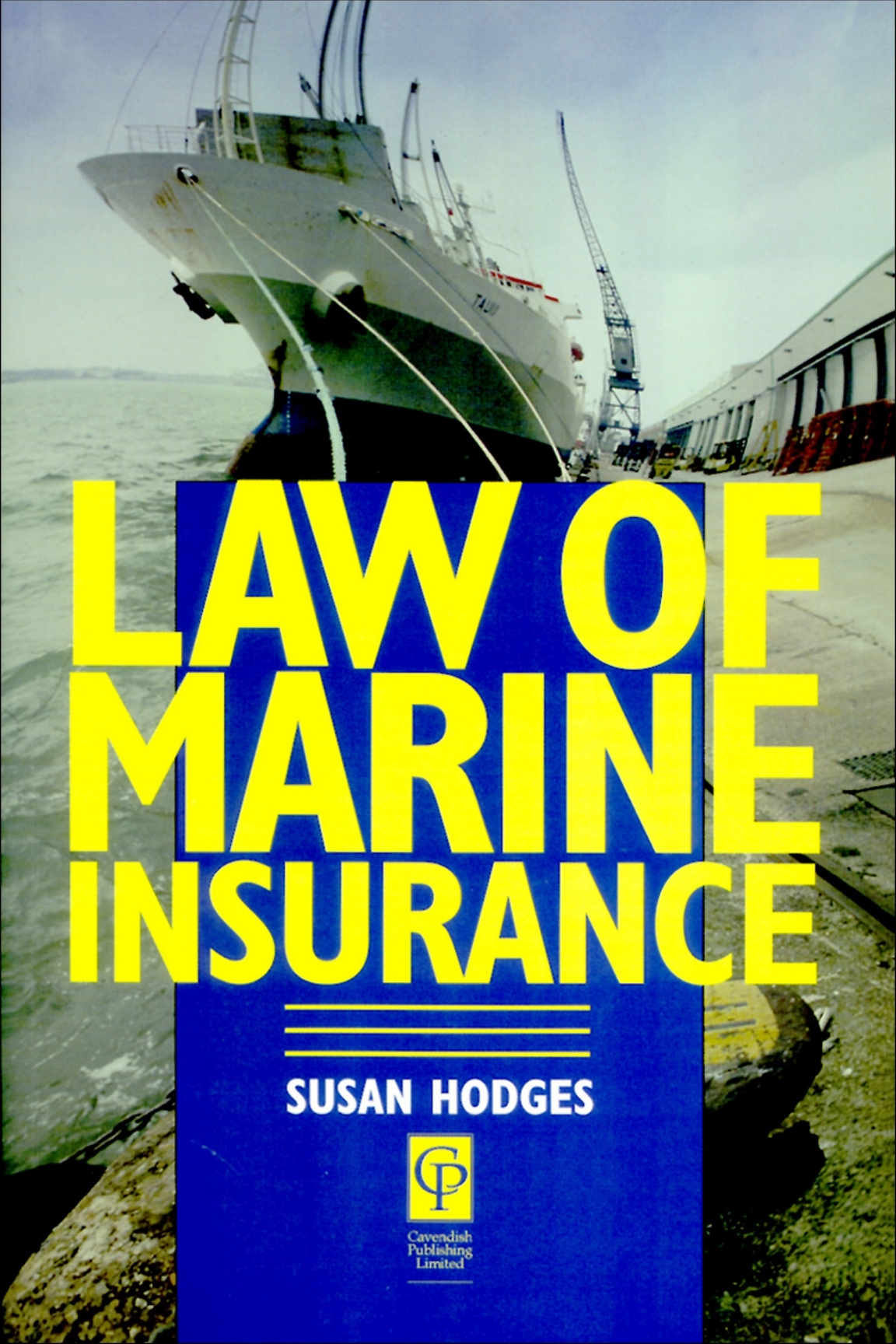

LAW OF MARINE INSURANCE

SUSAN HODGES

Cavendish Publishing Limited

CHAPTER 6

UTMOST GOOD FAITH, DISCLOSURE AND REPRESENTATIONS

UTMOST GOOD FAITH

The very foundation of a contract of marine insurance sits on the principle of *uberrimae fidei*. 'Insurance is a contract *uberrimae fidei*'[1] and this is declared in s 17 of the Act as:[2]

> 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.'

The principle applies to all policies whatever the risk or the subject-matter insured.

'Utmost'

The word 'utmost' suggests that a high degree of good faith is required to satisfy s 17. In *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda)*,[3] Lord Stephenson, though he had reservations as to whether it was possible to go into degrees of good faith, was nevertheless prepared to accept that: 'It is enough that much more than an absence of bad faith is required of both parties to all contract of insurance'. Though he was reluctant to enter into a discussion on the different shades of good faith, he was clear of the minimum standard, that something more than the absence of bad faith is required. However, Mr Justice Steyn in *Banque Keyser Ullmann v Skandia*,[4] remarked that the duty is, '… not only to abstain from bad faith but to observe in a positive sense the utmost good faith …'.

Disclosure and representations

Section 17 is the first of a group of sections falling under the heading 'Disclosure and Representations'. This arrangement of the sections had led some to deduce that the principle applies only to matters relating to disclosure and representations; and that as the duty of disclosure is by, s 18, only applicable 'before the contract is concluded', s 17 should likewise apply only to a pre-contract situation.

---

1 Chalmers, p 24.

2 See also s 86.

3 [1984] 1 Lloyd's Rep 476 at p 525, CA; reversing [1982] 2 Lloyd's Rep 178. Hereinafter referred to as *The CTI* case.

4 [1987] 1 Lloyd's Rep 69 at p 93.

The duty of disclosure is admittedly closely related to the doctrine of utmost good faith. The truth, however, is, as can be seen from the judgment of Lord Ellenborough in *Carter v Boehm*,[5] that the duty of disclosure stems from the principle of utmost good faith and not *vice versa*. But this, however, does not mean that the two notions are synonymous covering the same ground They may well overlap, but as the duty of utmost good faith is the source from which the duty of disclosure and the law of representation originate, it has to be the wider and more potent of the two concepts.

A breach of the duty of utmost good faith is generally established by proof of non-disclosure or misrepresentation. This has somehow, over the years, caused the line between the defences of non-disclosure and of utmost good faith to become less defined. The awakening that they are distinct principles came recently with the cases of *The CTI* case and, in particular, *The Litsion Pride*.[6]

An 'overriding duty'

In *The CTI* case, Lord Justice Kerr, sitting in the Court of Appeal, issued the reminder that the duty of utmost good faith is an 'overriding duty', of which the duty of disclosure is only an aspect thereof. In similar vein, Lord Justice Parker expressed the opinion that:[7] '… the duty imposed by s 17 goes … further than merely to require fulfilment of the duties under the succeeding sections …'. These comments have clarified that s 17 is independent of the duty of disclosure.

There are essentially two main legal issues in *The Litsion Pride*: the first, relating to time, raises the interesting question as to whether the duty of utmost good faith applies before and after the execution of the contract; and the second, as to whether the making of a fraudulent claim constituted a breach of the duty of utmost good faith. On the first issue, Mr Justice Hirst had no doubt whatsoever that the principle of utmost good faith applies before and after the execution of the contract. His observation was that: '… the authorities in support for the proposition that the obligation of utmost good faith in general continues after the execution of the insurance contract are very powerful'. In this sense, the duty of utmost good faith has to be wider than the duty of disclosure as defined in s 18, which states that the assured must disclose to the insurer 'before the contract is concluded' every material circumstance. Unlike s 18, there is no time limit imposed in s 17.

On the second question, Mr Justice Hirst held that: '… the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith is an implied term of the policy …'. This is a demonstration of the fact that s 17 stands in its own right as a complete defence: it clearly does not have to rely on the defences of non-disclosure or misrepresentation for sustenance.

5 (1766) 3 Burr 1905, 1 Wm Bl 593.

6 *Black King Shipping Corpn v Massie* [1985] 1 Lloyd's Rep 437, QBD.

7 [1984] 1 Lloyd's Rep 476 at p 512, CA.

Reciprocal duties of utmost good faith

The words 'by either party' in s 17 have made it patently clear that the duty of utmost good faith is reciprocal. This principle of mutuality is adopted from the common law. If further confirmation be required, reference should be made to *Banque Keyser Ullmann v Skandia*,[8] where Lord Justice Slade, on appeal, remarked that:[9] '… the obligation to disclose material facts is a mutual one imposing reciprocal duties on insurer and insured. In the case of marine insurance contracts, s 17 in effect so provides'.

'May be avoided'

The legal effect of a breach of utmost good faith is spelt out in the words 'the contract may be avoided by the other party'. Here, the operative word is 'may'. Avoidance in s 17 means 'avoidance *ab initio*'.[10] As no other remedy, such as a right to damages, is sounded in s 17, avoidance of the contract is the only remedy available to the assured.

To conclude this discussion of the doctrine of utmost good faith, the very recent case of *The Star Sea*[11] should be referred to, for in there can be found a concise summary of the salient features of s 17 drawn out by Mr Justice Tuckey, who said:

> 'Three things are of note. First, the duty is not limited to the pre-contract stage (compare ss 18 – 21). Second, there is no requirement of materiality (*ditto*). Third, the only specified remedy for breach is avoidance. The courts have held that damages cannot be awarded for such a breach.'

DUTY OF DISCLOSURE

The duty of disclosure laid down in ss 18 and 20 is derived from s 17, the duty of utmost good faith. Section 18 relates to disclosure by the assured, and s 19 by agents effecting the insurance.[12] The underlying basis for the principle of

8 [1987] 1 Lloyd's Rep 69 at p 93, QBD.

9 [1988] 2 Lloyd's Rep 513 at p 544, CA.

10 *Per* Hirst J in *The Litsion Pride* [1985] 1 Lloyd's Rep 437 at p 515. A long time ago, it was thought that, as in the case of fraud, a breach of the duty of utmost good faith rendered the contract void: *Carter v Boehm* (1766) 3 Burr 1905.

11 *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd & La R Reunion Europeene* [1995] 1 Lloyd's Rep 651, QBD.

12 Knowledge of a material fact by his agent will be imputed to the assured. It is unnecessary to devote a section on the duties of a broker, as the law of disclosure of material facts basically applies in the same way to the agent as it is to the principal, the assured. For an excellent account of the rights and liabilities of a principal by the knowledge of his agent, see *Blackburn, Low & Co v Vigors* (1887) 12 QBD 531, HL. Other cases dealing with the duty of disclosure by agents effecting insurance are: *Lynch v Dunsford* (1811) 14 East 494; *Fitzherbert v Mather* (1785) 1 TR 12; *Gladstone v King* (1813) 1 M & S 35; *Proudfoot v Montefiore* (1867) Law Rep 2 QB 511; *Stribley v Imperial Marine Insurance Co* (1876) 1 QBD 507; *Sawtell v Loudon* (1814) 5 Taunt 359; *Morrison v Universal Insurance Co* (1872) LR 8 Exch 40; *Blackburn v Haslam* (1888) 21 QBD 144; and *Wilson & Others v Salamandra Assurance Co of St Petersburg* (1903) 8 Com Cas 129.

disclosure was, as early as 1766, clarified by Lord Mansfield in the celebrated case of *Carter v Boehm*.[13] He began first by noting that, 'Insurance is a contract upon speculation' and then proceeded to say that: 'Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary ...'.[14]

Non-disclosure may be fraudulent or innocent. A fraudulent concealment of a material fact would obviously not only constitute a breach of the duty of utmost good faith, but also of the duty of disclosure. This explains why an eminent author has described it as a 'species of fraud'.[15] But not all non-disclosures are fraudulent: an assured may, by mistake or inadvertence, and without any fraudulent intention, conceal material information which he ought to have disclosed. An innocent concealment of a material fact, though it is not an infringement of the duty of good faith, will nonetheless entitle the insurer to avoid the contract. Although the suppression may be perfectly innocent, yet still the underwriter is misled. Furthermore, the risk run is really different from the risk understood and intended to be run, at the time of the agreement. There does not have to be fraud to constitute a breach of the duty of disclosure.[16] Thus, even an honest assured could, on the ground of non-disclosure, be denied of the right of recovery, if his insurer chooses to avoid the contract.

The duty of disclosure is a positive and not a negative duty; it is for the assured to take the initiative to reveal any material circumstance to the insurer, not for the insurer to inquire.[17]

It is necessary to mention that the right conferred to the insurer by s 18 to avoid the policy is based purely on the ground of a breach of the duty of disclosure. There is nothing in the sections, or in common law, requiring a causal link to be shown that the loss was caused by, or be related to, the fact of the undisclosed material circumstance. The question of the cause of loss does not arise when non-disclosure is pleaded as a defence.[18]

When to disclose

On a strict interpretation of s 18, the duty to disclose every material circumstance must take place 'before the contract is concluded'. According to

13 (1766) 3 Burr 1905 at p 1910.

14 Scrutton LJ in *Hoff Trading Co v Union Insurance Society of Canton Ltd* (1929) 45 TLR 466 at p 467, CA added that as '... the intending assured, knew everything, and the underwriter, the other party, knew nothing ... it was essential that the two parties should be put on equal terms, and it was the duty of the assured to disclose …'.

15 In *Greenhill v Federal Insurance Co* [1927] 1 KB 65 at p 77, Scrutton LJ cited the following statement from Park's *Marine Insurance* with approval: 'The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract'.

16 See *Joel v Law Union & Crown Insurance* [1908] 2 KB 863, CA, where the same principle was applied to a life policy. The assured had foolishly, but not fraudulently concealed a material fact; *Hoff Trading Co v Union Insurance Society* of Canton Ltd (1929) 45 TLR 466, CA, where the assured was unable to claim under the policy even though he did not consciously or deliberately over-value the ship.

17 A disclosure to the defendant's solicitor of the existence of a material circumstance is not notice of it to the defendant. See *Tate v Hyslop* (1885) 15 QBD 368.

18 See *Seaman v Fonereau* (1743) 2 Stra 1183.

s 21, 'A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not …'.[19]

A time limit is set by the words 'before the contract is concluded'. They give the impression that any material circumstance which comes to the knowledge of the assured *after* the contract is concluded need not be disclosed. The view that there is no continuing duty of disclosure was endorsed by a host of cases,[20] the most authoritative of which is *Niger Co Ltd v Guardian Assurance Co Ltd*,[21] where Lord Sumner in the House of Lords pointed out that, '... it would be going beyond the principle to say that each and every change in an insurance contract creates an occasion which a general disclosure becomes obligatory …'. It was thought that once the duty had 'attached' there was no further duty of disclosure; whatever events may subsequently happen, the assured need not communicate to the underwriters.

As was seen, *The Litsion Pride*,[22] albeit at first instance, has categorically held that the obligation of utmost good faith continues even *after* the execution of the contract. Bearing this in mind, and working from the premise that s 17 'overrides' or prevails over s 18, it could be argued that s 17 has extended the duty of disclosure beyond the time limit imposed by s 18. The effect of s 17 on the duty of disclosure was described by Mr Justice Hirst as follows:[23]

> '... it seems to be manifest that, as part of the duty of utmost good faith, it must be incumbent on the insured to include within it all relevant information to him at the time he gives it; and in any event the self-same duty required the assured to furnish to the insurer any further material information which he acquires subsequent to the initial notice as and when it comes to his knowledge, particularly if it is materially at variance with the information he originally gave.'

As the assured in this case had, during the currency of the policy, failed to notify the insurer with 'relevant information' of the voyage,[24] they were held to be in breach of the duty of utmost good faith. It is to be noted that, by reason of the War Risk Trading Warranties, the assured were required to inform the insurers as soon as practicable of voyages to additional premium areas.

The above-cited remarks by Mr Justice Hirst seem to suggest that the duty of disclosure is a continuing one. If this is the case, then the words 'before the contract is concluded' in s 18 are superfluous. This perhaps explains the anxiety

19 See *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179, Ex Ch where the non-disclosure of a material fact coming to the knowledge of the assured after the acceptance of the risk, but before the execution of the policy was held not to be a concealment so as to avoid the policy.

20 See *Cory v Patton* (1874) LR 9 QB 577; *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179; *Ionides v Pacific Fire and Marine Insurance Co* (1871) LR 6 QB 674 at p 684; *Willmott v General Accident Fire & Life Assurance Corpn* (1935) 53 Ll L Rep 156; and *Berger v Pollock* [1973] 2 Lloyd's Rep 442.

21 (1922) 13 Ll L Rep 75, HL.

22 [1985] 1 Lloyd's Rep 437, QB.

23 *Ibid*, at p 512.

24 For example, her ETA, destinations etc, are likely to change as she proceeded with the voyage.

felt by Lord Jauncey in *Banque Keyser v Skandia*,[25] who was keen to restrict the scope of the duty of disclosure in accord with the terms of s 18. 'There is', he said, 'in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract ... subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim'. Whether these are the only two exceptions to the general rule is not totally clear. But what is disturbing is that the range of information envisaged by the last part of this sentence is indeed very wide.

There are two points of view on the subject, both of which are of vital importance to the position of the assured. Needless to say, before an assured can comply with the duty of disclosure he has first to be made absolutely clear of the extent of his obligation. Until such a time as this matter is directly and conclusively clarified by a higher court, an assured would be well advised to take heed of the fact that the duty of utmost good faith is overriding. It is worthwhile to bear in mind that utmost good faith is the fountain-head from which all his other duties flow. So as not to compromise his position, he ought to disclose all 'material' circumstances and 'relevant' facts which can possibly affect the risks insured, coming to his knowledge before and after the conclusion of the contract.

Material circumstance

The duty imposed by s 18(2) on an assured to disclose 'every material circumstance' which is known to him places him in a dilemma of having to decide what information bearing upon the risk he ought to disclose.[26] The statutory requirement is that only 'material circumstances' which would 'influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk' need be disclosed.[27] It is the assured who has to decide, before the conclusion of the contract, what information he must disclose.[28]

The question whether a particular circumstance is or is not material resolves itself into one of pure fact. An undisclosed fact may be material in one case and not in another; it could be material at one period of time but not in another. As the matter is purely one of fact, it would be a futile exercise to examine all the

25 [1990] 2 Lloyd's Rep 377, HL.

26 When an insurer seeks to avoid a policy for non-disclosure, the arguments will naturally focus on the particular item of information which has been withheld. Seen from hindsight, this can be of little help or consolation to an assured who has to decide in advance which item of information he should disclose to the insurer. He could of course err on the side of caution and disclose everything to the insurer. But in the commercial world, this is not a practicable course to take. See *Ionides & Another v Pender* (1874) LR 9 QB 531 at p 539: '... it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required'.

27 See also s 20(2).

28 Note s 18(3) which spells out the circumstances which need not be disclosed.

cases which have held a particular circumstance material or not material.[29] This part will therefore examine only those aspects of the law which are either controversial or have been recently subjected to judicial scrutiny.

Materiality and avoidance

The test of materiality and the related question pertaining to the legal effect of non-disclosure are the two main topics in this area of law which have recently engendered a great deal of debate. For a period of time, it was thought that the matter relating to materiality and avoidance of the contract on the ground of non-disclosure had been put at rest by the Court of Appeal in *The CTI* case. These issues, however, were recently resurrected in *Pan Atlantic Insurance Co Ltd and Another v Pine Top Insurance Co Ltd*,[30] where the House of Lords finally resolved what it has regarded a 'long-standing controversy' with a history of more than 200 years.[31] Before proceeding to discuss the ruling of the House, it is necessary for a fuller understanding of the subject briefly to mention the law, laid down by *The CTI* case, as it stood before *The Pine Top* case.

The Court of Appeal in *The CTI* case held that there was only one test for determining the effect of non-disclosure of a material fact: The yardstick laid down by s 18(2) is the hypothetical, not the actual, or particular, insurer. It was held that a circumstance was material only if its disclosure would have *decisively* influenced the mind of a prudent insurer. Whether the actual or particular insurer was or was not induced by the undisclosed fact or misrepresentation to enter into the contract was considered irrelevant. The case decided that there was only one criterion which needed be applied. Materiality and the right of avoidance of the contract were both determined by proof of an actual effect of the undisclosed information on a prudent insurer. The principle of law propounded was that if the undisclosed information would have led a prudent insurer either to reject or to accept the risk on more onerous terms, that alone was sufficient to confer upon the particular insurer the right to avoid the contract. Whether the particular insurer himself was or was not actually induced by the undisclosed information to enter into the contract was considered of no consequence.

29 For a comprehensive study of examples of material circumstances, see Ivamy, pp 53-66. Excessive over-valuation of a ship is, of course, a classic example of non-disclosure of a material fact. As the law in this area is now well settled, it is unnecessary to go into the cases: see, eg, *Lewis v Rucker* (1761) 2 Burr 1167; *Haigh v De La Cour* (1812) 3 Camp 319; *Barker v Janson* (1868) LR 3 CP 303; *North of England Association v Armstrong* (1870) LR 5 QB 244; *Ionides v Pender* (1874) LR 9 QB 531; *Woodside v Globe Marine Insurance Co* [1896] 1 QB 105; *Thames & Mersey Insurance Co v Gunford Ship Co* [1911] AC 529, HL; *Visscherij Maatschappij v Scottish Metropolitan Assurance Co* (1922) 27 Com Cas 198, CA; *Mathie v The Argonaut Marine Insurance Co Ltd* (1925) 21 Ll L Rep 145; *Loders & Nucoline Ltd v Bank of New Zealand* (1929) 33 Ll L Rep 70; *Piper v Royal Exchange Assurance* (1932) 44 Ll L Rep 103, KBD; *Williams v Atlantic Co Ltd* [1933] 1 KB 81, CA; *Willmott v General Accident Fire & Life Assurance Corpn Ltd* [1935] 53 Ll L Rep 156; *Slattery v Mance* [1962] 1 Lloyd's Rep 60; and *Berger & Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442. Most of these incidents of scuttling of grossly over-valued ships have occurred at a time when there was a recession in the market. Some of these cases are discussed in relation to the defence of wilful misconduct: see Chapter 10.

30 [1994] 2 Lloyd's Rep 427, HL. Henceforth referred to as *The Pine Top* case.

31 *Per* Lord Mustill, *ibid*, at pp 432 and 442.

Contrary to *The CTI* case, *The Pine Top* case has declared that there is not one, but two distinct stages to the inquiry. The first is to determine the *materiality* of the circumstance, and the second, the right of the insurer to *avoid* the contract. It is relevant, at the outset, to note that there is no difference between an allegation of non-disclosure and of misrepresentation: the same criterion of materiality is laid down in ss 18(2) and 20(2). Furthermore, the legal effect is also the same: In both cases, the insurer may avoid the contract.[32] The ensuing discussion of the ruling of the House is, therefore, relevant to both non-disclosure and misrepresentation, but for convenience this discussion will only refer to the former.

Test for materiality

It has, first and foremost, to be shown that the undisclosed fact is material in accordance with the terms laid down in s 18(2). That materiality must be judged by the response of a hypothetical prudent insurer is clear, for if this was not the case, the actual underwriter could, after the risk has matured, convince himself and the court that he would have rejected the risk or increased the premium. But how this prudent insurer test is to applied is a question which has caused some concern.

The hypothetical prudent insurer

The real problem was framed by Lord Goff thus: 'Is the insurer required to show that full and accurate disclosure would have led the prudent insurer either to reject the risk or at least to have accepted it on more onerous terms?' This is referred to as the 'decisive influence test'.

Section 18(2) is capable of two interpretations. One interpretation, which relies on the 'decisive influence test', requires proof that a prudent insurer would be decisively influenced by the undisclosed fact. The other was referred to by Lord Mustill as the lesser standard of the 'impact on the mind of the prudent underwriter test'. By the latter criterion, any information which a prudent insurer would have wanted to know or take into account has to be disclosed.

The decisive influence test adopted by *The CTI* case was roundly rejected by the majority of the House in *The Pine Top* case.[33] Lord Goff, relying on a literal interpretation of the wording of s 18(2), held that they:

> '... denote no more than an effect on the mind of the insurer in weighing up the risk. The subsection does not require that the circumstance in question should have a decisive influence on the judgment of the insurer.'

'Influence' and 'whether'

Treating the matter as simply one of statutory interpretation, both Lord Goff and Lord Mustill pointed to the fact that the legislature had left the word 'influence' unadorned. The latter was of the opinion that the legislature could have easily inserted a phrase such as 'decisively influence', 'conclusively

32 See ss 18(1) and 20(1).

33 With Lord Templeman and Lord Lloyd of Berwick dissenting on this issue.

influence', 'determine the decision' and the like if it had intended to promote the decisive influence test. 'Influence the mind', said Lord Mustill, is not the same as 'change the mind'.

Emphasis was also placed on the word 'whether', which Lord Mustill had decided:[34] '... clearly denotes an effect on the thought processes of the insurer in weighing up the risk, quite different from words which might have been used but were not, such as "influencing the insurer to take the risk".' Lord Goff took the approach that: 'A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium.'

It is apparent from the above remarks that the decisive influence test is not to be applied. All that the assured need disclose is information which is objectively material; there is nothing in s 18(2) to suggest that materiality is to be confined to such circumstances as would definitely have changed the mind of a prudent underwriter.

Right of avoidance

The Pine Top case, after rejecting the decisive influence test, proposed an additional obstacle for the insurer: He has now not only to show that the undisclosed information is material in the sense described above, but also that he was in fact induced to enter into the contract on the relevant terms. The latter requirement, which was not adopted in *The CTI* case,[35] is referred to as the 'actual inducement test'.

The 'actual inducement' test

The House unanimously agreed that even though actual inducement is not expressly stipulated as a requirement by s 18(2), nonetheless it is an implied term of the contract. Lord Mustill phrased the issue as, '... the need, or otherwise, of a causal connection between the misrepresentation or non-disclosure and the making of the contract of insurance'. After conducting a thorough examination of the legal position, he concluded that:[36]

> '... there is to be implied in the 1906 Act a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using "induced" in the sense in which it is used in the general law of contract.'

If the non-disclosure or misrepresentation did not actually induce the making of the contract, the insurer will not be allowed to rely on it as a ground for avoiding the contract. Lord Templeman's sentiments were:[37]

34 [1994] 2 Lloyd's Rep 427 at p 440, HL.

35 *Ibid*, at p 431, Lord Goff explained that it was thought in *The CTI* case that actual inducement was not required because it was already incorporated in the decisive influence test, though attributing it not to the actual insurer, but to the hypothetical prudent insurer.

36 [1994] 2 Lloyd's Rep 427 at p 452.

37 *Ibid*, at p 430.

> 'The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as result of non-disclosure.'

It is evident from *The Pine Top* case that an insurer does not now have an unfettered or invariable right to avoid the contract. First, he has to prove the materiality of the undisclosed information, and secondly, that he was induced to enter the contract on the relevant terms. Lord Mustill has summed up the two stages of the legal inquiry as follows:[38]

> 'The materiality or otherwise of a circumstance should be a constant; and the subjective characteristics, actions and knowledge of the individual underwriter should be relevant only to the fairness of holding him to the bargain if something objectively material is not disclosed.'

The tests for materiality is *not* the same as that for inducement. If the insurance market had found the law as proposed in *The CTI* case 'remarkably unpopular',[39] they must surely now find the ruling of the House in *The Pine Top* case even more so: The two stages to the inquiry have rendered their burden of proof much more onerous.

REPRESENTATIONS

Like the duty of disclosure, the principles relating to representations made by an assured also stem from the doctrine of *uberrimae fidei* laid down in s 17. There are similarities and differences between the principles relating to disclosure and representation. As pointed out earlier, the tests for materiality and the legal effect of non-disclosure and misrepresentation are the same; the criterion of the hypothetical prudent insurer employed to determine the materiality of a fact or circumstance, and its twin, the 'actual inducement test' used for determining the right of avoidance, both enunciated by *The Pine Top* case,[40] apply to non-disclosure as well as misrepresentation.

Section 20, captioned as 'Representations pending negotiation of contract', defines the various types of representations and the legal effect of a misrepresentation. Representations are statements made by the assured or his agent, 'during the negotiations for the contract, and before the contract is concluded'.[41] The time when a contract is deemed to be concluded is spelt out in s 21.

Representations may be made orally or in writing. They are generally made spontaneously in answers to questions put to the assured by his insurer. If an assured is asked a question, he must answer truthfully regardless of the materiality of the question to the risk. If he gives a false or untruthful answer with the intention of deceiving the insurer, though it may not be a material fact, this would constitute a breach of the duty of utmost good faith, the effect of

38 *Ibid*, at p 442.

39 *Per* Steyn J, *The Pine Top* case [1993] 1 Lloyd's Rep 496 at p 505, CA.

40 [1994] 2 Lloyd's Rep 427, HL.

41 A disclosure of a material fact must also be made 'before the contract is concluded': s 18(1).

which would render the contract voidable at the option of the insurer under s 17.[42]

Unlike an express warranty, which must be 'included in, or written upon, the policy',[43] a representation is not a term of the contract of insurance, but a statement made during negotiations to induce the insurer to enter into the contract. By painting a favourable picture of the risk, the intention of the assured is to persuade the insurer to accept the risk, or to accept the risk at a lower premium. Non-disclosure, on the other hand, is a concealment of facts which tend to show the risk to be greater than it would otherwise appear.

Types of representations

Section 20(3) may initially give the impression that there are two types of representations, namely, as to a matter of fact and as to a matter of expectation or belief. Templeman, however, holds the view that there are three types of representation: a representation as simply of a fact; of a material fact; and a representation of expectation or belief.[44]

Section 20(1) states: 'Every material representation made by the assured … must be true. If it be untrue the insurer may avoid the contract.' There are two main features to this statement. First, the materiality of the representation has to be determined, and secondly, the meaning of the term 'true' has to be ascertained.

The test for materiality spelt out in s 20(2) is the same as that for non-disclosure of a material fact. It is to be determined by using the yardstick of a prudent insurer. If the representation is not material, then it should have no legal effect. But should it be found to be material, in the sense that it would influence the mind of a hypothetical prudent insurer, then the next step of the inquiry is to ascertain whether the representation of fact is 'true'. For this, reference to s 20(4) has to be made: Whether a material representation is or is not true depends on whether it is 'substantially correct', that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer. The prudent insurer test is applied twice: First, as to the materiality of the representation, and then as to the truth of the representation. The classic authority on the subject of misrepresentation is *Pawson v Watson*,[45] where it was represented that the ship carried 12 guns and 20 men when in fact she carried only nine guns, six swivels, 16 men, and nine boys. As this was held to be substantially correct, the insurer was unable to avoid the contract.

Whether there is a third category of representation, simply of fact, is, it is submitted, with due respect, doubtful, for it could be argued that that which is not material cannot possibly induce the insurer to enter into the contract or to enter the contract on different terms. In order to avoid the contract, the insurer

42 Section 17.

43 Section 35(2).

44 Templeman, *Marine Insurance, Its Principles and Practice* (1986, 6th edn), p 34; hereinafter referred to simply as 'Templeman'.

45 (1778) 2 Cowp 785. *Cf De Hahn v Hartley* (1786) 1 TR 343.

must now satisfy the actual inducement test. It is contended that the purpose of s 20(4) is not to create a new class of representation, that of fact, but to define the meaning of the word 'true' when applied in relation to a material representation as set out in s 20(1). Section 20(4) has to be read with ss 20(1) and 20(2).[46] Moreover, it has always been said that the single feature which distinguishes a representation from a warranty is that a warranty does not have to be material to the risk: This is made clear by s 33(3).

A representation as to a matter of expectation or belief is true if it be made in good faith.[47]

The effect of a misrepresentation is the same as that for non-disclosure: the insurer may avoid the contract if the representation turns out to be untrue. The insurer has now to prove that he was actually induced to enter the contract.

46 The word 'material' should perhaps be read before the word 'fact' in s 20(4).

47 Section 20(3).