111] *Boardman v Phipps* [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009 HL.

[112] Bribery Act 2010.

[113] *Hovenden & Sons v Millhof* (1900) 83 L.T. 41.

[114] *Logicrose Ltd v Southend United Football Club Ltd (No.2)* [1988] 1 W.L.R. 1256; [1988] E.G. 114 (C.S.) Ch.

[115] *Panama & South Pacific Telegraph Co v India Rubber, Gutta Percha & Telegraph Works Co* (1874–75) L.R. 10 Ch. App. 515 CA (Ch); *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] A.C. 717 at 742–3; [1986] 2 W.L.R. 1063 HL.

[116] *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.1)* [1990] 1 Lloyd's Rep. 167 QBD (Comm) at 171.

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Life and accident insurance

5–048 Examples include: age of insured[54]; residence[55]; medical history,[56] and anything affecting life expectancy; potentially harmful activities and habits; drug use or abuse; sexual proclivities and history; occupation[57]; hobbies[58]; and height and weight.[59]

Fire insurance

5–049 Examples include: immediate environment if capable of "inducing" fire[60]; age and condition of the property; and use of the property (including temporary or occasional storage of flammable items)[61]; the financial status of the insured and in particular any disputes with Her Majesty's Revenue & Customs, especially involving a failure to keep proper records when Business Interruption insurance is requested.[62]

Motor insurance

5–050 Examples include: storage of the car[63]; previous accidents of any proposed driver (stated with accuracy)[64]; age of proposed drivers; previous "losses" of the car[65]; and cancellations of other policies.[66]

Burglary and property insurance

5–051 Examples include: location, age, use and condition of the property.

[54] *Keeling v Pearl Assurance Co* (1923) 129 L.T. 573.
[55] *Grogan v London & Manchester Industrial Assurance Co* (1885) 53 L.T. 761.
[56] *Life Association of Scotland v Foster* (1873) 11 M. 351 Court of Session (Inner House, First Division).
[57] Curiously this may not be material to personal accident insurance: *Woodall v Pearl Assurance Co Ltd* [1919] 1 K.B. 593 CA. But the Court of Appeal found as a fact that there had not been any misdescription since the description was not misleading or substantially incorrect, although their comments do give rise to a presumption that they would have found a way around this problem. Bankes J says at 602 that he was unable to accept the contention that the insured had misdescribed his occupation because (a) if it succeeded it would turn policies into "mere traps to catch the unwary"; and (b) the description of occupation was as understood in the district.
[58] *McNealy v Pennine Insurance Co* [1978] 2 Lloyd's Rep. 18; [1978] R.T.R. 285 CA (Civ Div).
[59] *Levy v Scottish Employers Insurance Co* (1901) 17 T.L.R. 229.
[60] *Bufe v Turner* 128 E.R. 1065; (1815) 6 Taunt. 338 Court of Common Pleas.
[61] *Hales v Reliance Fire and Accident Insurance Corp Ltd* [1960] 2 Lloyd's Rep. 391 QB.
[62] *James v CGU Insurance Plc* [2002] Lloyd's Rep. I.R. 206 QBD (Comm) at [86].
[63] *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413; (1922) 12 Ll. L. Rep. 237 HL.
[64] *Dent v Blackmore* (1927–28) 29 Ll. L. Rep. 9 KB.
[65] *Farra v Hetherington* (1931) 40 Ll. L. Rep. 132 KB.
[66] *Norman v Gresham Fire & Accident Insurance Society Ltd* (1935) 52 Ll. L. Rep. 292 KB. This postulate could apply to all types of policy. The concept that the insured should confirm that his other policies were not cancelled for non-payment of premium was put forward, since it would also confirm that the insured was financially capable of taking all necessary steps to retain the vehicle in good condition. The court did not decide the case on this ground, but Lewis J held at 301 that the cancellation of previous policies was a material fact.

DUTY OF INSURED TO CARRY OUT A REASONABLE SEARCH

5–052 The Insurance Act 2015 introduced a duty on the insured to carry out a reasonable search for information. The Act confirms that an insured knows something if it is known to one or more individuals who are either part of the insured's senior management or responsible for the insured's insurance. Senior management in this context includes board members but also those who play significant roles in the making of decisions about how the insured's activities are to be managed or organised. Nelsonian "blind-eye" knowledge is included.

What exactly constitutes a "reasonable search" will depend on the size, nature and complexity of the business. The insured will be deemed to know what "should reasonably have been revealed by a reasonable search" (s.4(6) of the Act). As a result, information held by non-senior management (e.g. by those who perform a managerial role) may be imputed to the insured. The introduction of this concept is likely to present challenges for brokers advising insureds.

It should also be noted that information held within the insured's organisation or by "any other person" will be imputed to the insured if a reasonable search should have revealed that information. The phrase "any other person" is clearly wide enough to include a broker (and "the insured's agent" is given as a specific example in the Insurance Act 2015). However, s.4(4) provides that an insured is not taken to know confidential information acquired by the insured's agent (e.g. its broker) through a business relationship with someone other than the insured who is not connected with the insurance. This provision is designed to protect insurance brokers who may be privy to confidential information from other clients which would otherwise be material to the risk being placed for another client. We also consider attribution of the broker's knowledge to the insured further below.

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PROPOSAL FORMS

5–053 The duty to volunteer information has been retained for non-consumer insurance policies under the Insurance Act 2015.[67] Accordingly, an insured would still need to inform insurers of a material circumstance even in the absence of a question relating to it. However, the introduction of a duty to make a fair presentation will have the effect that an insured need not disclose every material circumstance, so long as the insurer has instead been put on notice that it will need to make further enquiries. The Act also imposes a positive duty of inquiry on the insurer too (see further below).

It was previously common for proposal forms to include a warranty that the insured's answers were correct, which effectively converted the answers into warranties. Any inaccuracy therefore became a breach of warranty, automatically terminating the policy, whether the answer was material or not.[68] The effect of any untruth was therefore harsh for the insured, unless he could expressly qualify the form by stating that they were only true to the best of his belief, so that an

[67] The position for consumers was dealt with under the Consumer Insurance (Disclosures and Representations) Act 2012, which came into force in April 2013.
[68] *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413.

innocent misrepresentation would not be fatal to his position.[69] However, the Insurance Act 2015 has rendered ineffective any provision in a proposal form which purports to convert answers in the form into warranties.

The impact of material information known by the broker

When and how does information known by the broker effectively become that of the insured?

5–054

> "Those primary rules of attribution [of actions to a company] are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of a company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as acts of the company. And having done so, it will make itself subject to the general rules of which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort."[70]

The presence of a broker between the contracting parties has engendered litigation arising out of his failure to pass on information in his possession to one party which that party would wish to have. Where the agent effects the insurance, his knowledge in so doing is imputed to his principal, and vice versa, whether or not the knowledge was actually passed from one to the other. The principal will therefore be estopped from denying that he was aware of the information, provided that the broker obtains the information in his capacity as broker for the principal during the relevant transaction; his duty to inform the principal will therefore depend on his status when he acquires the information.

In *Blackburn, Low & Co v Haslam*[71] the claimant underwriters in Glasgow employed a local firm of insurance brokers to reinsure a ship which was overdue. The Glasgow brokers received information that the ship had been lost. This information, however, was given in confidence, and so was not communicated by the Glasgow brokers to their client underwriters. The Glasgow brokers telegraphed instructions (in the name of the claimant underwriters and with no mention of the loss) to their London agents to insure the vessel, who replied with the relevant premium rates to the claimant underwriters, who then carried on the telegraphic discussion. The London agents then placed the reinsurance. It was held that there had been merely a handing over of the negotiations by the Glasgow brokers to their London agents, and therefore the non-disclosure by the Glasgow brokers of the loss of the ship was non-disclosure by the claimant underwriters, and the reinsurance was voidable at the instance of the reinsurers.

[69] *Macdonald v Law Union Fire & Life Insurance Co* (1873–74) L.R. 9 Q.B. 328; (1874) 38 J.P. 485.

[70] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 A.C. 500; [1995] 3 W.L.R. 413, Privy Council (New Zealand) per Lord Hoffman.

[71] *Blackburn Low & Co v Haslam* (1888) 21 Q.B.D. 144.

5–055

This case should be contrasted with the earlier case of *Blackburn Low & Co v Vigors*,[72] arising out of the same facts save that the claimant underwriters instructed another broker to insure the same overdue ship, which (without either the new agent or the claimant underwriters being aware of the loss) he effected with different reinsurers. Both the plaintiffs and the actual placing broker acted in good faith, and the question was whether the knowledge of the first broker would be imputed to the plaintiffs, thereby enabling the defendants to avoid the policy on the ground of non-disclosure of material information. The House of Lords decided that the policy could not be avoided because the authority of the first broker had ended before the reinsurance in question had been effected, and thus only the knowledge of the broker who actually effected the reinsurance could be imputed to the plaintiffs; and he was unaware of the information material to the risk. The distinction drawn between the two cases is that the transaction was seamless in *Haslam* but separate in *Vigors*. These cases provide the rationale for s.19 of the Marine Insurance Act 1906. If the broker obtains information material to the risk whilst acting as agent for the insured, and prior to the conclusion of a contract of insurance, it is his duty under s.19 to disclose it to the insurer. Any failure to do so will enable the insurer to avoid, and the broker's reason for not disclosing it is irrelevant.

Thus in *SAIL v Farex*,[73] SAIL had acted as agents for an insurer seeking reinsurance and engaged London brokers to arrange a facultative reinsurance facility. The brokers approached a reinsurance company which initially declined but whose manager of its international facultative department agreed in principle to share in retrocession cover if another reputable reinsurer could be found and interposed as reinsurer between the insurer and itself as retrocessionnaire. The brokers then placed this package using an appropriate reinsurer. The retrocessionnaire later claimed that it was entitled to repudiate liability on the grounds that its manager had no authority to bind it, and that this had been known to the brokers.

One contention made by the reinsurer was that if the retrocessionaire's allegations were true, the brokers had known that there was no effective retrocession agreement and should, as agent for SAIL, have disclosed this fact to the reinsurer in relation to the reinsurance contracts. SAIL contended, however, that any knowledge that there was no effective retrocession agreement had acquired by the brokers in the capacity of the reinsurer's agents to obtain the retrocession cover, and not as agents for SAIL.

5–056

One of the issues, therefore, which the court had to determine, was whether there had been non-disclosure as to the invalidity of the retrocession. The Court of Appeal held that in placing the retrocession the broker was acting as agent for the reinsurer and not for SAIL. Even if the broker had been aware that the retrocession was invalid, this knowledge would not be imputed to SAIL and SAIL had therefore not failed to make full disclosure. Thus information acquired by a broker acting for a reinsurer is not acquired also in its capacity as agent for the insurer, despite the clear relationship between the two contracts and the fact that reinsurance cover is often sold at the same time as request for the original

[72] *Blackburn Low & Co v Vigors* (1887) 12 App. Cas. 531 HL.

[73] *Societe Anonyme d'Intermediaries Luxembourgeois (SAIL) v Farex Gie* [1995] L.R.L.R. 116; [1994] C.L.C. 1094 CA (Civ Div).

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cover. Knowledge can only be imputed where the agent is under a duty to its principal either to disclose it to that principal, or where the relationship between principal and agent is so close that it can only be concluded that the agent's knowledge is also that of the principal.

Is the broker's knowledge imputed to the insured?

5–057 One central argument of *Deutsche Ruck v Walbrook Insurance Co Ltd*[74] (and its associated litigation) concerned the juristic basis for the attribution of knowledge from the broker to the insured, namely whether the agent owes an obligation to disclose all material facts within his knowledge or because the knowledge of the agent is imputed to his principal. It may seem to be an issue of little significance but its resolution affects the application of an exception to the rule whereby the agent's knowledge is imputed to his principal: the rule in *Re Hampshire Land (No.1)*,[75] which obviously would not apply as an exception if the juristic rationale were the obligation to disclose all material facts. The argument occupied the minds and time of two Commercial Court Judges and three Lords Justice, the primary issue concerning the nature and extent of the speech of Lord Macnaghten in *Blackburn Low & Co v Vigors*, and in particular whether it was a minority view. Lord Macnaghten railed against the imputation argument in favour of the obligation to disclose, an analysis of the law rejected by Phillips J in *Deutsche Ruck v Walbrook*—which analysis was itself rejected by Dillon and Hoffmann LLJ in *SAIL* (at 142 and 150 respectively) where the latter said:

> "...I think that Lord Macnaghten was right. His analysis is supported by the structure of the Marine Insurance Act, 1906, which distinguishes between the duty of the insured in s.18 to disclose matters within his knowledge and the duty of the agent in s.19 to disclose matters within his. The latter section would not have been necessary if the knowledge of the agent was imputed to the insured. It is also supported by the actual decision in Blackburn in which the knowledge of an agent was *not* imputed to the insured because, although he had acted on behalf of the insured, he had not actually concluded the contract. Of course it may come down to a matter of words so that the knowledge of the agent is 'imputed' to the insured for the purpose of a contract which the agent had concluded but not for the purpose of another contract which he has not, nor indeed for any other purpose whatever. This seems to me so artificial a compartmentalisation of the notional mind of the insured that I think it makes much more sense to adopt Lord Macnaghten's analysis".

Further endorsement was supplied by Staughton LJ in *PCW Syndicates v PCW Reinsurance*[76] where he pithily commented that "What in my judgment is clear is that s.19 enacted Lord Macnaghten's view. Since in the present case it is agreed that the Act has the same effect as the common law, we are presumably entitled to conclude that Lord Macnaghten's view was the common law".

The subject of imputed knowledge was considered in *Simner v New India Assurance Co Limited*,[77] in which the reinsured, a Lloyd's syndicate, instituted

[74] *Group Josi Re Co SA v Walbrook Insurance Co Ltd* [1995] 1 W.L.R. 1017; [1994] 4 All E.R. 181 QBD (Comm).

[75] *Re Hampshire Land Co (No.1)* [1894] 2 Ch. 632.

[76] *PCW Syndicates v PCW Reinsurers* [1996] 1 W.L.R. 1136 at 255; [1996] 1 Lloyd's Rep. 241 CA (Civ Div).

[77] *Simner v New India Assurance Co Ltd* [1995] L.R.L.R. 240 QB.

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proceedings against the reinsurer, New India, under a stop loss reinsurance agreement. The original policy underwritten by the Lloyd's syndicate was a participation in a binding authority prior to agreeing in June 1990 to participate in the binding authority, the syndicate was informed that there were no loss statistics available as the scheme was a new one. The syndicate did not request further information before signing the slip in July 1990 and was not informed that an ominous level of claims had become apparent by this date. Instructions were given to its broker by the syndicate to place the stop loss reinsurance soon after its acceptance of the share of the original policy, who were told that there were no claims figures. The reinsurer signed the reinsurance slip in August 1990 although various amendments were made and initialled by the reinsurer during the following month.

5–058 By early September 1990 it became clear that substantial claims had been submitted under the binding authority. The (different) broker who had placed the binding authority had become aware in early June that a larger than anticipated number of claims had been received, but this fact had been disclosed neither to the syndicate nor, given the syndicate's lack of knowledge, to the reinsurer India. By March 1991 the syndicate's losses were considerable. Shortly afterwards, the reinsurer purported to avoid the stop loss reinsurance on the basis of misrepresentation and non-disclosure.

The deputy judge held that there had not been any misrepresentation by the Lloyd's syndicate. The allegations of non-disclosure related primarily to the up-to-date claims figures and the amount of premium received. It was common ground that these matters were material. The facts were not actually known to the syndicate or to its brokers when the reinsurance slip was presented to and signed by the reinsurer, but were in the possession of the broker of the original insurance binding authority. The reinsurer, nonetheless, claimed that knowledge of these facts should be imputed to the syndicate. Two alternative arguments were advanced with regard to the alleged imputed knowledge of the syndicate:

(1) the broker of the original insurance binding authority was the agent of the syndicate to receive information on these matters, and his knowledge was to be imputed to the syndicate; or

(2) the syndicate had delegated the entire management of the binding authority to the broker of the original insurance binding authority, so that his knowledge was to be imputed to the syndicate.

5–059 The deputy judge held (at 254–255) that there were three situations in which the knowledge of an agent is deemed to be the knowledge of the insured:

(i) Where the insured relies upon a particular agent for information as to the risk, the insured is deemed to know any information which ought to have been communicated to him by the agent in the ordinary course of business (set out in *Proudfoot v Montefiore* and approved in *Blackburn Low & Co v Vigors* subject to the proviso that it applies only to a category of agent described as an "agent to know", and not to all agents without restriction). Diamond J commented that:

> "It should be noted that the principle, as laid down by Cockburn, CJ [in *Proudfoot v Montefiore*] and explained by Lord Watson [in *Blackburn Low v Vigors*], is not strictly a case where the knowledge of the agent is imputed to the assured. The principle is rather different, namely that both parties contract on the basis that the assured has disclosed both material facts within his knowledge and also material facts that would have been within his knowledge if the agents whom he employed to provide knowledge of the subject matter of the insurance, or in the ordinary course of his business ought to have employed, had communicated to the assured in ordinary course such facts as the agents knew or ought to have known in the ordinary course of business".

(ii) Where the agent can be regarded as being in such a predominant position in relation to the insured that his knowledge can be regarded as being that of the insured. One illustration of this possibility is the situation where the agent is a director of the insured company.[78]

(iii) Where the agent places insurance on behalf of the insured, the agent is required to disclose to the insurer all information in his possession including "every circumstance which ought to be known by, or communicated to him" under s.19 of the Marine Insurance Act 1906.

On the facts, the reinsurer had to argue that the broker of the original insurance binding authority was the agent of the syndicate in the sense described in (i) above, i.e. that the syndicate had relied upon the original broker for information and was accordingly deemed to know the information in that broker's possession. The deputy judge held that the administration of the binding authority was set out in the binding authority and placed in the hands of the original broker, who had an obligation to report to the leading underwriter and not to the syndicate itself as part of the following market: this claims reporting procedure was typical in the Lloyd's market. There was no evidence that either the loss adjuster who handled the claims or the leading underwriter had any duty to forward information to the syndicate (at 256) and the *Blackburn Low* principle was, therefore, inapplicable.

The reinsurer further submitted that the original broker was a general agent of the syndicate because the syndicate had delegated the whole management of the business connected with the binding authority so that the claims reporting provisions were not definitive as to the facts which the syndicate was deemed to know in the ordinary course of business, but Diamond J held that the syndicate had not delegated any general underwriting or other decisions to the original broker, so that the limited nature of the agency meant that the original broker was not in a predominant position as regards the syndicate. The knowledge of the original broker could not, therefore, be imputed to the syndicate (at 257).

The impact of fraud by an agent

5–060 The effect of fraud on the insured's contracts was considered in *Deutsche Ruck v Walbrook Insurance Co Ltd*[79] and associated litigation.[80] The reinsurers purported to avoid certain reinsurance contracts on the grounds of misrepresentation and/or non-disclosure based upon a report of inspectors appointed by the Department of

[78] See *Regina Fur Co v Bossom* [1957] 2 Lloyd's Rep. 466 at [468].

[79] *Group Josi Re Co SA v Walbrook Insurance Co Ltd* [1995] 1 W.L.R. 1017; [1994] 4 All E.R. 181 QBD (Comm).

Trade and Industry to investigate the reinsured's holding company. The material sections of the report found that three directors of the holding company, who were also directors of the reinsured and related companies which had underwritten the original business on behalf of the reinsured and had arranged the reinsurance of that business with the reinsurer, had improperly diverted overriding commissions from the reinsured to other companies controlled by those directors. The reinsurers' case was that the three directors had acted fraudulently in misappropriating the overriding commissions which should have been credited to the reinsured; that this fraudulent conduct was a material fact, that knowledge of this conduct was to be imputed to each of the reinsured companies because the directors concerned were the directing minds of those companies in relation to reinsurance and that, accordingly, those companies were obliged to disclose such conduct to the reinsurers; and that the directors themselves, as the agents placing the reinsurances on behalf of the reinsured, were obliged to disclose all material facts within their knowledge, including the fact of their own fraudulent conduct.

Phillips J had two options. He could apply the rule in *Fitzherbert v Mather*[81] that where an agent's fraud, default or wrongdoing caused loss or prejudice to two parties, the loss or prejudice should fall on the party by whom the agent was trusted or employed or who took the risk of the agent's wrongdoing, or the rule in *Re Hampshire Land*[82] whereby the knowledge of any fraud of an agent against his principal will not be imputed to the principal. The judge, although incorrectly deciding that the method of transferring knowledge was through imputation from agent to principal, considered that any fraud having a direct impact on an insured risk should be subject to the rule in *Fitzherbert*, but that the knowledge of the directors was *not* to be imputed to the reinsured in circumstances where the fraud is indicative of the moral hazard. It was "an affront to common sense that the cover of the insured or reinsured should be at risk because of failure to disclose a fraud committed on itself of which only the fraudster was aware.", i.e. the rule in *Re Hampshire Land*. It was also submitted that the dishonest conduct of the directors constituted a "moral hazard", and it was therefore axiomatic that their conduct was a material matter which ought to have been disclosed. Phillips J questioned, however, whether the dishonest conduct could have any impact on the risks being reinsured. Although he saw the force of an argument that reinsurers were likely to be disinclined to accept risks from brokers or agents who had behaved dishonestly, he held that the reinsurers should not, in the circumstances of this case, be entitled to avoid contracts placed by such brokers or agents on the grounds of non-disclosure.

The Court of Appeal subsequently made it clear that the rule in *Re Hampshire Land* would be applied, to the effect that any imputation of information from an agent to his principal is negated when that agent has acted fraudulently against his principal; an agent was acting on his own behalf when he effected a fraud on

[80] *PCW Syndicates v PCW Reinsurers* [1996] 1 W.L.R. 1136; [1996] 1 Lloyd's Rep. 241 CA (Civ Div); *Group Josi Re Co SA v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152; [1996] 1 Lloyd's Rep. 345 CA (Civ Div).

[81] *Fitzherbert v Mather* (1785) 1 Term Rep. 12 KB.

[82] *Re Hampshire Land Co (No.2)* [1896] 2 Ch. 743.

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his principal.[83] Further, where the agent has not carried out any fraud but rather the lower sin of misconduct directed against the insured, there will again not be any imputation of the knowledge of that misconduct to the insured.[84] Equally any attempt by the agent to defraud insurers will not taint the insured by imputation, and the rule will apply to normal principles of attribution, so that the failure of the managing director of the insured to disclose previous fraud to insurers would not affect the rights of the insured company.[85]

5–061 The other contribution made by the PCW trilogy of cases, *Sail v Farex* and *Simner v New India* is the further categorisation by capacity of agents acting for the insured. Section 19(a) clearly refers to an "agent to insure", which would not include an underwriting agency responsible for obtaining insurance but not for actually placing it, or where the part played by the agent was so small that its role limited the transfer of its knowledge to the insured. "Agents to insure" are clearly caught by s.19, but intermediate agents or "agents to inform" are not. The obligations vis-à-vis the insurer and insured are not affected by this distinction because "The agents will either be agents to insure under that section [19], and thus will have to disclose material circumstances within their knowledge, or will be intermediaries, in which event the agent to insure will be deemed to know material circumstances which ought in the ordinary course of business to be communicated to them"[86] so that a producing broker would be obliged to pass on material information to the placing broker and the insurer could avoid if it were not disclosed to him.

If the broker is acting for the insurer, any knowledge acquired by him within his authority to acquire such knowledge will be imputed to the insurer. Knowledge acquired prior to his employment by the insurer or in another capacity is irrelevant. In *Wilkinson v General Accident Fire & Life Assurance Corp Ltd*[87] the agent acquired knowledge of the sale of a car as a car dealer and not as agent for the insurer, and therefore the knowledge could not be imputed to him as agent of the insurer when he also effected the insurance check. However, an exception was outlined in *Taylor v Yorkshire Insurance Co Ltd*[88] where the agent's position and relationship with his principal enabled previously obtained information to be imputed where the agent was "an agent to know". A proper disclosure of all material facts by the insured to the broker will discharge his duty to the insurer[89] and the broker's actions thereafter will not affect the insured, e.g. if the broker fails to communicate all material facts to the insurer.

[83] *PCW Syndicates v PCW Insurers*; [1996] 1 Lloyd's Rep. 241. And also in respect of fraud on a third party: *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262; [1998] C.L.C. 1351 QBD (Comm).

[84] *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd (No.1)* [1999] Lloyd's Rep. I.R. 371 CA (Civ Div).

[85] *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262.

[86] *Group Josi v Walbrook* [1996] 1 Lloyd's Rep. 345.

[87] *Wilkinson v General Accident Fire and Life Assurance Corp* [1967] 2 Lloyd's Rep. 182 Assizes (Manchester).

[88] *Taylor v Yorkshire Insurance Co Ltd* (1913) 2 I.R. 1 at [21].

[89] *Joel v Law Union & Crown Insurance Co* [1908] 2 K.B. 863 CA.

Knowledge of the insurer

5–062 The Act also creates a positive duty of inquiry for the insurer, too. An insurer "ought reasonably to know" something if it is known to an employee/agent who ought reasonably to have passed it on, or relevant information which is readily available and held by the insurer.[90]

It might prove difficult to establish what an insurer ought reasonably to know on the basis of information which is "readily available". How far should an underwriter be looking at information on the internet? In *Sea Glory Maritime Co v Al Sagr National Insurance Co (The Nancy)*,[91] the insured argued that, even though certain information was not disclosed, it was available online and it was market practice for insurers to check that information. It is an established principle that there is no presumption of knowledge of the facts concerning particular ships merely on the basis that they have been published in Lloyd's List (a London insurance market newspaper).[92] Blair J said that electronic databases should not be treated as equivalent to information in hard copy such as newspapers: "... an underwriter does not have to carry the information in an electronic database in his head. Online information is available to be called up when required".[93]

However, the judge agreed that the fact that information is available to an underwriter online does not necessarily give rise to a presumption of knowledge. Each case will turn on its particular facts. It is also unclear whether information is "held" by an insurer if that information is stored on a (possibly subscribed-to) database owned by a third party.

5–063 An insurer will also be presumed to know things which are common knowledge, or which an insurer offering insurance of the class in question to insureds in the field of activity in question would be expected to know in the ordinary course of business.

Limiting the duty of disclosure

5–064 If the insured can persuade the insurer to agree, then with appropriate drafting "in the clearest possible terms" the insured can obtain a waiver of his duty of disclosure altogether, as well as that of his agent.[94] Where the duty is entirely waived the waiver applies both to insured and agent, and it does not matter whether any non-disclosure is negligent or non-negligent because the duty to disclose simply does not exist. Although exclusion clauses usually require a specific reference to negligence in order to exclude it, a blanket exclusion (e.g. "for liability of any nature") will be sufficient because the parties are likely to

[90] Section 5(2) of the Insurance Act 2015.

[91] *Sea Glory Maritime Co v Al Sagr National Insurance Co (The Nancy)* [2013] EWHC 2116 QBD (Comm); [2014] 1 Lloyd's Rep. 14.

[92] Arnould's *Law of Marine Insurance and Average*, 18th edn (London: Sweet & Maxwell, 2013), para.16–194.

[93] At [174].

[94] See, e.g. *Brotherton v Aseguradora Colseguros SA (No.3)* [2003] EWHC 1741 (Comm); [2003] Lloyd's Rep. I.R. 762.

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have contemplated negligence when drafting[95] and "because the duty of good faith is unitary and absolute in the sense that it does not depend on innocence or negligence".[96]

The insured cannot exclude his own liability for fraud but can expressly exclude that of his agent.[97] Such an exclusion will not be successful if the insured is in some way implicated in the agent's fraud or the exclusion is part of a fraudulent scheme.[98]

Can the broker be liable to the insurer for non-disclosure or misrepresentation?

5–065

> "But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes a duty to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings".[99]

> "There is no reason in principle why the professional agent of the employer cannot become liable to the contractor for negligent misstatements made by the agent to a contractor to induce the contractor to tender, if the contractor relies on those misstatements. But whether a duty of care in fact arises in any given situation must depend on all the circumstances . . .[100]"

Section 19 of the Marine Insurance Act 1906 dealt with the agent's responsibilities[101]:

> "Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the insured 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 insured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."

Section 19 was designed to oblige an agent to disclose any facts to an insurer which the agent knew but which might not be known by the insured. It did not necessarily place a liability upon the agent *to the insurer* for any failure to do so. It simply meant that the insured could not state that he had disclosed every aspect simply by pointing to the fact that he was not aware of a material fact but that his

[95] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250; [2001] Lloyd's Rep. I.R. 703.

[96] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 703 at [113], [159].

[97] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 703 at [109].

[98] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 703 at [104], [109].

[99] *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560 at 571; [1992] 2 W.L.R. 867 Ch.

[100] *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* [2001] EWCA Civ 19 at [51]; [2001] Lloyd's Rep. P.N. 308 CA (Civ Div).

[101] Section 19 was repealed by the Insurance Act 2015 but will continue to apply to contracts of insurance entered into before 12 August 2016.

agent was. A breach by the broker of s.19 which results in avoidance meant that he would usually be liable to the insured, not the insurer.

Assuming that s.19 effectively applied to non-marine insurance,[102] the question then must be to determine the extent to which the brokers would have been liable to insurers. One might immediately think of the basic rule that the broker is the agent of the insured and must not have any conflict of interest, so that it will only be on rare occasions that a broker will have an independent liability to the insurer. Such a concurrent liability will not be enforced because the insurer will simply avoid the policy and the insured will sue the broker. But the insurer may already have paid out a claim to the insured who has disappeared or is insolvent, or the insurer may have agreed not to enforce any right to avoid, which may encourage him to sue the broker for any amount paid and to recover premium.

5–066 It is certainly clear from *Pryke v Gibbs Hartley Cooper*[103] that the broker may well fall under a personal responsibility to insurers where he misrepresents the position effectively on his own behalf and clearly without any authority from the insured, as distinct from a misrepresentation emanating from the insured. Waller J said:

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> "it seems to me that Section 19 of the Marine Insurance Act certainly supports the view that a broker has a personal responsibility in the insurance market. Furthermore, there is no reason why on the principles of *Hedley Byrne v Heller* why the broker should not be personally liable in relation to any negligent misrepresentation . . . Thus the practice in the market . . . for brokers to disclose material facts . . . would seem to me to be one that almost certainly would follow naturally and properly from the way in which negotiations take place; and furthermore, brokers might themselves be personally liable in damages for any failure in that regard . . .".

It may be the case, therefore, that the non-disclosure, or more likely the misrepresentation, would need to have emanated from the brokers "off their own bat", i.e. it is something that they have mentioned independently and on their own behalf to the insurer. Thus a clear endorsement of the insured, such as his solvency and excellent risk management techniques, which the insured would not himself rate in such glowing terms, amounting to an active misrepresentation, could have led to the broker being liable to the insurer. The possibility that the broker would be liable for a simple non-disclosure, is, following *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*, no longer likely. The problem with this analysis is that if the representation fell within the broker's ostensible or usual authority, then it is effectively made on behalf of the insured; where it does not and the insurer knows this, then the broker could simply state that the knowledge of the insurer means that he is not entitled to rely on it.

Given that the only remedy was avoidance a broker could not, however, be liable to the insurer for pure non-disclosure (i.e. in the absence of allegations of deceit or misrepresentation), following *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*,[104] the above suggestion of Waller J would not have

[102] *PCW Syndicates v PCW Reinsurers* [1996] 1 W.L.R. 1136; [1996] 1 Lloyd's Rep. 241 CA (Civ Div).

[103] *Pryke v Gibbs Hartley Cooper Ltd* [1991] Lloyd's Rep. 602 QBD (Comm), i.e. an assumption of responsibility.

[104] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 191.

been upheld. The insurer could claim against the insured for deceit where the agent has been fraudulent, or for damages under s.2(1) of the Misrepresentation Act 1967 (for misrepresentation but not for non-disclosure). The latter proposition has not been substantively endorsed by the courts but has been apparently assumed to be applicable, in *Toomey v Eagle Star Insurance Co (No.2)*[105] and at first instance in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*. It may also have applied to contracts for insurance, such as open covers, reinsurance treaties, etc. damages in lieu of rescission under s.2(2) were not available.[106]

5–067 **Construction.** The usual rules of construction apply to documents used in the making of any insurance contract. The following tenets have particular application:

(a) The document must be considered as a whole. Minor omissions or trivial mistakes do not operate to render the document inaccurate since it must be considered as a whole. Any answer may be qualified by another, even in another proposal if two or more proposal forms refer to each other.[107]

(b) A fair and reasonable construction must be placed on the contents of the proposal form, and the words used will be construed as if interpreted by ordinary men of normal intelligence and average knowledge of the world.[108] For example questions requesting information about illnesses are limited to serious illnesses,[109] and may also be limited to the context of the insurance; an insured's eyesight which is slightly defective but nevertheless satisfactory for the purpose of driving will not require specific disclosure in a proposal for motor insurance. Similarly, other insurance unconnected with the insurance in question need not be disclosed, unless clearly requested. Thus a question in a fire insurance proposal form as to whether the insured is or has been "insured in this or any other office" does not include all property ever occupied by the insured, but refers only to the particular premises to be insured, unless other premises are distinctly referred to.[110]

In general a question which may be ambiguous or has been wrongly misinterpreted (without recklessness) which elicits a truthful but incomplete answer from the insured will be construed *contra proferentem* against the insurer. Thus in *Yorke v Yorkshire Insurance Co Ltd*[111] the answer to a question as to the temperate habits of the insured which correctly represented his lack of alcoholism but failed to include his capacity for

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[105] *Toomey v Eagle Star Insurance Co Ltd (No.2)* [1995] 2 Lloyd's Rep. 88; [1995] 4 Re. L.R. 314 QBD (Comm).

[106] *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep. 109 QBD (Comm); *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 703 at [51]. See also para.5–069.

[107] *McGugan v Manufacturers & Merchants Mutual Fire Insurance Co* (1879) 29 C.P. 494.

[108] *Yorke v Yorkshire Insurance Co Ltd* [1918] 1 K.B. 662 at 668.

[109] *Connecticut Mutual Life Insurance Co of Hertford v Moore* (1881) 6 App. Cas. 644 Privy Council (Canada).

[110] *Golding v Royal London Auxiliary Insurance Co Ltd* (1914) 30 T.L.R. 350.

[111] *Yorke v Yorkshire Insurance Co Ltd* [1918] 1 K.B. 662.

certain drugs did not entitle the insurer to rescind. The courts have, however, also decided against the insured in instances of honest *mistake*[112] and whether or not there is a right to rescind will depend on the facts.

(c) The insured must disclose the whole truth of any answer. Supplying an answer which is literally true but does not provide all the information requested will enable the insurer to rescind the contract. Thus supplying a correct answer such as identifying one claim, without identifying all other relevant claims, is inadequate, since the clear inference is that there are no other claims.[113]

(d) Inconsistencies apparent from the face of the document operate to waive the insurer's rights to rescind, since the insurer has the option prior to the formation of the contract of declining to accept the risk, or obtaining additional information, or charging a higher premium.[114]

BURDEN OF PROOF

5–068 The burden of proof is clearly on the insurer alleging that there has been non-disclosure, since the fact that a policy exists gives rise to the presumption that all obligations have been satisfied.[115] Such a presumption is, of course, rebuttable. However, "... the universal rule in professional or any negligence, [is] that he who alleges must prove".[116] Facts which are clearly material do not require evidence to substantiate their materiality[117] but facts less obviously so will require the testimony of an expert witness, who will usually be someone well known in the relevant market, to demonstrate the matters that are material to the "prudent insurer".[118] Thus in cases in which brokers are sued for negligence in failing to transmit specific information to the insurer, where their defence is that the insurer would either not have accepted the risk, or would have been entitled to avoid it for another reason, the insurer should be invited to state whether he would have pursued either course to the detriment of the insured.[119]

The absence of expert evidence enables the court to draw on its experience of materiality, and it will not apply the standard of the ordinary businessman, who

[112] *Glicksman v Lancashire & General Assurance Co Ltd* [1927] A.C. 139; (1926) 26 Ll. L. Rep. 69 HL.

[113] *Condogianis v Guardian Assurance Co Ltd* [1921] 2 A.C. 125; (1921) 7 Ll. L. Rep. 155 Privy Council (Australia).

[114] *Keeling v Pearl Assurance Co Ltd* (1923) 129 L.T. 573.

[115] *Elkin v Janson*, 153 E.R. 274; (1845) 13 M. & W. 655 Court of Exchequer.

[116] *Insurance Co of the State of Pennsylvania v Grand Union Insurance Co* [1990] 1 Lloyd's Rep. 208 at 224 Court of Appeal (Hong Kong).

[117] *Glicksman v Lancashire & General Assurance Co Ltd* [1927] A.C. 139; (1926) 26 Ll. L. Rep. 69 HL.

[118] *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd (No.1)* [1984] 1 Lloyd's Rep. 476 CA (Civ Div).

[119] *Fraser v BN Furman (Productions) Ltd* [1967] 1 W.L.R. 898; [1967] 2 Lloyd's Rep. 1 CA (Civ Div); *Alfred James Dunbar v A&B Painters Ltd and Economic Insurance Co Ltd and Whitehouse & Co* [1986] 2 Lloyd's Rep. 38 CA (Civ Div).

knows little of insurance, but rather its own judgment from such knowledge as it has.[120] It will not, however, jump to the conclusion that a fact is material where any substantial doubt exists.

Once a fact has been shown by the insurer to have been material but not disclosed, the burden shifts onto the insured to show that the actual underwriter was not induced by its absence to write the risk.[121]

EFFECT OF BREACH OF DUTY OF GOOD FAITH

5–069 The only remedy for a pre-contractual breach of good faith under s.17 of the Marine Insurance Act 1906 was rescission, which served to dissolve the contract as though it had never existed, at the option of the insurer.[122] The "default necessarily strikes at the very basis of the contract itself" and the insurer must elect to ignore the defect or avoid ab initio. The insured was also entitled to repayment of his premium under s.84(1) of the Marine Insurance Act 1906, unless there was fraud on his part or unless the contract contained a term denying the insured's right to such return of premium. In the latter case, there was a chicken and egg quality concerning the concept of a right to retain premium which was paid under a contract which is deemed never to have existed. Nevertheless, a court may uphold such a clause.[123]

The remedy for a post-contractual breach, such as a failure to provide all relevant information under a "held covered" provision or non-disclosure in respect of a claim, was again rescission or avoidance at the insurer's option. However, the underwriters were fully entitled to defend the claim on grounds of bad faith and to reject the claim simpliciter while leaving the policy intact, fully in accordance with the modem approach that the remedy should be proportional to the breach—e.g. *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd.*[124] "... s 17 ... did no more than confer upon the insurer, or the insured in appropriate circumstances, a right to avoid. It did not therefore follow that the

[120] *Glasgow Assurance Corp v Symondson & Co* (1911) 16 Com. Cas. 109; (1911) 104 L.T. 254 at [257].

[121] *New Hampshire Insurance Co v Oil Refineries Ltd (Avoidance for Non Disclosure)* [2002] 2 Lloyd's Rep. 462 at [40]; [2003] Lloyd's Rep. I.R. 386 QBD (Comm).

[122] "Rescission" has been regularly regarded as coterminous with "termination", a usage described as "misleading" by Diplock J in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; [1980] 2 W.L.R. 283 HL. Rescission for misrepresentation arises from a defect in the formation of the contract, entitling the insurer to avoid ab initio. Rescission for breach arises from a defect in the performances of the contract, giving rise to a right to claim damages for breach; the difference is that damages are not available for breach of a non-existent contract. So a breach of the duty of good faith after inception in theory should give rise to a right to damages. But the duty of good faith starts when negotiations commence for the contract, and continue until complete expiry of all its aspects; breach at any time is retroactive to the inception of the duty i.e. ab initio. The effect is that damages cannot be available for a breach of the duty of good faith, as confirmed by the Court of Appeal in *Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)* [1990] 1 Q.B. 665; [1988] 2 Lloyd's Rep. 513 CA (Civ Div); and *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1990] 1 Q.B. 818; [1989] 2 Lloyd's Rep. 238 CA (Civ Div).

[123] *Thomson v Weems* (1824) 9 App. Cas. 671.

[124] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hong Kong Fir)* [1962] 2 Q.B. 26; [1962] 2 W.L.R. 474 CA. This has now been codified in the Insurance Act 2015.

insurer was required or bound to avoid, at all events for post-contract breach, particularly since s.91(2) of the [Marine Insurance] Act specifically preserved the rules of common law save insofar as they were inconsistent with express provisions of the Act".[125]

Where the breach is effected by a positive misrepresentation, the court theoretically has power to refuse to allow rescission and to substitute damages in place of the insurer's right, under s.2(2) of the Misrepresentation Act 1967. A court would no doubt be sympathetic where the misrepresentation is innocently made and immaterial to the cause of the insured's claim, but Steyn J in *Highland Insurance Co v Continental Insurance Co*[126] stated that:

> "Avoidance is the appropriate remedy for material misrepresentation in relation to marine and non-marine contracts of insurance ... the rules governing material misrepresentation fulfil an important 'policing' function in ensuring that the brokers make a fair representation to underwriters. If Section 2(2) were to be regarded as conferring a discretion to grant relief from avoidance on the grounds of material misrepresentation the efficacy of those rules would be eroded. This policy consideration must militate against granting relief under Section 2(2) from an avoidance on the grounds of material misrepresentation in the case of commercial contracts of insurance."

REMEDIES INTRODUCED BY THE INSURANCE ACT 2015

5–070 The availability of only one type of remedy for breach of the duty of good faith was seen as a drawback for both insureds and insurers. For insureds, the remedy could be draconian, given that it removed cover for all losses, whether or not they were connected to the material misrepresentation or non-disclosure. For insurers too there was a feeling that courts might be reluctant to grant the remedy in the absence of very strong grounds and, even if the remedy could be obtained, it would usually signal the end of the business relationship with the insured. It might also be the case that the premium earned was worth more than the total amount of claims payable for the policy period, and so the remedy did not have much practical use in such a situation.

Accordingly, the Insurance Act 2015 has now introduced a broader range of remedies where an insured has failed to make a fair presentation.

It is now possible to avoid a policy and keep the premium only where the misrepresentation or non-disclosure was deliberate or reckless. In all other cases (even where the insured is innocent), a scheme of proportionate remedies applies,[127] as follows:

- where the insurer would have declined the risk altogether, the policy can be avoided, with a return of premium;
- where the insurer would have accepted the risk but included a contractual term, the contract should be treated as if it included that term (irrespective of whether the insured would have accepted that term); and

[125] *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437 at [514], [515]; (1984) 134 N.L.J. 887 QBD (Comm).

[126] *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep. 109 (Note) QBD (Comm).

[127] See Sch.1 of the Insurance Act 2015.

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proviso that any non-payment caused solely through the fault of the insurer would mean that the policy would neither lapse nor become void, and that the presentation of a completed direct debit mandate to the insurer discharged the assured's payment obligations. In any event the court took the view that the insurer had clearly assumed responsibility so that there was a duty of care in tort and consequently that the insurer had voluntarily assumed full responsibility for collecting payment from the insured's bank.

NON-PAYMENT BY THE INSURED

8–039 There are two situations where non-payment of the premium does not affect the insured's right to payment in the event of loss. These are as follows:

Policy made under seal reciting payment of premium

8–040 The insurer can be potentially estopped from denying payment where the policy is made under seal and recites that the premium has been paid. The strength of the recital must be balanced against any conflicting proviso stating that the insurer would not be liable prior to payment. The insurer will be liable when the policy has been executed if the recital carries more weight than the proviso,[66] but not when the proviso makes it clear that liability cannot arise until "actual" payment, particularly where the receipt clause was a matter of "common form".[67] Further, a necessary ingredient of estoppel—actual reliance by the party later seeking to rely on it—is missing. Even if the insured attempted to rely on it, it is clearly inconsistent with his knowledge that premium has not been paid, so that it is not an unequivocal representation. In policies which are not made under seal the apparent confirmation of receipt in the policy does not amount to a waiver of any stipulation for payment prior to liability, and the insurers can rely upon non-payment to avoid liability.

Every Lloyd's policy states that the premium has been paid and is treated as so paid at the completion of the contract. The insurer cannot rely upon non-payment to avoid liability because s.53 of the Marine Insurance Act 1906 makes the broker directly responsible to the insurer for premiums, and s.54 states:

> "Where a marine policy effected on behalf of the insured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the insured, but not as between the insurer and the broker."

Thus the policy is valid even though the premium has not been paid by the insured to the broker, or accounts settled between insurer and broker

[66] *Roberts v Security Co Ltd* [1897] 1 Q.B. 111 CA.

[67] *Equitable Fire and Accident Office Ltd v Ching Wo Hong* [1907] A.C. 96 Privy Council (Singapore).

No specified time limit on payment

8–041 It is a commonly held myth that an insured has to pay for his insurance to be able to enforce it. Nothing could be further from reality. The consideration for the contract is the obligation to pay premium, not its actual payment. Despite its obvious importance to insurers, the obligation to pay premium is no more than a contractual term. The effect of breaking a contractual term will depend on the importance of that term, and on the intention of the party in breach. In the absence of the premium, insurance contracts are not terminated for lack of consideration, but for breach of contract. That breach occurs if payment is not made by a particular date, specified either in the contract, or by notice from the insurer, or at the expiry of a reasonable time within which to pay the premium, but although technically a breach it may not be a repudiatory breach, and even if it were it would still have to be accepted by the insurer. A failure to pay premium would not usually of itself amount to a repudiatory breach of contract.[68]

Thus in *Fenton Insurance Co Ltd v Gothaer Versicherungsbank VVAG*[69] the reinsurer pleaded a repudiatory breach of contract based upon non-payment of premiums between 1976 and 1980. The judge was not able to find that premiums had been paid, and the reinsured was clearly in breach of the treaty. There was, however, no term in the treaty making time for payment of the essence and the judge refused to accept that the failure to pay premiums constituted a repudiatory breach of contract. He accepted that where accounts are rendered and paid through brokers, delays in payment are not infrequent and that a distinction should be drawn between a delayed payment (especially as a result of administrative failure) and a persistent failure in the face of demands or protests (which would invariably evidence an intention not to pay and would be either a breach or anticipatory breach of contract). Further, the court stated that even if the reinsured's conduct could be regarded as repudiatory at any stage, it would be of no consequence until accepted by the reinsurer, after which it would only discharge the parties from their obligations prospectively, i.e. from the date of acceptance of the breach, and not from inception or the failure to pay. Unless and until accepted such a repudiatory breach would only be a "thing writ in water".[70]

This case was upheld in *Pacific & General Insurance Co v Hazell*[71] where it was accepted that a failure to pay premium would not usually of itself amount to a repudiation of the contract. "It has often been said that a repudiation is a serious matter not likely to be inferred, and that is particularly so when the parties are doing business in a context where delays in payment are not unknown".

8–042 Matters came to a head in *Figre Limited v Mander*[72] in which a delay of six years in payment of premium was not held sufficient to amount to a breach. This case is interesting because there came a time by which the claims under that cover exceeded the liability for the adjustment premium and it was certainly accepted

[68] *Pacific & General Insurance Co Ltd v Hazell* [1997] L.R.L.R. 65.

[69] *Fenton Insurance Co v Gothaer Versicherungsbank VVaG* [1991] 1 Lloyd's Rep. 172 QBD (Comm).

[70] *Howard v Pickford Tool Co Ltd* [1951] 1 K.B. 417 at 421; (1951) 95 S.J. 44.

[71] *Pacific & General Insurance Co Ltd v Hazell* [1997] L.R.L.R. 65.

[72] *Figre Ltd v Mander* [1999] Lloyd's Rep. I.R. 193.

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as a matter of law that thereafter the premium could have been offset and deducted from any claims due. The court held that the obligation to pay premium was an intermediate term and that a failure to make payment on a fixed date amounted to repudiatory breach of contract entitling the other party to terminate in any of three situations:

(a) where the parties have expressly stipulated that time is to be of the essence;
(b) where the circumstances indicate that the fixed date must be precisely complied with; or
(c) where time was not of the essence but one party has been guilty of undue delay and the other party has given notice requiring the contract to be performed within a reasonable time.

A renunciation of a contract occurs where one party by words or conduct indicates that he would not be performing his obligations under the contract in some essential respect, provided that the repudiation (and its acceptance if damages for repudiation are to be claimed) is conveyed in clear and unequivocal terms.[73] A mere omission to do something which a party ought to do would not necessarily justify the other in repudiation and there has to be an absolute refusal to perform. The court held that the late tender of premium was a result of administrative error and mistake on the part of the brokers, and that at no time did the reinsurer complain about non-payment of premium, or demand premium or warn the reinsured that if the premium were not paid by a particular time the contract would be terminated.

The court referred to *Amherst v James Walker Goldsmith & Silversmith Ltd*[74] in which the judge stated that "I know of no ground to say that mere delay, *however lengthy*, destroys the contractual right of the party guilty of delay. It may put the other party in a position where, by taking the proper steps, he may become entitled to treat himself as discharged from his obligation, but that *does not occur automatically from mere passage of time*". He approved a statement to the effect that "in some circumstances, of course, the delay on the part of A may *so gross and inexplicable as to make it so clear that he does not intend to exercise his right or to perform his part of the contract that any such notice is unnecessary.* But, ordinarily, it will be necessary for B to serve a notice on A or at least to have some communication with him before he can properly and safely regard himself as being absolved."

8–043 The insured's intention, prior to and up to the formation of the contract, of not paying any premium to the insurer could constitute a breach of the utmost good faith either as a non-disclosure of a material fact or as part of the moral hazard of the insured.

Where the insured does not have to comply with the condition of payment within a specified time, because the insurer has agreed to accept a later payment of premium, the insurer waives the condition of payment and cannot avoid liability to the insured by relying on the insured's non-payment. However, the necessary conditions must be present to enable the insured to prove that the

[73] *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89 QBD (Comm).
[74] *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305; [1983] 3 W.L.R. 334.

insurer has waived his rights, which invariably depend upon the circumstances. The insurer must be aware of all relevant facts, and intend to waive. Thus waiver will be implied where the insurer agrees to give credit to the insured[75] or to accept a negotiable instrument,[76] but not solely from mere delivery of the policy to the insured[77] or perhaps because prompt payment had previously been waived.[78] Where the insurer wrongfully refuses to accept premium, he is in breach of contract and liable in damages accordingly for the occurrence of any insured risk.[79]

In *Pacific & General Insurance Co v Hazell* the reinsurance contracts stipulated for minimum and deposit premium payable "in four equal instalments in advance". The reinsurers alleged that this amounted to a condition precedent which had not been waived. The judge found, however, that the terms did not support the implication that prompt payment must be made even in accordance with the market terms of credit, or that the provision for payment of instalments in advance was sufficient to make the payment of premium a condition precedent to reinsurers' liability. A failure to pay premium would not usually of itself amount to a repudiation of the contract but in this case the provisional liquidator had failed to pay the first two instalments of the premium and had stated that no funds would be made available for the payment of premium in future, and this was sufficient to amount to a repudiation of the contracts which was accepted by reinsurers. Finally, the insurer can sue for the premium even though the policy provides that the risk cannot attach until payment.

8–044 What is an insurer or reinsurer to do? He certainly cannot just terminate the contract. The least he must do is request payment of premium and warn that non-payment will result in dire consequences, so that the insured will have free insurance until termination. With a small amount of forethought the insurer could have made the contract suspensory and incapable of inception until payment of premium, or the payment of premium a condition precedent, or he could have inserted a premium warranty so that termination would be automatic if premium were not paid within say 60 days (and he would be on risk for any loss within that time). Of course he should always have the longstop of setting off any premium payable against any claim due if the necessary mutuality between these obligations is present (and it may not be where the broker is liable for premium to the insurer and the insurer is liable to the insured for claims), but that would mean that the insured has effectively had his insurance for free: no claim means no premium, and a claim means he has only had to pay for a certainty, paying a small amount of premium to receive a much larger claim.

[75] *Prince of Wales Life Assurance* Co *v Harding* (1858) E.B. & E. 183.
[76] *London and Lancashire Life Assurance Co v Fleming* [1897] A.C. 499 Privy Council (Canada).
[77] *Equitable Fire & Accident Office Ltd v Ching Wo Hong* [1907] A.C. 96.
[78] *Redmond v Canadian Mutual Aid Association* (1891) 18 O.A.R. 335.
[79] *Honour v Equitable Life Assurance Society of the United States* [1900] 1 Ch. 852.

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PAYMENT TO THE INSURER'S AGENT

8–045 Payment to the insurer's agent constitutes valid payment to the insurer if that agent had sufficient authority to accept payment in the manner in which it was made. The agent must have usual or apparent authority to receive the premium, which may be implied from the insurer's conduct. Thus payment to the agent who originally effected the insurance on behalf of the insurer usually constitutes valid payment.[80] Similarly, an agent with authority to provide a cover note on behalf of the insurer has authority to accept premium, as does a sub-agent.[81]

If the policy stipulates a particular method of payment and the insurer's agent accepts premium in another way, the insured cannot argue that the agent had authority to accept the premium, because he knows of the agent's lack of authority. Authority to accept payment in the manner tendered by the insured must be proved by the insured for such payment to be binding upon the insurer, for example where the insured can prove that the insurer had previously accepted the insured's manner of payment, and therefore waived his contractual right to payment in a particular manner; the general rule, however, is that payment can only be made in money.[82]

An agreement by the agent to accept payment in full by the insured at a later date—such as a post-dated cheque—is not within an agent's authority since it amounts to the supply of credit. Where, however, the agent agrees to provide credit to the insured and to pay premium to the insurer on behalf of the insured, the agent becomes the agent of the insured as regards payment of premium, and can sue him for the debt thereby created.[83]

8–046 More usual is settlement in account between the insurer and the insured's agent, where the agent is simply debited with the premium less his commission. In fact actual settlement need not occur; the agent need only debit himself with the premium in his account to constitute valid payment.[84]

What is the position when the broker is holding claims monies paid by insurers in an Insurance Broking Account for the benefit of their client, the insured, in excess of the premium paid, and they inform the brokers and the insured that they are avoiding the contract for non-disclosures and misrepresentations made prior to its conclusion? It is certainly the case that the broker would not be obliged to pay any monies back to insurers, but the real questions are whether the broker would be subject to any liability to insurers if it were to pay any sums to the insured, and whether the insured can compel payment to it. One might initially think that the broker has received funds as agent for and on behalf of the insured, so that as far as insurers are concerned the money has effectively been paid to the insured and there is therefore no reason for the broker not to pay it to the insured in account or otherwise. This gives rise to the proposition that only the insured, as principal, can be sued, whether the principal has received the money or not, because payment to the broker as agent constitutes payment to the principal.

80 *Wing v Harvey* 43 E.R. 872; (1854) 5 De G.M. & G. 265.
81 *Rossiter v Trafalgar Life Assurance* 54 E.R. 148; (1859) 27 Beav. 377 Ch.
82 *Pape v Westacott* [1894] 1 Q.B. 272 CA.
83 *Newcastle Fire Insurance Co v Macmorran and Co* 3 E.R. 1057; (1815) 3 Dow 255 at 264 HL.
84 *Prince of Wales Life Assurance* Co *v Harding* (1858) E.B. & E. 183.

The majority of cases, however, take the view that a claim in "restitution" will lie against the agent unless the agent has *in good faith* paid the money over to his principal, or done something equivalent (e.g. spending it on behalf of the principal and with his authority). The defence which an agent can usually use is known as "payment over", but any such payment *must* be made in good faith. Thus in *Holland v Russell*[85] the plaintiff insurer had paid money to the defendant agent who acted for the owner of a ship which had been lost. In fact the insurance policy with the owner was voidable for previous non-disclosure. The plaintiff insurer sought to recover from the defendant agent the money which he had previously paid to the agent, who had received it on behalf of the insured. The defendant agent successfully resisted the action because in good faith he had paid over some of the money to his principal, had used part to settle a debt owed to him by the principal, and had spent the rest on his principal's behalf and with his authority. If he had not, however, he would have been liable. The short answer is that the defence of payment over cannot be successfully maintained if an agent has paid money over to his principal after receiving notice of the plaintiff's claim. It may be surprising that these old cases still appear to be good law, but they have not been overturned. In fact as recently as 1944 a judge stated that "Where money has been received by an agent for a principal he cannot be sued for its return if *before notice* he has paid it away to his principal or on his principal's instructions." In this situation no payment should be made to any party.

8–047 Another aspect of this problem is that until November 1998 there may have been an argument that reinsurers could not recover a claim which they had paid before avoiding the policy. This argument was based on the application of a distinction as to whether an insurer had paid under a mistake of fact or a mistake of law. This distinction no longer exists, as a result of *Kleinwort Benson v Lincoln City Council*.[86] The type of mistake is no longer relevant.

Further, the brokers do not actually need to receive notice from every insurer that (a) it intends to avoid; and (b) the money must not be paid to the insured. Of course this proposition is arguable: each insurer's position may be technically different vis-à-vis the alleged non-disclosures, and each insurer must elect to avoid its contract. Nevertheless, any broker aware that non-disclosure is being alleged by the majority of insurers is on notice and may not be able to rely on this defence if he were to ignore it and pay the insured.

There is a possibility that the brokers could pay the money to the insured and hope that if the allegations of non-disclosure are upheld by a court, then the insured will repay the claims monies to insurers. If the insured is unsuccessful in their defence and becomes insolvent or is unable to repay its insurers, however, then it is a possibility that reinsurers could sue the brokers. Alternatively, if reinsurers are aware that the brokers are retaining the funds, then there is a real possibility that they will include the brokers in the litigation. The brokers could play a very minor role by adopting an "interpleader" role and simply awaiting the outcome of the main dispute between reinsurers and reinsured. The funds could be placed in an escrow account and agreement reached with all parties as to their payment to the "victor", with no further liability on the brokers as to interest.

85 *Holland v Russell* 122 E.R. 365; (1863) 4 B. & S. 14.
86 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] Lloyd's Rep. Bank. 387.

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8–048 Equally, however, the insured could insist upon immediate payment. If so, the brokers may have to consider making an application to the court for a finding as to whether it has to pay or not. A court would allow the brokers to disappear from the litigation after paying the money into court. Another option would be for the insured to put up good security to guarantee repayment of the monies by the brokers to the insured.

RETURN OF PREMIUM

8–049 The premium is returnable by the insurer to the insured where the risk contemplated by the parties is never run by the insured, so that he obtains no benefit from the contract. Put simply "the insurer shall not receive the price of running a risk if he runs none",[87] and the whole of the premium should be returned, subject to any agreement to the contrary. Similarly, any agreement as to the return of all or part of the premium will override any statutory stipulations, which are contained in ss.82–84 of the Marine Insurance Act 1906. Section 82 states that:

> "Where the premium or a proportionate part thereof is, by this Act, declared to be returnable:
> (a) If already paid, it may be recovered by the assured from the insurer; and
> (b) If unpaid, it may be retained by the assured or his agent."

Section 83 states that:

> "Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or as the case may be, the proportionate part thereof, is thereupon returnable to the assured."

Section 84 stipulates that:

> "(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.
> (2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.
> (3) In particular—
> (a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable;
> (b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable; Provided that where the subject-matter has been insured 'lost or not lost' and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.
> (d) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;
> (e) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

[87] *Stevenson v Shaw* (1877) 4R 1076, Ct. of Sess.

> (f) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;
> (g) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable: Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable."

Thus the premium may be recovered in whole or in part. Where the insurance contract contains an express right enabling the insured to cancel with a concomitant right to the return of the unearned premium, a similar right to return premium will be implied where the contract also expressly enables the insurer to cancel without express reference to return premium.[88]

RECOVERY OF THE ENTIRE PREMIUM

8–050 This is allowed where the consideration has totally failed, under s.84(1) above, and in certain circumstances where:

(a) there has been a failure to agree so as to negative consensus *ad idem*; or
(b) the contract is avoided ab initio; or
(c) the policy is illegal; or
(d) the insurer has been fraudulent; or
(e) the insured has broken a warranty; or
(f) the policy is void because its issue was ultra vires the insurer.[89]

A complete failure to agree will be rare. There will always be cases where one party misunderstands the extent of the cover provided, but these will usually be unilateral in nature and, as such, will not give rise to any right to avoid. Where the mistake is bilateral, their common mistake makes the contract void and any premium paid will be returnable.

More common is an avoidance of the policy by the insurer for misrepresentation or non-disclosure by the insured. This may occur:

(i) if the misrepresentation or non-disclosure was innocent. The insurer can avoid the contract ab initio in which case the premium must be returned because the consideration has wholly failed, the risk never attaching.[90] This principle is so entrenched that the insurer will run the risk of affirming the contract if he knowingly fails to tender the premium back to the insured; or
(ii) if the insured or his agent has acted fraudulently. Fraudulent behaviour by the insured disentitles him to sue for the recovery of any premium paid, since to allow him to do so would be to allow him to rely on his own wrongdoing to claim relief. Curiously, though, a Chancery court may not grant the equitable remedy of rescission to an insurer on his application in

[88] *Re Drake Insurance Plc* [2001] Lloyd's Rep. I.R. 643 Chancery Division (Companies Court).
[89] *Re Phoenix Life Assurance* 70 E.R. 1131; (1862) 2 John. & H. 441.
[90] *Anderson v Thornton* 155 E.R. 1415; (1853) 8 Ex. 425.

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such a situation unless he effectively repays any premium, on the basis that he who seeks equity must do equity.[91] There is no recent case, however, which would today support the Chancery approach in non-marine insurance. Nevertheless the fact is that where the insurer has avoided the policy ab initio (at least in cases where there is no fraud), the correct legal basis for the return of the premium is that the consideration has wholly failed, so that the insured has a restitutionary claim to the return of the premium as money had and received. It is difficult to see why the fact that the reason why the insurer could avoid ab initio was fraud by the insured should deprive the insured of that claim for money had and received: in either case, fraud or not, there has been a total failure of consideration. In making his claim for return of the premium as money had and received, the insured does not need to rely upon his fraud but only upon the avoidance and consequent total failure of consideration. Thus, notwithstanding s.84(3) of the Marine Insurance Act, and the Insurance Act 2015, it may still be possible for the insured in the case of non-marine insurance to argue that premium should be returned notwithstanding that he has been fraudulent.

8–051 A contract which is illegal when it incepts gives neither party any rights under it, if both parties are equally guilty. Thus any fault of the insured will operate so as to prevent him reclaiming any premium. So the absence of an insurable interest in life insurance or the absence of authorisation on the part of the insurer to carry on that type of insurance business in the UK, of which the insured is aware, will ensure that the premium remains with the insurer.[92] (For a full discussion of the absence of authorisation and its effects see paras 5–004 and 11–006).

Different considerations apply to the case where the insured has no insurable interest at the time of the loss and where he has had no insurable interest at any time during the period of the insurance. The insured need only have an insurable interest at the time of loss to recover under a policy.

The sale of property owned and insured by the insured would preclude that insured from later recovery for a post-sale loss under the contract of insurance because he would not have an insurable interest at the time of loss. However he did have an insurable interest when the property remained in his ownership in relation to which the insurer was on risk, so that there has not been a total failure of consideration, and he could recover his premium. Accordingly there would not have been a total failure of consideration and there would be no entitlement to return of the premium.

8–052 In the case where the insured *at no time* had any insurable interest, there will have been a total failure of consideration, and he should be repaid his premium, but any such claim faces other problems in the form of ss.4 and 5 of the Marine Insurance Act 1906 in the case of marine insurance, the Life Assurance Act 1774

[91] *Barker v Walters* 50 E.R. 36; (1844) 8 Beav. 92 at 96; *London Assurance Co v Mansel* (1879) 11 Ch. D. 363 at 372. However, it may be arguable that there is no equity against the insurer, where it is blameless. Wright J did not decide this point in *Biggar v Rock Life Assurance Co* [1902] 1 K.B. 516 at 526.

[92] *Re Arthur Average Association for British, Foreign and Colonial Ships* (1874–75) L.R. 10 Ch. App. 542.

in the case of life assurance and the Gaming Act 1845 in the case of other non-marine insurances, which between them require the insured to have an insurable interest. The absence of an insurable interest may render the contract void and illegal as being in the nature of a wagering or gaming contract.

The law in this regard is strict. If there has been no insurable interest, then the contract is void and illegal and the insured cannot recover the premium, even if the insured was innocent in the sense of being unaware that an insurable interest was required. The cases appear to draw a distinction between situations where the contract is both void and illegal (such as where the insured has no insurable interest) in which case there can be no claim for the return of the premium, and situations where the policy is merely void (such as those where the parties agree that the policy itself will be proof of an insurable interest in breach of s.4 of the Marine Insurance Act 1906, notwithstanding an actual insurable interest[93]), in which case the insured should be able to recover the premium.

There are, however, certain exceptions to the illegality rule which operate in favour of the insured:

(i) where the insurer fraudulently represented the position and such fraud induced the insured to contract with the insurer, e.g. as to the legality of the contract, e.g. where the insurer represented that an insurable interest was unnecessary under a life policy, knowing that this was untrue.[94] An innocent misrepresentation as to legality will not entitle the insured to a return of premium.[95] The rationale for this is that whilst ignorance of the law is not usually a defence, the parties are not expected to be experts in insurance law and where both parties are innocent, the situation is simply frozen. This case has now been overruled by *Kleinwort Benson v Lincoln City Council*[96];

(ii) where the insured contracted under a mistake of fact, such as an ignorance that war has broken out and the insured has become someone who cannot validly contract, e.g. an enemy alien, or that a life is insured in the belief that the *cestui qui vie* is alive, when he is not[97];

(iii) perhaps where there is *locus penitentiae*. This is literally a chance of repentance and can be exercised by the insured while the contract remains executory and the risk has not attached.[98] It is not clear whether the insured actually has to repent or can simply state that he does not want to continue;

[93] *Thomas Cheshire & Co v Vaughan Bros & Co* [1920] 3 K.B. 240; (1920) 3 Ll. L. Rep. 213 CA.

[94] *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482 CA; *Tofts v Pearl Life Assurance Co Ltd* [1915] 1 K.B. 189 CA.

[95] *Harse v Pearl Life Assurance Co* [1904] 1 K.B. 558 CA.

[96] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] Lloyd's Rep. Bank. 387 HL.

[97] *Oom v Bruce* 104 E.R. 87; (1810) 12 East 225 KB; *Pritchard v Merchant's and Tradesman's Mutual Life-Assurance Society* 140 E.R. 885; (1858) 3 C.B. N.S. 622, at 644–645 Court of Common Pleas; *Strickland v Sarah Turner, Executrix of E. H. Lane*155 E.R. 919; (1852) 7 Ex. 208. These examples apply the general principle that money paid under a (common) mistake of fact is recoverable, since the contract is void.

[98] *Lowry v Bordieu* 99 E.R. 299; (1780) 2 Doug. K.B. 468; *Busk v Walsh* 128 E.R. 340; (1812) 4 Taunt. 290 Court of Common Pleas; *Howard v Refuge Friendly Society* (1886) 54 L.T. 644.

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(iv) breach of the duty of good faith by the insurer may also entitle the insured to recover his premium, because damages are not available for breach of the duty,[99] so that avoidance is the only remedy, giving rise to a right to premium. The insured can elect to waive the insurer's breach, in which case he will not be entitled to any return of premium;

(v) where the subject matter of the contract of insurance is incapable of identification so as to render the contract void for uncertainty, or it has been destroyed (except in marine insurance where the risk has attached retrospectively);

(vi) where the policy does not accord with the contract premiums will be refundable because they were paid under a mistake,[100] except where the insured is entitled to rectification of the policy.[101]

Breaking a warranty

8–053 Where the insured has broken a warranty, the insurer is not liable for any causally related loss until the breach is remedied, unless he waives the breach.[102] Thus:

(i) where the insured warrants that a particular state of affairs exists at inception, such as that his habits are temperate, when in fact they are intemperate,[103] or that the subject matter is in a specified location or condition when that is not in fact the case, the risk does not attach with the effect that the premiums are not due. However, the loss must be linked to the breach, e.g. drunken driving; where it is not, the insurer will be liable. Where the breach of warranty occurs before inception of the risk so that the insurer will never be liable, the consideration will have failed and the insured will be entitled to a return of his premium[104];

(ii) where a continuing warranty or future warranty is broken after inception, premiums paid prior to the breach will not be returned to the insured because the insurer has been on risk. Nor will premiums paid after the breach be recovered, because the liability for premium will survive the discharge of the insurer from liability under the contract (unless they are payable in respect of discrete, divisible periods of risk). After a renewal of the contract premiums may be recovered, since there is a new contract of insurance which falls into (i) above: the risk does not attach as the breach takes place before (re)inception.[105] However, any entitlement to recover

[99] *Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)* [1990] 1 Q.B. 665; [1988] 2 Lloyd's Rep. 513 CA (Civ Div).

[100] *Fowler v Scottish Equitable Life* (1858) U. Ch. 225.

[101] *General Accident Insurance Corporation v Cronk* (1901) 17 T.L.R. 233.

[102] *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233; [1991] 2 Lloyd's Rep. 191 HL. As a matter of promissory estoppel: *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA Civ 1572; *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions (formerly Axa Reassurance SA)* [2002] Lloyd's Rep. I.R. 325 QB.

[103] *Thomson v Weems* (1884) 9 App. Cas. 671 at 682; (1884) 11 R. (H.L.) 48.

[104] *Dawsons Ltd v Bonnin* [1922] A.C. 413; (1922) 12 Ll. L. Rep. 237.

[105] *Sparenborg v Edinburgh Life Assurance Co* [1912] 1 K.B. 195 at 204.

may be negated by agreement by a term providing for forfeiture of premiums if the insured breaches any warranty at any stage.

The insurer is not avoiding the policy but rather is repudiating it by relying on its terms, subject to any argument that such a clause is a penalty.[106]

RECOVERY OF PART OF THE PREMIUM

8–054 Some premium can be recovered:

(a) By agreement;
(b) Section 84(2) of the Marine Insurance Act 1906;
(c) Over-insurance;
(d) Unvalued policy;
(e) Valued policy;
(f) Double insurance;
(g) Where the insurer goes into liquidation;
(h) Cooling-off period.

By agreement

8–055 An agreement to return premium in whole or in part can often be found in both marine and non-marine policies, but it is less usual in non-marine. Partial return of premium may occur when the policy is cancelled by agreement or the risk is reduced, or upon the exercise of a clause by which the insurers can unilaterally cancel upon return of unearned premium (on a pro rata basis).

In reinsurance treaties it is usual for the reinsured to set aside and retain a proportion of the premium (up to a specified total), known as a premium reserve deposit. This provides the reinsured with security for the termination of the contract, against the risk exposure to primary insureds, which may leave it exposed for many years. There may also be a local statutory requirement which may require the imposition of this term by a foreign reinsured, which may sometimes be satisfied by the provision of Letters of Credit. In this way unearned premium, i.e. premium for the period after termination until the end of the risk, calculated on a pro rata basis, can be allocated by the reinsured either to pay claims against him or as premium for other reinsurance.

Section 84(2) of the Marine Insurance Act 1906, which applies to marine and non-marine insurance

8–056 Where the risk can be apportioned, a proportionate part of the premium will be returnable if there is a total failure of any apportionable part of the risk. This will only be effective where the insurance covers several subject matters, or where a clear division of risk can be made, e.g. where a voyage is subject to different

[106] *Kumar v Life Insurance Co of India* [1974] 1 Lloyd's Rep. 147; (1973) 117 S.J. 833.

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warranties for different sections. Failure to comply with a warranty will mean that the risk will not attach for that part of the voyage, and a proportionate part of the premium will be refundable.[107] The success of any attempt to apportion a risk will always depend on the construction of the policy.[108]

Over-insurance

8–057 The principle allowing for return of premium in over-insurance is that some of the premium has been paid for the balance of the over-insurance, i.e. over the amount that the insured would be entitled to claim. Thus part of the premium is paid without consideration, since the insurer would not have to pay the full amount of the insurance in the event of loss. This principle was enunciated in *Fisk v Masterman*[109] as being "on the ground of short interest".

Unvalued policy

8–058 In non-marine insurance the premium is not apportionable and is therefore not recoverable under the above principle.[110] Marine insurance under s.84(3)(e) provides for a proportionate return of premium.

Valued policy

8–059 The parties have agreed the value of the subject matter, and overinsurance cannot therefore occur. But where the extent of insurance provided to the insured cannot be fully ascertained until the policy period has expired, the premium cannot be properly quantified in any event.

Double insurance

8–060 This is a form of over-insurance, in circumstances where more than one policy has been taken out on the same subject matter, and the total amount recoverable is in excess of the true value of the subject matter. The overriding principle is that, since the contract of insurance is generally one of indemnity, the insured cannot therefore recover more than he has lost. Each insurer must have been on risk in order for the insured to be able to recover under either policy. That being so, the premium cannot be apportioned in non-marine insurance and the insurers can therefore retain the premium.

However, for marine insurance s.84(3)(f) of the Marine Insurance Act 1906 provides that a proportion of the premium is returnable, depending on the dates upon which the policies were effected. These are as follows:

[107] *Stevenson v Snow* 97 E.R. 808; (1761) 3 Burr. 1237.
[108] *CT Bowring Reinsurance Ltd v Baxter (M Vatan and M Ceyhan)* [1987] 2 Lloyd's Rep. 416; [1987] 1 F.T.L.R. 7 QBD (Comm).
[109] *Fisk v Masterman* 151 E.R. 994; (1841) 8 M. & W. 165 at 168.
[110] *Wolenberg v Royal Co-operative Society* (1915) 84 L.J.K.B. 1316.

(i) policies effected on the same day are treated as one insurance, and therefore neither insurer will bear the risk in full. The insured may recover premium in proportion to the amount each insurer has agreed to pay[111];

(ii) policies effected on different dates must mean that the earlier insurer was on risk in full, and would be liable if a loss had occurred before further insurance was effected. Therefore, as the consideration has not failed, no premium need be returned by the "earlier" insurer. But the later policies occasion the overinsurance and may have to return premium on a pro rata basis, in proportion to the sums insured. Where a claim is made on one policy for the full sum, no premium will be returned, nor when the double insurance is knowingly effected by the insured.

Where the insurer goes into liquidation

8–061 Liquidation of a corporate insurer will result in termination of the policy. The consideration will therefore have failed for the remainder of the policy after the date of liquidation and the insured will be entitled to a partial return of premium. Of course any loss prior to the date of liquidation occasions liability on the part of the insurer, although there may be insufficient funds to pay in full. Where the insurer was not authorised to make the contract of insurance, and it is thus illegal, the insured (who could not enforce any claim in the insurer's liquidation) could recover his premium in full if he was unaware of the lack of authorisation.[112]

The amount recoverable will be assessed under the Insurance Companies (Winding-Up) Rules (SI 2001/3635) (and SI 1986/2002).

Cooling-off period

8–062 The insured may decide that he does not wish to continue with the policy of insurance during the statutory period for "cooling off"[113] and is therefore entitled to return of all his premium.

[111] *Fisk v Masterman* (1841) 8 M. & W. 165.
[112] *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep. 430.
[113] COB 6.7. See Ch.15.

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What happens if the plaintiff does not have sufficient financial resources to mitigate his loss properly, so that he claims more from his insurer to cover the additional damage that he could have reduced had he been in funds? At first sight the well known "eggshell skull" principle—that a victim's skull would not have been fractured when hit without excessive force but for the fact that it was abnormally thin—would appear to be applicable, so that a plaintiff's inability effectively to mitigate damage owing to his own impecuniosity would not reduce any sum which he could recover from a third party. However, the application of this principle in respect of impecuniosity has been the subject of judicial dispute, mainly on the basis that the impecuniosity of the plaintiff is unforeseeable and too remotely linked to the damage for it to be applied. In *Ramwade v Emson*[17] the Court of Appeal rejected a claim stemming from the claimants' impecuniosity after the defendant insurance brokers had failed to obtain comprehensive insurance for one of the claimants' lorries. The lorry was written off and the broker delayed in providing funds for a replacement. The claimants were unable to purchase a replacement owing to inadequate funds and were forced to hire a lorry, and it was for these hire charges that they sued the brokers. Although the claimants claimed that the brokers were well acquainted with the business and knew that hire charges would be incurred pending payment on the insurance policy, the Court of Appeal felt that the charges were not recoverable because the insurance policy which the brokers should have obtained would not in any event have covered hire charges. On the face of it this seems entirely correct, until one considers that the thrust of the claimants' claim was that payment under the insurance policy could be expected to be prompt in the absence of any dispute as to coverage, and it was the slow payment that had actually caused the hire charges to be incurred.

9–010 A string of House of Lords decisions[18] have since confirmed the principle that damages recoverable for a replacement car following the loss of use of a damaged car may be higher if the claimant is impecunious and so can only hire a car with credit terms.

A chink in the armour of the *Liesbosch* principles had also been introduced by Lord Denning in *Perry v Sidney Phillips & Son*,[19] in which he held that the principles were not of universal application and that damages for stress and inconvenience were recoverable when the insured had insufficient funds to move out of the property during its renovation following a surveyor's failure to identify a structural problem, because they were reasonably foreseeable.

The lines of authority have not yet been conclusively determined either way, and there must therefore be a considerable risk that the failure of a claimant to mitigate loss as a result of his own impecuniosity (which can all too often arise temporarily out of cash flow problems) will later reduce the claim against the party causing such loss.

[17] *Ramwade Ltd v WJ Emson & Co Ltd* [1987] R.T.R. 72; (1986) 83 L.S.G. 2996 CA (Civ Div).
[18] *Giles v Thompson* [1994] 1 A.C. 142; [1993] UKHL 2 HL; *Dimond v Lovell* [2002] 1 A.C. 384; [2000] UKHL 27 HL; *Langden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 HL.
[19] *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297; 22 B.L.R. 120 CA (Civ Div).

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Recovering costs of mitigation

9–011 Having mitigated his loss for the benefit of the insurer, whose subsequent payment to the insured may be substantially smaller as a result, the insured will want to recover his costs of mitigation. He may be able to do so on the basis that the contract contains an implied term to this effect; the insured is insured against the loss in question, and it is not for his benefit that he has incurred costs. One might assume that an insured would be entitled to recover from his insurer any costs spent in *avoiding* a loss, which would otherwise occur and be paid as a claim by the insurer. Common sense would scream its agreement, but on balance the courts have not (notably in *Yorkshire Water v Sun Alliance*[20] although in respect of a liability policy rather than a property policy), partly because even where the contract expressly provides that the insured must take all reasonable measures to avert a loss, there is apparently no implied term that he would be reimbursed by his insurer, and partly because any duty to mitigate arises after a breach, not before it. More technically for the purposes of insurance law the breach of a contract of indemnity is not the occurrence of the insured peril but the fact that the insured has suffered loss. One might also take the view that a breach which could be averted is not sufficiently fortuitous to merit cover. On the other hand there are obvious public policy reasons for enabling an insured to recover such costs, not least being the fact that the insurer suffers a diminished loss, and that it makes little sense to allow an insured to recover if it does nothing but not if it takes positive action. Nevertheless, insureds would be well advised expressly to include clauses for such recovery in their policies, in the absence of which recovery may not be allowed.

Emperor Goldmining Co Ltd v Switzerland General Insurance Co Ltd[21] is an Australian authority in favour of the recovery by the insured of his proper costs of mitigation in marine insurance, in the absence of a sue and labour clause, which would appear to be applicable also to non-marine insurance in England.

However, this case was not followed by Neill J ("with great diffidence") in *Integrated Container Service Inc v British Traders Insurance Co Ltd*[22] because "it is not necessary to imply an obligation on the insurers to reimburse the insured for any expenses incurred in carrying out the duty imposed by state . . .", despite the fact that that duty was no more than a codification of the common law. Further, the implied term was not thought necessary to give business efficacy to the contract. However, Neill J and the Court of Appeal on other grounds held that the expenses of mitigation were reasonable upon the construction of the policy, the latter without reference to *Emperor Goldmining* although Eveleigh LJ stated, in the context of s.78(4), that "the right to recover expenses is a corollary to the duty to act". The argument therefore remains open partly because *Emperor Goldmining* was distinguished by Neill J on the basis that it did not contain a sue and labour clause, and partly because Neill J was in a difficult position; having already rejected the right to recovery expressed in the contract, he could not then

[20] *Yorkshire Water Services Ltd v Sun Alliance and London Insurance Plc* [1997] 2 Lloyd's Rep. 21.
[21] *Emperor Goldmining Co Ltd v Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep. 348 Supreme Court (New South Wales).
[22] *Integrated Container Service v British Traders Insurance Co* [1981] 2 Lloyd's Rep. 460 at 465; [1981] Com. L.R. 212 QBD (Comm).

imply a similar right. He also made it clear that his views were strictly obiter. Finally, he was essentially construing s.78(1) which only attaches when a sue and labour clause exists in the policy, and the effect of cl.9 of the Institute Container Clauses and s.78(4) on the sue and labour clause, rather than the duty of mitigation imposed solely by s.78(4). On the other hand, if upheld, *Emperor Goldmining* would render all sue and labour clauses otiose since the insured could recover any sum provided it was reasonably incurred. It is therefore arguable that the costs of mitigation can be recovered in the absence of a sue and labour clause (which invariably makes any expenditure an indemnifiable loss), perhaps provided that the total sum payable by the insurer does not exceed the limit of insurance cover under the policy (which would be a restriction on the proposition that such expenses are in addition to the policy limit).

9–012 It is certainly the case that there is clear Court of Appeal authority for the proposition that it is neither a general proposition of law nor an implied term of a public liability insurance contract that an insured must make reasonable efforts to prevent or minimise loss.[23] This follows from the principle that contracts of insurance are of indemnity and that liability policies are phrased in terms where the peril insured against is the insured's legal liability to pay a sum as breach of duty or obligation to a third party, rather than the event or occurrence giving rise to that liability. The case, in which the insured claimed reimbursement of expenses incurred to avert further damage to the property of others, turned largely on its wording which did not allow pre-event or post-event expenses to be recovered. Stuart Smith LJ stated "I am not persuaded that there is such a general duty [to make reasonable efforts to prevent or minimise loss which would otherwise fall to be paid by insurers]. It is not akin to the duty of the victim of a tort or breach of contract to mitigate the damage which the tortfeasor or contract breaker will otherwise have to pay for", although his immediate premises for this comment may be thought somewhat unfounded: that no authority was cited for the proposition[24]—despite being set out in s.78(4) and therefore something that must be taken as read, as a codification of the common law in 1906[25]; that it is usually the subject of an express term and therefore should not be implied—despite many terms being made express which would otherwise be implied, including the common law (and statutory) requirement to sue and labour; that the cases from other jurisdictions supporting the theory reflected their public policy and a benign attitude to insureds, rather than any principles of construction of English law; and that the presence of an excess and a policy limit make it within the interest of the insured to take action—despite the rather greater interest of the insurer for the sum which falls between these two boundaries. The proposition that there is no such duty is more sustainable on the basis that a loss which is

[23] *Yorkshire Water Services Ltd v Sun Alliance and London Insurance Plc* [1997] 2 Lloyd's Rep. 21; [1997] C.L.C. 213 CA (Civ Div).

[24] He also commented that no textbook writer suggested that there was such a term, a comment read by the author with a wry smile in the light of his endorsement of the proposition in the first edition of this work, but then nor was the court referred to *Emperor Goldmining* [1964] 1 Lloyd's Rep. 348 or *ICS v British Traders* [1981] 2 Lloyd's Rep. 460. Clearly his Lordship meant to imply the word "leading" before "textbook".

[25] See, e.g. Staughton LJ in *PCW Syndicates v PCW Reinsurance* [1996] 1 W.L.R. 1136; [1996] 1 All E.R. 774; [1996] 1 Lloyd's Rep. 241 CA (Civ Div), see fn.25 at para.5–056.

reasonably avoidable is not sufficiently fortuitous to be indemnified by insurance, which did form part of the decision, and if such a duty were to exist the risk of loss would perhaps have to be recognised by the insured on the basis of the "reasonable care" cases,[26] but it is hoped that effect of this decision will be limited to liability policies and specific wordings which make it clear that such costs are not to be payable. The rationale for foreign decisions to the contrary is simply that it clearly makes sense to allow an insured to recover costs which he has incurred to minimise any payment by the insurer, with the corollary that an insured would otherwise be better placed by allowing the insured peril to cause loss and then recover it from the insurer, a proposition which should be capable of being effected without hardship to insurers where the insured peril has already come into effect and will give rise to payment by the insurers unless the insured takes active steps to prevent it.

Subrogation: how far do you have to go?

9–013 Closely allied with the concept of mitigation is the doctrine of subrogation in that a failure by the insured to take adequate preventative measures by way of mitigation of further loss could also prejudice the insurer's rights of subrogation. This doctrine has two limbs. The first is that the insurer is entitled to stand in the shoes of its insured and enforce any claims possessed by the insured against third parties which will have the effect of diminishing the loss insured. The second is that the insurer is entitled to recover from the insured any benefits received by him from a third party in diminution of the loss. In *The Vasso*[27] insurers sought to establish a breach of duty which would allow them to refuse payment under the insurance policy, on the basis that the insured had failed to take every possible step to preserve and exercise all rights against third parties. The contract of insurance required the insured "to take such measures as may be reasonable for the purpose of averting or minimising such loss; and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised".

The insurers alleged that the insured cargo owners should have applied for a freezing order even though they may only have had a slim chance of success, because in insurers' view the clause required the insured to take *every* possible step. The court held that the mere failure to apply for an injunction did not of itself establish a breach of duty, because the insured cargo owners had acted reasonably, properly and conscientiously. The insurers were unable to prove that the application was a proper step which a reasonable insured should have taken, having regard to the interests of himself and the insurers and to the provisions of the policy.

Although an insured will breach an implied duty of the insurance policy if he unilaterally abandons or renounces his claim, a bona fide bilateral settlement with the third party will not be a breach (provided that there has not been any collusion

[26] *Noble Resources and Unirise Development v George Albert Greenwood (The Vasso)* [1993] 2 Lloyd's Rep. 309 QBD (Comm). See below, para.9–047.

[27] *Noble Resources and Unirise Development v George Albert Greenwood (The Vasso)* [1993] 2 Lloyd's Rep. 309.

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between the insured and the third party). In *Horwood v Land of Leather and Zurich*[28] the insured had a potential claim against a third party but it entered into a settlement with that third party. The settlement agreement proved to be unenforceable. The judge held that the insured was under a general implied duty to not do anything which might prejudice the insurer's subrogation rights. Although a breach was held to have occurred (because the settlement agreement was unenforceable), on the facts, no loss had been caused to the insurer.

9–014 There is no answer to all of these problems, but the least that an insured should do to maximise his insurance recovery is to keep his insurers fully informed at all times, obtain their agreement to any costly courses of action before they are pursued, and—as a counsel of perfection—crystallise any rights and obligations more clearly in the policy.

Incurring an increased loss or "secondary" liability

9–015 The insured, whilst attempting to mitigate, might actually increase the loss, or incur a "secondary" liability to a third party. Provided the insured's actions were reasonable and the secondary loss or liability was not too remote to be excluded by the doctrine of proximate cause, he can recover a sum in respect of his loss in addition to his costs of mitigation.[29] Problems may arise where the insured's actions give rise to loss from an uninsured risk. In this case the court will apply the doctrine of proximate cause and consider whether the secondary loss can be directly linked to the insured risk or whether the steps taken by the assured give rise to a novus actus interveniens. Thus damage caused by water used to douse goods on fire will be considered as damage caused by fire,[30] and even loss caused by theft of the insured's goods after their removal from burning premises was held to be recoverable under a fire policy.[31] Negligence by an insured may however, preclude recovery, if it is a novus actus interveniens, i.e. itself an act causative of the loss.

Further, the commencement of the insured risk will enable the insured to take whatever steps he considers necessary to mitigate without breaking the chain of causation from the risk, so that "any loss resulting from an apparently necessary and bona fide effort to [minimise the risk] . . ., every loss that clearly and proximately results whether directly or indirectly, from the [risk], is within the policy".[32] However, where the risk appears to have commenced but in actuality has not, for example smoke emanating from a cargo hold which comes not from a fire but from a defective valve, then the damage caused by mitigation will not be recoverable by the insured,[33] a principle reflected in s.78(3) of the Marine

[28] *Horwood v Land of Leather Ltd* [2010] EWHC 546; [2010] 1 C.L.C. 423 QBD (Comm).
[29] *Lloyds & Scottish Finance Ltd v Modern Cars & Caravans (Kingston) Ltd* [1966] 1 Q.B. 764; [1964] 3 W.L.R. 859.
[30] *Stanley v Western Insurance Co* (1867–68) L.R. 3 Ex. 71.
[31] *Levy v Baillies* 131 E.R. 135; (1831) 7 Bing. 349 Court of Common Pleas.
[32] *Stanley v Western Insurance Co* (1867–68) L.R. 3 Ex. 71 at 74.
[33] *Joseph Watson & Son Ltd v Firemans Fund Insurance Co* [1922] 2 K.B. 355; (1922) 12 Ll. L. Rep. 133.

Insurance Act 1906 which states: "Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause."

NOTIFICATION OF LOSS

9–016 The insured is under no duty to give immediate notice of any loss[34] to the insurer in the absence of a term requiring such a prompt reaction. Such terms are usually phrased "as soon as possible" or "as soon as reasonably practicable" and are subject to the usual rules of interpretation, which take all relevant circumstances into account, including the availability of knowledge of a loss or events giving rise to a claim to the party responsible for bringing a claim. These clauses are, however, construed objectively in that delay which could have been avoided, or which ought to have been avoided in the circumstances, will operate to defeat the claim. "Forthwith" or "immediately" require stricter compliance, not only within a reasonable time and without unjustifiable delay, but also probably at the first available opportunity.[35]

It is arguable, however, that the absence of a term requiring immediate notice will not absolve the insured from giving notice as quickly as possible after a loss or event. The insurer is entitled to be subrogated to the rights of the insured and could be prejudiced in his ability to claim against offending parties if notification is late. It is therefore arguable that a term requiring timeous notification is implied into every contract, since the very purpose of prompt notification is to enable the insurer to take such steps as he may consider necessary to ameliorate the position. Whether or not the notice must be given as promptly as possible, Lloyd J endorsed Professor Hardy Ivamy's view (at 398) that notice must be given within a reasonable time, in *Hadenfayre Ltd v British National Insurance Society Ltd*.[36] What is clear, however, is that any obligation is not subject to any duty of good faith[37] save that the notification will provide the insurer with substantive rights if it is dishonest.[38]

[34] *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437; (1984) 134 N.L.J. 887. Or any notice of a claim against it which has not communicated to it, even if a writ has been issued (but not served): *Robert Irving & Burns v Stone* [1997] C.L.C. 1593; [1998] Lloyd's Rep. I.R. 258 CA (Civ Div).
[35] *Re Williams and Lancashire and Yorkshire Accident Insurance Co* (1902) 19 T.L.R. 82. However, Nourse J held in *PS Refson & Co Ltd v Saggers* [1984] 1 W.L.R. 1025; [1984] 3 All E.R. 111 Ch that there was no difference in meaning or effect between "forthwith" and "as soon as reasonably practical". "Immediately" was held in *Re Coleman's Depositories Ltd and Life & Health Assurance Association's Arbitration* [1907] 2 K.B. 798 at 807 to mean "with all reasonable speed considering the circumstances of the case", and was followed in *Farrell v Federated Employers Insurance Association Ltd* [1970] 1 W.L.R. 1400; [1970] 3 All E.R. 632 CA (Civ Div) at 635. The fact is that the meaning of any limiting phrase will be determined by the wording.
[36] *Hadenfayre v British National Insurance Society* [1984] 2 Lloyd's Rep. 393 at 398, 402; (1984) 134 N.L.J. 1017.
[37] *Alfred McAlpine Plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep. 437 at 441; [2000] C.L.C. 812 CA (Civ Div).
[38] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2001] 2 W.L.R. 170.

Although the insured need not exercise any right to claim under the policy, and is entitled to pursue the offending party for recompense for his loss, the obligation to notify does not arise when he decides to claim under the policy, but at the date of the relevant event giving rise to the loss.

A condition precedent

9–017 A more difficult problem of interpretation from the view of the insured is whether or not the term is a condition precedent, with which he may have been unable to comply. A condition precedent demands its discharge before the insurer can be liable, subject to s.11 of the Insurance Act 2015 (see further below) whilst an ordinary condition entitles the insured to claim even when in breach. Breach of an ordinary condition entitles the insurer to claim damages but these will be minimal where the notice provision has been complied with as soon as practicable, or where the insurer has not suffered prejudice. The courts tend towards holding that a condition is not a condition precedent unless it is very clearly expressed, since the rules of construction dictate that the clause relied upon to preclude liability is construed *contra proferentem*, and will only do so where the clause is specifically expressed to be a condition precedent, or where it is clearly stated that compliance with it is of fundamental importance to the insurer.

Nevertheless, conditions expressed to be precedent may be held not to have that effect. In *Re Bradley and Essex and Suffolk Accident Indemnity Society*[39] several conditions stated to be precedent to liability were not upheld because some of the clauses could not be so appropriately described. The claimant was entitled to an indemnity despite breach of a condition because the sole object of that condition was to provide for the adjustment of premiums. The case was decided in 1912 but seems to have anticipated recent trends favouring the consumer (the insured) in that factors such as the size of print, the insurer's failure to indicate the inclusion or nature of the terms in the policy, and their general unsavoury nature operating against the insured, were all held to be relevant in a decision which was distinctly contrary to what was agreed by the parties. This decision is outside the English contractual doctrine of laissez-faire; there did not appear to be any great inequality of bargaining power between the parties, and the insured may have been able to obtain less onerous insurance elsewhere. It may be contrasted with the later decision of *Aspen Insurance UK Ltd & v Pectel Ltd*[40] where a clause in the policy provided that "the liability of Underwriters shall be conditional on—(i) The Assured paying in full the premium demanded and observing the terms and conditions of this insurance". Teare J held that it is well established that a general clause, such as this one, in an insurance policy purporting to make compliance with obligations in the policy a condition precedent to the underwriters being liable in respect of a claim, can indeed have that effect. It is not necessary to use the term "condition precedent"—instead, what had to be found is a "conditional link" between the insured's obligation to give notice and the underwriters' obligation to pay the claim. On the facts of the case, he held that a clause which required immediate written notice with full

[39] *Re Bradley & Essex & Suffolk Accident Indemnity Society* [1912] 1 K.B. 415 CA.
[40] *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804; [2009] Lloyd's Rep. I.R. 440 (Comm).

particulars of any occurrence which may give rise to indemnity under the insurance, when read in conjunction with the general clause, had this required "conditional link" and so was to be treated as a condition precedent.

Nevertheless, extreme care should be taken by the insurer to specify the nature of conditions precedent and their importance to him if he is to enforce them. Expressing other terms as conditions precedent may lead to an application of the *expressio unius exclusio alterius* rule, so that any omission to categorise a term as a condition precedent in the presence of conditions precedent will strongly indicate that it was not intended by the parties to be a condition precedent.[41]

9–018 Once a condition precedent has been found, compliance used to be strict. So, for example, in, *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd*[42] Bingham J adopted a strict technical approach to hold that breach of a clearly expressed condition precedent was an absolute defence by the insurer, and that the fact that the insurer was not prejudiced by late notification was irrelevant. He also commented that if prejudice were necessary, relatively little prejudice would be sufficient, e.g. any weakening of the insurer's position in that they were unable to negotiate or put the claimant to proof, or apply their minds as to the tactics of litigation.

However, even before the Insurance Act 2015 came into force (see further below), the courts disliked insurers who hide between unmeritorious defences which are not linked to the loss. In *Layher Ltd v Lowe*[43] the Court of Appeal held that where a policy required as a condition precedent immediate notice of an "occurrence likely to give rise to a claim", the facts to be examined were those existing immediately after the incident and that "likely" meant "at least 50% likely" rather than merely possible. The insured had notified the insurers only on being joined as a fourth party in an action. The insurers' argument that they were entitled to reject the claim on the basis that the collapse of the roof was an "occurrence likely to give rise to a claim" was rejected by the court on the grounds that there had been nothing in the immediate aftermath of the collapse to show that a claim against the insured was "likely". The fact that a claim was later made did not make it likely at an earlier date. In practical terms this finding limits the protection afforded to insurers by this clause.

Layher was followed in *Jacobs v Coster*,[44] where the disdain with which such clauses are treated by the courts was shown by its lack of enforceability even when a third party had suffered serious injury on the insured's premises and the insured had not notified its insurer. The Court of Appeal commented that society had not then reached the sorry state that the fact that a person has suffered a serious injury by itself demonstrated that there is then a greater than 50 per cent likelihood of a claim (para.14).

[41] *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 Q.B.D. 237.
[42] *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 2 All E.R. 395; [1985] 1 Lloyd's Rep. 274 QBD (Comm). Approved by the Privy Council in *Motor and General Insurance Co Ltd v Pavy* [1994] 1 W.L.R. 462; [1994] 1 Lloyd's Rep. 607 Privy Council (Trinidad and Tobago).
[43] *Layher Ltd v Lowe* 58 Con. L.R. 42; [2000] Lloyd's Rep. I.R. 510 CA (Civ Div).
[44] *Jacobs v Coster (t/a Newington Commercials Service Station)* [2000] Lloyd's Rep. I.R. 506 CA (Civ Div).

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9–019 In *Alfred McAlpine v BAI (Run-Off) Ltd*[45] the Court of Appeal (pausing only to comment that the law as to the effect of notice clauses was remarkably unsettled) held that late notice would not amount to a breach of the duty of good faith, in the absence of dishonesty. It held that the notice term, which had been held by the Commercial Court not to have been a condition precedent, was "innominate", an important term but not one whose breach would entitle the insurer to repudiate the entire policy. If the breach amounted to a demonstration that the insured had no intention of making a claim, or had serious consequences for the insurer, it could deny liability for the claim (leaving the contract otherwise unaffected). Thus a failure to notify would deny the insurer the chance to investigate the claim, which could be sufficiently prejudicial to allow it to reject the claim. It may also be evidence of a repudiatory breach, the insured no longer wishing to be bound by the policy, although late notice would not have this effect; the giving of notice can only indicate an intention so to be bound. In *McAlpine* the delay in notifying insurers was not sufficiently serious to enable them to reject the claim and the case substantiates the proposition that insurers will have to prove prejudice with considerable certainty. Damages can also be claimed for the breach of an innominate term. In *National Insurance & Guarantee Corp Ltd v Nulty*,[46] there was a breach of a notification condition and the judge held that "it is self-evident that a cold trail always puts an investigator at a disadvantage". The insurer had lost the chance to investigate a claim properly because of the breach of a notification condition and "largely as a matter of impression" he decided to assess that loss of chance at 15 per cent of the policy limit (even though the judge did not find any "very powerful" factors to indicate that the insurer had indeed lost any specific investigation opportunity).

Section 11 of the Insurance Act 2015 introduced a new provision for any term (including a condition precedent) designed to reduce the risk of a particular type of loss, or of loss at a particular time or in a particular place. It will not apply to terms which define the risk as a whole.

Where there is non-compliance with such a term, insurers will not be able to rely on that non-compliance as a defence if the insured can demonstrate that such non-compliance "could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred". This reinforces the idea, therefore, that (in broad terms) the insurer will have to show prejudice as a result of the breach of the condition precedent. However, it would appear that this section does not affect the position in relation to notification condition precedents, since these must be complied with only after a loss has already arisen (and so are not designed to reduce the risk of a particular type of loss).[47] Accordingly, the breach of a notification condition precedent can still be relied on, even if no prejudice is suffered by the insurer.

[45] *Alfred McAlpine v BAI (Run-Off) Ltd* [2000] Lloyd's Rep. I.R. 352.
[46] *Milton Keynes BC v Nulty* [2011] EWHC 2847 (TCC); [2012] Lloyd's Rep. I.R. 453.
[47] At least for property policies. See *Omega Proteins Ltd v Aspen Insurance UK Ltd* [2010] EWHC 2280 (Comm) at fn.134, para.13–085.

Absolute terms

9–020 A time specified by the insurer in absolute terms (i.e. "within 14 days") which is also a condition precedent requires absolute compliance, even though the loss claimed for does not arise until well after the event giving rise to that loss.[48] However, any such condition may require to be drawn specifically to the attention of the insured and would, no doubt, be considered with disfavour by the courts where the insured has not complied but has not been at fault. Thus in *Re Coleman's Depositories Ltd and Life & Health Assurance Association*[49] there was a departure from the rule that an insured's offer to pay premium is accepted by the insurer on his usual terms, and that the contract is made when the offer is accepted, in respect of which both parties are bound, although this perhaps may be distinguished on the grounds that the insurance was provisional, the cover note being a contract distinct from any later contract of insurance, and the conditions usually inserted by the insurer were not expressly incorporated into the cover note. One other explanation which was not canvassed by the Court of Appeal was the proposition that the insurer must draw attention to any strict or onerous requirement upon which he will insist, under his obligation of good faith. Perhaps more relevant today is the court's dislike of such exclusion clauses generally.

Failure to comply with a strict notification period

9–021 The fact is that a failure to comply with a strict notification period contained in a condition precedent, where the insured is clearly unable to comply, which apparently justifies non-payment by the insurer (and retention of the premiums), is an absurdity, since such a clause enables the insurer to have his cake and eat it. It wholly defeats the purpose of the insurance. It has, however, been ameliorated by the change of wording in fraud policies where the time for notification does not begin to run until the insured becomes aware of the fraud, and not when it occurred or when the insured ought to have become aware of it. This is laudable, particularly since the nature of fraud is such that its existence is unlikely to be discovered until well after the event. But it should apply across the board. Statutes such as the Latent Damage Act have gone some way to redress the balance in other fields, but the Unfair Contract Terms Act 1977 was excluded from insurance contracts on an understanding between the insurers and the Government, later contained in a "Statement of Practice" dated 1981 and revised in 1986. The Statement of Practice has now been subsumed into the FCA *Handbook* ICOBS.

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[48] *Cassel v Lancashire and Yorkshire Accident* (1885) 1 T.L.R. 495.
[49] *Re Coleman's Depositories Ltd and Life & Health Assurance Association's Arbitration* [1907] 2 K.B. 798 CA.

Time limits in liability policies

9–022 It is accepted, however, that time limits in liability policies require a higher level of compliance. A liability policy enables the insured to obtain payment up to a specified limit in respect of any liability considered or found to be owing by the insured to a third party, and the keystone for such payment is the event giving rise to the alleged liability. Insurers usually insist on becoming involved with the resolution of the claims following events which may lead to liability, to the extent of appointing their own loss adjusters or investigators to look into the event as quickly as possible after it happens, and notification provisions are therefore important to liability insurers. The insured must therefore draw a line between constantly advising his insurers of every event which could in some way lead to a claim, however unlikely, and notifying his insurers only of events which will clearly give rise to claims. Nevertheless, however tedious it may be, he should err on the side of excessive advice and should request insurers to inform him whether they require further information in each case. A failure by insurers to follow up such requests may lead to an estoppel operating against their later denial of liability.

Temporary cover[50]

9–023 The other problem that may occur concerns temporary cover, which does not specify or necessarily incorporate any terms of the policy intended to be issued. Any claim by the insured will be under the contract as evidenced by the cover note, and the comments above should apply to this situation. However, the insured may be in a stronger position than he would have been had a policy been issued, in that he may not be penalised if he is not made aware of any term as to notification, as in *Re Coleman* (above). Where the cover note states that it is subject to the proposal form, which in turn states that it is subject to the usual conditions of the insurer's policy, the insured will be bound by the insurer's usual terms.[51]

Blanket notifications and depth of notice

9–024 Notice to a party competent to receive it need not be in writing unless specified by the policy. As has been noted, the purpose of giving notice to the insurer is not only to enable the insured to initiate formally the claims process, but also to enable the insurer to consider the loss and take such steps as may be necessary to minimise it so far as they are capable. Thus blithely and vaguely informing the insurer that events have occurred which may give rise to a claim may not constitute good notice, even though it would probably lead to proper notice if the insurer took further steps or investigated it further. Essentially the notice must

[50] See para.6–011.

[51] *Wyndham Rather Ltd v Eagle Star & British Dominions Insurance Co Ltd* (1925) 21 Ll. L. Rep. 214 CA.

bring "home to the mind of a reasonably intelligent and careful recipient such knowledge as fairly, and in a business sense amounts to notice of" the relevant event or loss.

In *Thorman v New Hampshire Insurance Co and Home Insurance Co*[52] the developers of a building, which had suffered damage as a result of the architects' negligence, wrote to the architects in terms that "Serious problems have arisen in this development, inter alia, with regard to cracking and defective brickwork, for which we must hold you responsible" in June 1982. The Court of Appeal held that this letter constituted a general claim which included defective brickwork, as a result of the words inter alia, so that later claims would fall under the policy in force at the date of notification, even though the detail would not become known until much later.[53]

Some policies specify the extent and depth of the notice. "Full particulars" means "the best particulars which an assured can reasonably give".[54] Compliance with such clauses generally requires the insured to provide sufficient particulars to enable the insurer to understand the nature, ambit and essence of the loss. Since particulars are by definition more detailed than notice, a longer time for their provision will be allowed in the absence of a term to the contrary. However, the insured must still take all possible steps to comply. Thus a failure to comply with a provision requiring the insured to provide a detailed account of the loss within 15 days "as the nature and circumstances of the case will permit", in that the insured could have provided a more detailed account than he did, will justify non-payment by the insurer.[55]

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9–025 In *J Rothschild Assurance Plc v Collyear*[56] the insured was required to give "as soon as possible full details in writing of the circumstances which *may* give rise to a claim". The insurers argued that the notice which they had received was purely precautionary and had not identified a specific cause of concern in the absence of actual criticism of the claimant, and was therefore not a valid notification. Rix J accepted that the test of materiality for notice is a weak one. In his view "may" connoted a lesser degree of probability than "likely". In rejecting the insurers' claim, he held that there were circumstances which "may give rise to a claim" when the claim was "at least possible".

The issue of blanket notifications was again explored in *Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd*.[57] The insured was a contractor employed to design and build a block of flats. It took out professional indemnity insurance and the policy was a claims-made policy which provided

[52] *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep. 7; 39 B.L.R. 41 CA (Civ Div).

[53] So too for notification of a fraud, where "it goes without saying that there may be further hidden ramifications beyond the original discovery of the fraud": *Hamptons Residential Ltd v Field* [1998] 2 Lloyd's Rep. 248 at 253; (1998) 95(23) L.S.G. 28 CA (Civ Div).

[54] *Mason v Harvey* 155 E.R. 1585; (1853) 8 Ex. 819 at 820.

[55] *Hiddle v National Fire and Marine Insurance Co of New Zealand* [1896] A.C. 372 Privy Council (Australia).

[56] *J Rothschild Assurance Plc v Collyear* [1998] C.L.C. 1697; [1999] Lloyd's Rep. I.R. 6 QBD (Comm).

[57] *Kajima UK Engineering Ltd v Underwriter Insurance Co Ltd* [2008] EWHC 83 (TCC); 122 Con. L.R. 123.

that "The Insured shall give written notice to the Underwriters as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a claim".

The insured notified insurers of "accommodation pods settling and moving excessively", although no third party claim had been made against it. Akenhead J held that it might be legitimate, for example, for a contractor to notify insurers that one of its design engineers working for it on other projects (as well as the project being insured) has been negligent or incompetent on those other projects and that negligence/incompetence might well have been repeated on the insured project. Accordingly, it was possible for the insured to give notice of a "hornets' nest" or "can of worms" type of circumstance. However, it is not enough for the insured to say: "I think it is possible that there may be some unknown and unidentified design deficiencies in a particular building"—the insured would simply be guessing that there might be circumstances. It is only circumstances of which the insured is actually aware which can be the subject matter of a notification.

9–026 In *McManus v European Risk Insurance Co HF*,[58] the claimant solicitors had notified a claim under their professional indemnity insurance policy after discovering various problems with work carried out by a firm which they had taken over. The claimants had notified 17 claims relating to particular files (which the insurer agreed was a valid notification) but had also made a "blanket notification" after concluding (following an investigation) that every file worked on by the other firm was "more likely than not to contain examples of malpractice negligence". Some 5,000 files had fallen into this category.

Rose J had agreed that that notification was valid because there had been a "substratum of underlying external facts, over and above [the insured's] mere concerns" (see *HLB Kidsons v Lloyd's Underwriters*[59]). However, she had refused to grant a declaration to this effect, on the basis that it would be better to wait and see what claims actually materialised.

On appeal, the Court of Appeal held that although the facts, as presented by the claimant, could in theory provide the basis for a valid notification, there was no firm evidence at this stage of any "persistent failure" or "consistent pattern" and it could not properly be said that samples which had been taken were representative or random. It was also "highly speculative" to assert that the grant of declaratory relief would be of considerable benefit to the parties over and above the existence of the judgment itself. For those reasons, the judge had been entitled (exercising her discretion) to find that the declaration should not be granted.

The issue of block notifications also arose in *Ocean Finance & Mortgages Limited v Oval Insurance Broking Ltd*. The claimant sold secured loans and PPI. It retained the defendant producing broker, which in turn retained the third party defendant placing broker. In November 2008, the FOS Ombudsman handed down a final decision (in a complaint which did not involve the insured) in which it had found that it is a defect in the selling process if a firm fails orally to set out the

[58] *McManus v European Risk Insurance Co hf* [2013] EWCA Civ 1545; [2014] Lloyd's Rep. I.R. 169.

[59] *HLB Kidsons (A Firm) v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] Bus. L.R. 759.

cost of the PPI. The insured then recognised (and told its producing broker) that "if the question was asked whether [the insured] had disclosed the cost of the PPI in addition to the loan the answer in 99 per cent of cases would be that it was disclosed in the paperwork but not orally on the phone". In September 2009 (over a month before expiry of the insured's 2008/09 professional indemnity policy), the FSA (in response to its "serious concerns" regarding how PPI complaints had been dealt with by firms) published CP 09/23, which advised firms how to deal with such complaints. In particular, a full past business review would probably need to be conducted, and this would have identified the defect in the insured's sales process.

The placing broker then made a limited notification of circumstances under the 2008/09 policy of complaints which had already been made and rejected by the insured in relation to PPI. However, neither the placing nor the producing broker made a block notification to insurers of the entirety of the insured's 18,000 sales of PPI policies. When a block notification was subsequently made under the following year (renewal) PI policy, it was not accepted by the insurer, who contended that any block notification should have been made under the 2008/09 year and relied upon a policy term requiring prompt notification of "any circumstances which may give rise to a loss or claim".

Cooke J noted expert evidence which showed "a market awareness of the unwillingness of underwriters to accept block notifications", but said that the pensions mis-selling scandals meant that the concept of such notifications was not unfamiliar and should not have been unfamiliar to brokers. Given that the policy referred to "any circumstances which may give rise to a loss or claim", the brokers had to consider whether there was a "real possibility", as opposed to a remote risk, of a claim. Although the judge accepted that there had been a risk that the insurer would reject a block notification under the 2008/09 year, legal advice would have confirmed that there would have been a strong case that such notification was valid: "It is clear that the 'may' or 'might' criteria creates a low threshold for notification of circumstances.... The risk of not obtaining cover for the ensuing year existed regardless of block notification to the earlier year. However it is not hard to envisage circumstances in which a renewal offer could be sought, obtained, and accepted, with disclosure of material facts prior to expiry of the current year, followed by block notification to the current year policy".

The judge therefore found that both the producing and placing brokers had breached their duties by failing to give the block notification (notwithstanding that the producing broker had played down the risk of multiple claims emerging against the insured to the placing broker): "this is a situation where both brokers were at fault because they each failed to grapple with the question of block notification at all in 2009 when they should have done in the light of the information each had (even though the information was different)". It was held that the insured would have sought legal advice and made a block notification had it been given appropriate advice by the brokers.

Adopting a broad brush approach, the judge held that the placing broker's responsibility for the loss was 30 per cent and the producing broker's responsibility was 70 per cent. The producing broker had already settled with the

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