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COLINVAUX'S LAW OF INSURANCE IN HONG KONG

FOURTH EDITION

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SWEET & MAXWELL

TABLE OF CONTENTS

<i>Preface</i>	vii
<i>Acknowledgement</i>	ix
<i>Table of Cases</i>	xxxv
<i>Table of Legislation</i>	ccxxxi

CHAPTER 1 CONTRACT OF INSURANCE

1. Definition of Insurance	1.001
(a) Need for a general definition	1.001
(b) Meaning of "insurance"	1.002
(c) Insurer's obligation	1.007
(d) Uncertain event	1.008
(e) Marine and non-marine insurance	1.011
2. Formal Requirements for Insurance Contracts	1.012
(a) Background	1.012
(b) Life policies	1.013
(c) Policies on real property	1.014
(d) Liability policies	1.015
(e) Policies on goods	1.016
(f) Content of policy	1.017
(g) Rectification of policy	1.018
3. Formation of Insurance Contracts	1.019
(a) Ordinary contractual principles	1.019
(b) Offer	1.020
(c) Acceptance	1.022
(d) Formation and increase of risk	1.025
(e) Commencement of the insurer's liability	1.027
4. London Market Procedures	1.030
(a) The original practice	1.030
(b) Background to reform in England	1.031
(c) The Market Reform Contract	1.032
(d) Slip and policy	1.033
(e) Potential difficulties arising from the Lloyd's procedure	1.034
(f) Placement arrangements used in the London market	1.040
5. Renewal of Insurance Contracts	1.043
(a) Significance of renewal	1.043
(b) Agreement as to renewal	1.044

(c) Renewal of life policies	1.045
(d) Terms of renewal	1.046
6. Temporary Cover	1.047
(a) Significance of temporary cover	1.047
(b) Creation of temporary cover	1.048
(c) Issue of temporary cover by agents	1.051
(d) Content of temporary cover	1.052

CHAPTER 2 CONFLICT OF LAWS

1. Jurisdiction of the Hong Kong Courts	2.001
(a) Legal structure	2.001
(b) Service of writ in Hong Kong	2.002
(c) Service of writ outside jurisdiction	2.003
(d) Discretion	2.004
(e) Insurance illustrations	2.005
(f) Negative declaratory relief	2.006
(g) Anti-suit injunctions	2.007
2. Proper Law	2.008
(a) Legal framework	2.008
(b) Proper law of insurance contracts	2.013

CHAPTER 3 CONSTRUCTION OF THE POLICY

1. Principles of Construction	3.001
(a) The context of construction	3.001
(b) Significance of rules of construction	3.002
(c) Significance of precedent	3.003
2. The Intentions of the Parties	3.004
(a) Early approaches to construction	3.004
(b) The modern test	3.005
(c) Reasonableness and business common sense	3.006
(d) Subsequent conduct as an aid to construction	3.007
3. The Importance of the Factual Matrix	3.008
(a) The principle	3.008
(b) Illustration	3.009
4. Contra Proferentem	3.010
(a) The nature of the contra proferentem principle	3.010
(b) Limits on contra proferentem	3.011
(c) Policy prepared by broker	3.012
(d) Contra proferentem and exclusions from insurance coverage	3.013

5. Specific Rules of Construction	3.014
(a) Technical words	3.014
(b) Departure from technical words	3.015
(c) Precedent	3.016
(d) Context	3.017
(e) <i>Ejusdem generis</i>	3.018
(f) Presumption of validity	3.019
(g) Custom	3.020
(h) Superfluous words	3.021
6. Technical Rules of Construction	3.022
(a) Successive documents	3.022
(b) Size of print	3.023
(c) Recitals, headings and schedules	3.024
(d) Added words	3.025
(e) Deletions	3.026
7. Incorporation	3.027
(a) Achieving incorporation	3.027
(b) Weight of incorporated terms	3.028
(c) Parol evidence rule	3.029
8. Judicial Control of Policy Terms	3.030

CHAPTER 4 INSURABLE INTEREST

1. Significance of Insurable Interest	4.001
(a) Need for insurable interest	4.001
(b) History of insurable interest	4.002
2. Principle of Indemnity	4.003
(a) Principle and its exceptions	4.003
3. Present Regulatory Structure	4.004
(a) Application of legislative and common law principles	4.004
(b) Effects of payment on policy made without interest	4.005
(c) Interest need not be stated	4.006
4. Meaning of Insurable Interest	4.007
(a) General definition	4.007
(b) Pecuniary interest	4.008
(c) Absence of any intention to gamble	4.009
(d) Limited interests	4.010
(e) Expectancies	4.011
(f) Moral obligations	4.012
5. Insurance Effected by an Agent	4.013
(a) Issues raised	4.013

TABLE OF CONTENTS

(b) Policy for assured or for assured and third party	4.014
(c) Undisclosed agency	4.015
(d) Ratification	4.016
(e) Rights and liabilities of the agent	4.018
6. Reform of the Law on Insurable Interest	4.019
(a) The need for reform	4.019
(b) Moves in the UK	4.020
(c) The Insurable Interest Bill 2016	4.021
(d) The Insurable Interest Bill 2018	4.022

CHAPTER 5 RISK

1. Commencement and Duration of Risk	5.001
(a) Commencement of cover	5.001
(b) Termination of risk	5.005
(c) Goods in transit policies	5.010
(d) Time of loss	5.016
2. Increase of Risk	5.021
(a) Increase of risk and change of risk	5.021
(b) Common law principles	5.022
(c) Contractual provisions against increase of risk	5.023
(d) Change of risk	5.029
3. Proximate Cause	5.034
(a) Nature of the doctrine	5.034
(b) Burden of proof	5.035
(c) Ascertaining proximate cause of a loss	5.036
(d) Effect of express wording	5.037
(e) Losses arising from concurrent causes	5.047
4. Illegality and Misconduct	5.052
(a) Significance of illegality	5.052
(b) Insurance policies prohibited by statute	5.053
(c) Unlawful conduct contemplated by the policy	5.054
(d) Insurance of tainted subject matter	5.055
(e) Post-contract illegality vitiating the policy	5.056
(f) Loss following assured's misconduct	5.057
5. Public Policy	5.064
(a) The legal test	5.064
(b) Nature of the turpitude	5.064
(c) Loss following assured's negligence	5.066
	5.072

CHAPTER 6 UTMOST GOOD FAITH

1. History and Nature of the Duty	6.001
(a) Good faith in the common law	6.001
(b) Good faith in insurance law	6.002
(c) The scope of the utmost good faith principle	6.003
2. The Assured: Pre-Contractual Duty: Disclosure and Representations	6.004
(a) The scope of the duty of fair presentation	6.004
(b) Duty of disclosure	6.005
(c) Misrepresentation	6.010
(d) Causation	6.023
3. The Assured's Pre-Contractual Duty: Materiality and Inducement	6.024
(a) General definition	6.024
(b) Limb 1: The prudent insurer test	6.025
(c) Limb 2: Inducement	6.031
(d) Date of assessment of materiality and inducement	6.041
4. The Assured's Pre-Contractual Duty: Risk Presentation and Agency	6.044
(a) Relevance of the knowledge of the assured's agent	6.044
(b) Insurance effected by an agent	6.049
5. The Assured's Pre-Contractual Duty: Material Facts	6.054
(a) Classification of material facts	6.054
(b) Materiality from an aggregation of facts	6.055
(c) Moral hazard	6.056
(d) Physical hazard	6.071
6. The Assured's Pre-Contractual Duty: Facts Which Need Not Be Disclosed	6.073
(a) Circumstances which diminish the risk	6.073
(b) Circumstances which the insurer knows or is presumed to know	6.074
(c) Waiver by the insurer	6.078
(d) Facts covered by an express warranty	6.084
(e) Discrimination	6.085
7. The Assured's Pre-Contractual Duty: Remedies	6.086
(a) Right to avoid	6.086
(b) Damages	6.090
(c) Contracting out of remedies	6.093
(d) Exclusion of misrepresentation	6.096
(e) Loss of right to avoid	6.101
(f) Waiver	6.102
(g) Estoppel	6.111

TABLE OF CONTENTS

(h) Effect of actual avoidance	6.112
(i) Damages where right to avoid is lost	6.113
8. The Assured's Post-Contractual Duty of Utmost Good Faith	6.114
(a) Duty terminates at the date of contract	6.114
(b) A general continuing duty of good faith?	6.119
(c) Utmost good faith and subscription contracts	6.129
(d) Declaration policies and good faith	6.130
9. The Insurer's Pre-Contractual Duty of Utmost Good Faith	6.135
(a) Bilateral nature of duty	6.135
(b) Scope of the insurers' duty	6.136
(c) Regulatory controls: the Code of Conduct for Insurers	6.137
(d) Remedies for breach	6.140
(e) Causation	6.141
10. The Insurers' Post-Contractual Duty: Of Utmost Good Faith	6.142
(a) Existence of the duty	6.142
(b) Disclosure of terms	6.143
(c) Duty to warn assured of right to refuse to pay	6.144
(d) Claims handling	6.145
(e) Exercise of discretion	6.146
(f) Avoidance	6.147
(g) Duty of care	6.148

CHAPTER 7 TERMS OF INSURANCE CONTRACTS

1. Terminology	7.001
2. Insurance Conditions	7.002
(a) Subject matter of conditions	7.002
(b) Conditions precedent to the validity of the policy or to the attachment of the risk	7.003
(c) Conditions precedent to the insurer's liability	7.005
(d) Other conditions	7.007
(e) Summary of the present law	7.012
(f) Creation of conditions precedent	7.013
(g) Construction of conditions precedent	7.018
(h) Burden of proof	7.019
(i) Waiver of breach of condition	7.020
3. Insurance Warranties	7.023
(a) Nature of a warranty	7.023
(b) Creation of warranties	7.023
(c) "Basis of the contract" clauses	7.026
	7.032

TABLE OF CONTENTS

xvii

(d) Scope of warranties	7.035
(e) Breach of warranty	7.040
(f) Waiver of breach	7.049

CHAPTER 8 PREMIUM

1. Payment of Premium	8.001
(a) Meaning of "premium"	8.001
(b) Forms of payment	8.002
(c) Payment to an agent	8.003
(d) Payment and commencement of the risk	8.004
(e) Effect of payment on issue of policy	8.005
(f) Mutual insurance	8.006
2. Amount of Premium	8.007
3. Renewal Premiums and Days of Grace	8.008
(a) Effect of renewal	8.008
(b) Reinstatement of life policy following lapse	8.009
4. Consequences of Non-Payment	8.010
(a) Possible remedies	8.010
(b) Actions for the premium	8.011
(c) Rejection of claims	8.012
(d) Forfeiture or determination for breach	8.013
(e) Late payment under marine policies	8.017
5. Return of Premium	8.018
(a) Return of premium by agreement	8.018
(b) Total failure of consideration	8.019
(c) Apportionment	8.020
(d) Fraud and illegality	8.021
(e) Liability for return of premium	8.022
(f) Return of premium in specific cases	8.023

CHAPTER 9 CLAIMS

1. Claims Conditions	9.001
(a) Nature of claims conditions	9.001
(b) Effects of breach of claims condition	9.002
(c) Classifying the condition	9.005
(d) Obligations imposed by notification clauses	9.006
(e) Compliance with claims conditions	9.010
(f) Knowledge	9.012
(g) Waiver of breach of condition	9.017

TABLE OF CONTENTS

2. Cooperation and Proof of Loss	9.00
(a) Burden of proof	9.00
(b) The duties of the assured	9.01
(c) Submitting proofs of loss	9.02
(d) Duties of insurers in handling claims	9.03
3. Fraudulent Claims	9.03
(a) Introduction	9.03
(b) Meaning and duration of a "claim"	9.03
(c) Meaning of fraud	9.04
(d) Classes of fraudulent claim	9.04
(e) Consequences of fraudulent claim	9.05
(f) Express fraudulent claims clauses	9.05
(g) Effect of plea of fraud by insurers	9.06
(h) Evidence of fraud on appeal	9.06
(i) Fraud by third party	9.06
(j) Fraud by foreign state	9.06
(k) Reform	9.06
4. Limitation of Actions	9.06
(a) Statutory limitation period	9.06
(b) Variation of limitation period	9.06
(c) Loss of right to rely upon limitation period	9.07
5. Claims by Third parties	9.07
(a) Third party claims in general	9.07
(b) Scope of legislation	9.07
6. Declaratory Relief	9.07
(a) The right to seek declaratory relief	9.07

CHAPTER 10 LOSS AND THE MEASURE OF INDEMNITY

1. The Meaning of Loss	10.00
(a) Forms of loss	10.00
(b) Destruction and damage	10.00
(c) Loss and damage	10.00
(d) Loss or damage must be physical	10.00
(e) Loss of possession	10.00
(f) Loss of value or use	10.01
(g) Loss of adventure	10.01
(h) Effect of payment by a third party	10.01
2. The Measure of Indemnity	10.01
(a) Valued and unvalued policies	10.01
(b) Measure of indemnity under a valued policy	10.02

TABLE OF CONTENTS

(c) Measure of indemnity under an unvalued policy	10.021
(d) Destruction of or damage to buildings	10.024
(e) Destruction of or damage to goods	10.033
3. Successive Losses	10.039
(a) Successive partial losses	10.039
(b) Partial loss followed by total loss in same policy period	10.040
(c) Further loss after expiry of policy	10.042
(d) Reinstatement of cover	10.044
4. Reinstatement	10.047
(a) Purposes of reinstatement	10.047
(b) Contractual reinstatement	10.048
(c) Can reinstatement be frustrated?	10.058
(d) Costs of reinstatement increased by external events	10.059
(e) Costs of reinstatement increased by pre-existing defects	10.060
(f) Obligation to reinstate as condition of indemnity	10.061
(g) Relationship between insurers, assured and repairer	10.062
(h) Duty of assured to third party	10.065
5. Consequential Loss	10.067
(a) Loss of profits	10.067
(b) Damages for late payment	10.070
(c) Late payment in Australia and New Zealand	10.075
(d) The measure of damages	10.078
(e) Interest	10.082
(f) Costs	10.085
6. Limits on Recovery	10.086
(a) Betterment	10.086
(b) Average	10.087
(c) Mitigation of loss	10.089
(d) Self-insured retentions	10.095
(e) Aggregation of losses	10.098
(f) "Series" clauses	10.107
7. Settlements	10.112
(a) Ex gratia payments	10.112
(b) Follow the leader provisions	10.113
(c) Settlement contracts	10.117
(d) Payments in the absence of a settlement contract	10.121
(e) No loss suffered by assured	10.125

CHAPTER 11 THE RIGHTS OF INSURERS

1. Subrogation	11.001
(a) General definition and objectives	11.001

(b) Juridical basis	11.002
(c) Subrogation and related doctrines	11.003
(d) Provision of an indemnity	11.005
(e) Rights of insurers prior to provision of indemnity	11.008
(f) Rights of the insurer following the provision of an indemnity	11.011
(g) Allocation of subrogation recoveries	11.017
(h) Persons immune from subrogation proceedings	11.024
(i) Payments to the assured not affected by subrogation rights	11.032
(j) Significance of the insurer's conduct	11.036
(k) Loss of subrogation rights: agreements by the insurer	11.037
(l) Loss of subrogation rights: agreements by the assured	11.039
2. Double Insurance and Contribution	11.043
(a) Double insurance	11.043
(b) Policy variations on the assured's rights	11.051
(c) Contribution	11.058
(d) Determining the amount of contribution	11.069
3. Abandonment and Salvage	11.074
(a) Abandonment and salvage defined	11.074
(b) Abandonment and salvage in non-marine insurance	11.075
(c) Abandonment and underinsurance	11.076

CHAPTER 12 REGULATION OF INSURANCE BUSINESS

1. Regulatory Framework	12.001
(a) Insurance Ordinance	12.001
(b) Insurance Authority	12.002
(c) Powers	12.003
(d) Corporate plan and annual estimates	12.004
(e) Industry advisory committees and other committees	12.005
(f) Insurance Advisory Committee	12.006
(g) Insurance Appeals Tribunal	12.007
2. Regulated Insurance Business	12.012
(a) General insurance business	12.012
(b) Long-term business	12.030
(c) Specific forms of insurance business	12.038
3. Authorisation to Carry on Insurance Business	12.042
(a) Authorisation requirement	12.042
(b) Exemptions from authorisation requirement	12.043
(c) Overseas insurers	12.044
(d) Meaning of "carries on insurance business"	12.045
(e) Where is insurance business carried on?	12.046

(f) Conditions for authorisation	12.047
(g) Appeal against refusal of authorisation	12.050
(h) Contracts made by unauthorised insurers	12.051
4. Regulation of Authorised Insurers	12.052
(a) Entry into contracts	12.052
(b) Accounts and audit	12.053
(c) Controllers	12.054
(d) Directors to be fit and proper persons	12.055
(e) Key persons in control functions	12.056
(f) Insurance groups and holding companies	12.057
(g) Requirements for long-term insurance business and general business	12.058
(h) Maintenance of assets in Hong Kong	12.059
(i) Transfer of insurance business	12.060
(j) Intervention by Insurance Authority	12.062
(k) Inspection and investigation	12.076
(l) Disciplinary actions	12.081
(m) Failure to maintain solvency margin	12.082
(n) Offences	12.083
(o) Duties and liabilities of institutions	12.084
5. Winding-up of Insurance Companies	12.087
(a) Grounds for winding-up	12.087
(b) Prohibition on voluntary winding-up of insurer	12.088
(c) Petitioner	12.089
(d) Winding-up of insurers involved in transfer of business	12.091
(e) Winding-up of insurers involved in long-term business	12.092
(f) Allocation of assets: winding-up rules	12.095
(g) Insolvency proceedings outside Hong Kong	12.096
6. Regulation of Lloyd's	12.097
7. Other Matters Affecting Insurance Policies	12.098
(a) Customer Protection Declaration Form and Illustration Standards for Long Term Insurance Policies	12.098
(b) Code of Conduct for Insurers	12.099
(c) Insurance Claims Complaints Bureau	12.100
(d) Other Statutory Requirements	12.101

CHAPTER 13 ASSURED

1. Contractual Capacity	13.001
(a) Principle of capacity	13.001
(b) Minors	13.002
2. Co-Insurance	13.003

(a) Forms of co-insurance	13.000
(b) Insurable interest and co-insurance	13.006
(c) Creation of co-insurance	13.007
(d) Agency and co-insurance	13.008
(e) Enforcement under Contracts (Rights of Third Parties) Ordinance (Cap.623)	13.013
(f) Noting	13.014
(g) Rights under joint and composite policies	13.015
3. Unnamed Co-Assureds	13.021
(a) Direct enforcement against insurers	13.025
(b) Indirect enforcement against insurers	13.026
4. Assignment	13.027
(a) Voluntary assignment of subject matter	13.027
(b) Assignment of policy	13.028
(c) Assignability of proceeds of policy	13.034

CHAPTER 14 INSURANCE INTERMEDIARIES

1. General Agency Principles	14.001
(a) Classes of insurance intermediary	14.001
(b) Authority of agents	14.002
(c) General duties of intermediaries	14.008
(d) Rights of intermediaries	14.012
(e) Liabilities of intermediaries	14.013
2. Regulation of Insurance Intermediaries	14.014
(a) Licensing of intermediaries	14.014
(b) Licensing of the classes of insurance intermediary	14.022
(c) Inspection and investigation	14.029
(d) Disciplinary controls over intermediaries	14.033
(e) Insurance Appeals Tribunal	14.038
3. Agents of Insurers	14.039
(a) General conduct requirements for licensed insurance agencies and their responsible officers	14.039
(b) The Code of Conduct for Licensed Insurance Agents	14.040
(c) The authority of agents	14.041
(d) Effect of Insurance Ordinance	14.042
(e) Illustrations of the role of insurance agents	14.043
4. Underwriting Agents	14.049
(a) Nature	14.049
(b) Accepting business	14.050
(c) The pool's outwards reinsurance	14.051

5. Insurance Brokers	14.054
(a) The role of brokers	14.054
(b) Sub-brokers	14.057
(c) Remuneration	14.061
(d) General conduct requirements for licensed insurance brokers and their responsible officers	14.063
(e) Brokers' Code of Conduct	14.065
(f) Duties of brokers on placement	14.066
(g) Assistance during the currency of the policy	14.069
(h) Documents in the broker's possession	14.075
(i) Remedies for breach of duty	14.077
(j) Defences open to brokers	14.083
(k) Liabilities to third parties	14.094

CHAPTER 15 REINSURANCE

1. Definition of Reinsurance	15.001
(a) Basic forms	15.001
(b) Alternative risk transfer	15.002
(c) Reinsurance as insurance	15.003
(d) The parties	15.004
(e) Insurable interest in reinsurance	15.005
2. Formation of Reinsurance Contracts	15.006
(a) Reinsurance in advance of insurance	15.006
(b) Utmost good faith	15.007
(c) Renewal	15.011
3. Terms of Reinsurance Contracts	15.012
(a) Express terms	15.012
(b) Incorporation from insurance contract	15.013
(c) Implied terms	15.014
(d) Presumption of back-to-back cover	15.015
4. Reinsurance Losses and Claims	15.018
(a) Use of "honourable engagement" arbitration clauses	15.018
(b) "Loss"	15.019
(c) The obligation to indemnify	15.020
(d) "Follow the settlements"	15.025
(e) Proof of liability of reinsurers	15.030
(f) "Claims co-operation" or "Claims control" clauses	15.035
(g) Inspection clauses	15.038
(h) Limitation of actions	15.039

CHAPTER 16 LIFE AND ACCIDENT INSURANCE

1. Nature of Life and Accident Policies	16.001
(a) Life insurance	16.001
(b) Accident insurance	16.002
(c) Renewal of life and accident policies	16.003
2. Insurable Interest	16.004
(a) Existence and timing of insurable interest	16.004
(b) Assignment of policy to person without interest	16.005
(c) Payment of premiums by third party without interest	16.006
(d) Insertion of names of interested persons	16.007
(e) Amount recoverable	16.008
(f) Consequences of lack of insurable interest	16.009
(g) Examples of insurable interest in lives: personal and family relationships	16.013
(h) Insurable interest in lives: business relationships	16.018
(i) Reform of the law	16.022
3. Assignment of Life Policies	16.023
(a) Assignability	16.023
(b) Payment of proceeds	16.024
4. Utmost Good Faith	16.025
(a) Age	16.026
(b) Residence and domicile	16.027
(c) Health	16.028
(d) Medical history	16.029
(e) Intemperate habits and other risks	16.030
(f) Occupation and hobbies	16.031
5. Coverage of Life Policies	16.032
(a) Suicide	16.033
(b) Provisions as to age	16.036
(c) Territorial limitations and restrictions on occupation	16.037
(d) Indisputable life policies	16.038
(e) Effect of war on a life policy	16.039
6. Coverage of Personal Accident Policies	16.040
(a) "Accident"	16.040
(b) Violent, external and visible means	16.053
(c) Disablement	16.058
(d) Bodily injury	16.063
(e) Effect of assured's insolvency	16.064
7. Health Insurance	16.065

CHAPTER 17 PROPERTY INSURANCE

1. Insurable Interest in Property	17.001
(a) Insurable interest requirement	17.001
(b) Amount of recovery	17.003
(c) Consequences of lack of insurable interest	17.004
(d) Insurance of two or more interests under a single policy	17.005
(e) Destination and transfer of policy benefits	17.006
(f) Buyer and seller of goods	17.007
(g) Vendor and purchaser of land	17.008
(h) Blocks of flats	17.010
(i) Bailor and bailee	17.011
(j) Other persons in possession of goods or land	17.015
(k) Landlord and tenant	17.016
(l) Hirer and lessee	17.025
(m) Mortgagor and mortgagee	17.026
(n) Creditor insuring property of debtor	17.029
(o) Trustee and beneficiary	17.030
(p) Personal representatives	17.031
(q) Contractor	17.032
(r) Reform of the law	17.033
2. Utmost Good Faith	17.034
3. Coverage	17.035
(a) Types of cover	17.035
(b) Situation of insured subject matter	17.036
(c) Accidental, sudden and unforeseen damage	17.037
(d) Insured perils	17.040
(e) Burglary and theft policies	17.052
(f) Defects in title	17.063
(g) Exclusions from property cover	17.064
(h) Defective design	17.068

CHAPTER 18 LIABILITY INSURANCE

1. Principles Governing Liability Policies	18.001
(a) Compulsory and voluntary liability insurance	18.001
(b) Scope of coverage	18.012
(c) Liabilities covered by a liability policy	18.016
(d) Disclosure	18.025
(e) Classifying the assured's liability	18.029

(f) Coverage based on the assured's activities	18.001
(g) Common policy provisions	18.004
(h) Claims under liability policies	18.005
(i) Notification obligations	18.004
(j) Notification under claims made policies	18.004
(k) Defending the claim against the assured	18.005
(l) Defence costs	18.002
(m) Liability for the plaintiff's costs	18.003
(n) Liability of insurers to follow the assured's settlements	18.004
2. Insurable Interest in Liability Insurance	18.007
3. Employer's Liability Insurance	18.008
(a) Liabilities faced by employers	18.008
(b) Liability for injury	18.001
(c) Assessment and payment of compensation for injury	18.002
(d) Liability for occupational disease	18.003
(e) Obligation to insure	18.004
(f) Claims	18.003
(g) Special cases	18.009
(h) Enforcement	18.002
(i) Fallback provision of compensation	18.009
(j) Facility for terrorism risks	18.007
4. Product Liability Policies	18.008
(a) Period of cover	18.008
(b) "Product"	18.009
(c) Risks covered	18.100
(d) Loss must be external to products supplied	18.101
5. Directors' and Officers' Liability Insurance	18.103
(a) Liabilities of company directors	18.103
(b) Duties owed to persons dealing with the company	18.104
(c) Insurability	18.105
(d) Right to insure	18.106
(e) Nature of the policy	18.107
6. Third Party Rights under Liability Policies	18.117
(a) Background	18.117
(b) Events triggering the operation of the Third Parties Ordinance	18.118
(c) Contracts within Third Parties Ordinance	18.120
(d) Extraterritorial effect	18.122
(e) Establishing and quantifying the liability of the assured to the third party	18.123
(f) Obtaining payment from the insurers	18.128

(g) Prioritising competing claims	18.141
(h) Waiver of rights by insurers	18.142
(i) Surpluses and deficits	18.143
(j) Contracting out	18.144
(k) Settlement contracts	18.148
(l) Provision of information	18.149

CHAPTER 19 MOTOR VEHICLE INSURANCE

1. Compulsory Motor Insurance	19.001
(a) Legal framework	19.001
(b) Obligation to insure	19.002
(c) Elements of the statutory requirement	19.006
(d) Civil consequences of failing to insure	19.012
(e) Formal requirements	19.014
(f) Liabilities to be insured under policy	19.018
(g) Scope of compulsory policy	19.020
(h) Protection of passengers	19.023
(i) Control of policy terms	19.028
2. Actions for the Proceeds of Compulsory Motor Policies	19.030
(a) Forms of proceedings	19.030
(b) Right to proceed against the user's insurers	19.031
(c) Defences of insurers to an enforcement action	19.036
3. Uninsured and Untraced Drivers: The Hong Kong Motor Insurers Bureau	19.041
(a) History and legal framework	19.041
(b) Enforcement of the Agreements	19.042
(c) First Fund Agreement 1981	19.043
(d) HKMIB Undertaking of June 1995	19.047
(e) Supplemental Agreement of June 2002	19.048
(f) Untraced drivers	19.049
(g) Structure of the HKMIB	19.050
4. Non-Compulsory Cover Under Motor Policies	19.051
(a) Scope of extensions	19.051
(b) Utmost good faith	19.052
(c) Users of the vehicle	19.053
(d) Vehicles covered by the policy	19.056
(e) Condition of the vehicle	19.057
(f) Protecting the vehicle	19.059
(g) Uses to which the vehicle is put	19.062
(h) Replacement vehicles	19.067

CHAPTER 20 FINANCIAL INSURANCE

1. Mortgagees' Interest Insurance	20.000
(a) Significance	20.000
(b) Institute mortgagees' interest insurance clauses	20.002
2. Legal Expenses Insurance	20.008
(a) Nature	20.008
(b) Scope of cover	20.009
(c) Direct action against insurers by third party	20.010
(d) Litigation buy-out insurance	20.011
3. Guarantee Insurance	20.012
(a) Insurance business and guarantees	20.012
(b) Guarantee insurance and guarantee distinguished	20.013
(c) Non-disclosure	20.014
4. Fidelity Insurance	20.015
(a) Nature	20.015
(b) Losses covered	20.016
(c) Exclusions	20.017
(d) Persons covered	20.018
(e) Term of policy	20.019
(f) Conditions	20.020
(g) Calculation of indemnity	20.021
(h) Subrogation	20.022
5. Insurance of Debts	20.023
(a) Principles applicable	20.023
(b) Insurance of completion of contract	20.024
(c) Export credit insurance	20.025
(d) Time variable cover	20.026
6. Business Interruption Insurance	20.027
(a) Nature of business interruption policies	20.027
(b) The primary trigger of cover: material damage	20.028
(c) Secondary triggers	20.029
(d) The locality requirement	20.030
(e) Disease triggers	20.031
(f) Combined disease and loss of access triggers	20.032
(g) Loss or prevention of access triggers	20.033
(h) Trigger exceptions	20.034
(i) The basis of indemnity	20.035
(j) Causation	20.036
(k) Trends clause	20.037

(l) Increased costs of working	20.038
(m) Deductibles	20.039

CHAPTER 21 MARINE INSURANCE

1. Coverage of Marine Policies	21.001
(a) Hulls and freight clauses	21.001
(b) Cargo clauses	21.006
(c) Mutual insurance: club benefits	21.007
2. Text of the Marine Insurance Ordinance (Cap.329)	21.008
(a) Short title	21.009
(b) Marine insurance defined	21.010
(c) Marine adventure and maritime perils defined	21.011
3. Insurable Interest	21.012
(a) Avoidance of gaming or wagering contracts	21.012
(b) Insurable interest defined	21.016
(c) When interest must attach	21.017
(d) Defeasible of contingent interest	21.020
(e) Partial interest	21.021
(f) Reinsurance	21.022
(g) Bottomry	21.023
(h) Master and seamen's wages	21.024
(i) Advanced freight	21.025
(j) Charges of insurance	21.026
(k) Quantum of interest	21.027
(l) Assignment of interest	21.031
4. Insurable Value	21.032
(a) Measure of insurable value	21.032
5. Disclosure and Representations	21.033
(a) Insurance is <i>uberrimae fidei</i>	21.033
(b) Disclosure by assured	21.034
(c) Disclosure by agent effecting insurance	21.040
(d) Representations pending negotiation of contract	21.041
(e) When contract is deemed to be concluded	21.042
6. The Policy	21.043
(a) Contract must be embodied in policy	21.043
(b) What policy must specify	21.044
(c) Signature of insurer	21.045
(d) Voyage and time policies	21.046
(e) Designation of subject-matter	21.047
(f) Valued policy	21.048

TABLE OF CONTENTS

(g) Unvalued policy	
(h) Floating policy by ship or ships	
(i) Construction of terms in policy	
(j) Premium to be arranged	
7. Double Insurance	
(a) Double insurance	
8. Warranties, Etc	
(a) Nature of warranty	
(b) When breach of warranty excused	
(c) Express warranties	
(d) Warranty of neutrality	
(e) No implied warranty of nationality	
(f) Warranty of good safety	
(g) Warranty of seaworthiness of ship	
(h) No implied warranty that goods are seaworthy	
(i) Warranty of legality	
9. The Voyage	
(a) Implied condition as to commencement of risk	
(b) Alteration of port of departure	
(c) Sailing for different destination	
(d) Change of voyage	
(e) Deviation	
(f) Several ports of discharge	
(g) Delay in voyage	
(h) Excuses for deviation or delay	
10. Assignment of Policy	
(a) When and how policy is assignable	
(b) Assured who has no interest cannot assign	
11. Premium	
(a) When premium payable	
(b) Policy effected through broker	
(c) Effect of receipt on policy	
12. Loss and Abandonment	
(a) Included and excluded losses	
(b) Partial and total loss	
(c) Actual total loss	
(d) Missing ship	
(e) Effect of transshipment, etc	
(f) Constructive total loss defined	
(g) Effect of constructive total loss	
(h) Notice of abandonment	

TABLE OF CONTENTS

xxxi

(i) Effect of abandonment	21.093
13. Partial Losses	21.094
(a) Particular average loss	21.094
(b) Salvage charges	21.095
(c) General average loss	21.096
14. Measure of Indemnity	21.097
(a) Extent of liability of insurer for loss	21.097
(b) Total loss	21.098
(c) Partial loss of ship	21.099
(d) Partial loss of freight	21.100
(e) Partial loss of goods, merchandise, etc	21.101
(f) Apportionment of valuation	21.102
(g) General average contributions and salvage charges	21.103
(h) Liabilities to third parties	21.104
(i) General provisions as to measure of indemnity	21.105
(j) Particular average warranties	21.106
(k) Successive losses	21.107
(l) Suing and labouring clause	21.108
15. Rights of Insurer on Payment	21.109
(a) Right of subrogation	21.109
(b) Right of contribution	21.110
(c) Effect of under insurance	21.111
16. Return of Premium	21.112
(a) Enforcement of return	21.112
(b) Return by agreement	21.113
(c) Return for failure of consideration	21.114
17. Mutual Insurance	21.115
(a) Modification of Ordinance in case of mutual insurance	21.115
18. Supplemental	21.116
(a) Ratification by assured	21.116
(b) Implied obligations varied by agreement or usage	21.117
(c) Reasonable time, etc, a question of fact	21.118
(d) Slip as evidence	21.119
(e) Interpretation of terms	21.120
(f) Savings	21.121
(g) Prohibition on gambling on loss by marine perils	21.122
19. Form of Policy	21.123
20. Rules for Construction of Policy	21.124
(a) Lost or not lost	21.125
(b) From	21.126
(c) At and from	21.127

TABLE OF CONTENTS

(d) From the loading thereof	21.128
(e) Safely landed	21.129
(f) Touch and stay	21.130
(g) Perils of the seas	21.131
(h) Pirates	21.143
(i) Thieves	21.144
(j) Restraint of princes	21.145
(k) Barratry	21.146
(l) All other perils	21.147
(m) Average unless general	21.148
(n) Stranded	21.149
(o) Ship	21.150
(p) Freight	21.151
(q) Goods	21.152

CHAPTER 22 WAR RISKS

1. Insurability of War and Related Risks	22.001
2. Specific War Risks	22.002
(a) Causation issues	22.002
(b) War	22.003
(c) Hostile acts	22.004
(d) Military or usurped power	22.005
(e) Revolution and rebellion	22.006
(f) Insurrection	22.007
(g) Civil commotion	22.008
(h) Riot	22.009
(i) Invasion	22.010
(j) Seizure	22.011
(k) Infringement of customs or trading regulations	22.012
(l) Terrorists and persons acting from a political motive	22.013
(m) Persons acting maliciously	22.014
(n) Strikes, lock-outs and labour disturbances	22.015
(o) Sanctions	22.016

CHAPTER 23 INSURANCE LAW OF THE PEOPLE'S
REPUBLIC OF CHINA

1. Introduction	23.001
(a) The history of insurance	23.002
(b) The legal framework	23.003

TABLE OF CONTENTS

2. Principles and Rules of Insurance Contract Law	23.004
(a) Contract of insurance	23.004
(b) The parties	23.005
(c) Insurable interest	23.009
(d) Formation of contract	23.001
(e) Contents of contract	23.012
(f) Non-disclosure and misrepresentation	23.015
(g) Insurer's pre-contractual duties	23.022
(h) Status of contract terms	23.030
(i) The risk	23.033
(j) Claims	23.036
(k) Subrogation	23.041
(l) Double insurance and contribution	23.050
(m) Construction of the policy	23.052
(n) Jurisdiction	23.054
(o) Governing law	23.055
(p) Conflict of laws	23.056
(q) Limitation of actions	23.057
3. Regulation of the Insurance Business in the PRC	23.060
(a) Regulatory structure	23.060
(b) Regulation of insurers	23.067
(c) Insurance agents	23.075
(d) Insurance brokers	23.080
(e) Insurance adjusters	23.085
4. Specific Types of Insurance Contracts	23.090
(a) Reinsurance	23.090
(b) Personal insurance	23.094
(c) Property insurance	23.103
(d) Liability insurance	23.110
(e) Motor vehicle insurance	23.114
(f) Marine insurance	23.121
Index	1597

into existence. In addition, the insurers have the usual right to claim damages for negligent or fraudulent misrepresentation; and also damages under s.3(1) of the Misrepresentation Ordinance.

6.133

Utmost good faith and declarations to open covers. It is settled law that each declaration under a contract for insurance creates a binding contract of insurance.⁷⁷³ It is immaterial to this outcome whether the declaration is made under an obligatory or a non-obligatory declaration policy. The manner in which and the persons to whom, a non-obligatory declaration is made is a matter for the policy itself. Where there are numerous subscribers underwriters the policy may provide for notification to the leading underwriter only on behalf of the following market, although if there is no "leading underwriter" clause to this effect then there has to be separate notification to each underwriter.⁷⁷⁴ Any purported notification must be viewed objectively to determine whether there was an unconditional intention on the part of the reinsured to notify a risk.⁷⁷⁵

The further question is whether individual declarations attract the duty of utmost good faith. Where the open cover is obligatory as far as the insurer is concerned, so that as soon as a declaration is made a binding contract of insurance comes into being without the insurer having the opportunity to consider, rate or reject the subject matter of the declaration, it is difficult to see how any duty of utmost good faith can be applicable.⁷⁷⁶ This is so because the definition of materiality in ss.18(2) and 20(2) of the Marine Insurance Ordinance – which refers to the fixing of the premium and the taking of the risk by the insurer – cannot be met in a case where the premium is fixed and the risk accepted. Thus, although a contract of insurance is created by a declaration, the declaration does not attract a duty of disclosure: the result is presumably rationalised by recourse to the doctrine of waiver, ie that insurers have agreed to accept any risk which falls within the ambit of the open cover without regard to any special circumstances surrounding the risk.⁷⁷⁷

The case of an open cover which is non-obligatory as far as the insurer is concerned is relatively straightforward. The open cover is no more than a framework agreement which establishes machinery for the making of individual contracts. As the insurer has the right to accept or reject any individual declaration,⁷⁷⁸ it follows that the duty of utmost good faith has not been waived and accordingly that the insurer is entitled to avoid any declaration in the event of misrepresentation or non-disclosure relating to

⁷⁷³ *Citadel Insurance Co v Atlantic Union Insurance Co SA* [1982] 2 Lloyd's Rep 543; *Sedgwick Tomenson Inc v PT Reasuransi Umum Indonesia* [1990] 2 Lloyd's Rep 334.

⁷⁷⁴ *BP Plc v GE Frankona Reinsurance* [2003] 1 Lloyd's Rep 537.

⁷⁷⁵ *BP Plc v Aon Ltd* [2006] Lloyd's Rep IR 577.

⁷⁷⁶ *Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co* (1915) 31 TLR 572; *Ionides and Chapeaurouge v Pacific Fire and Marine Insurance Co* (1871) LR 6 QB 674.

⁷⁷⁷ It may be noted, however, that in *China (HK) Chemical & Plastics Co Ltd v China Insurance Co Ltd* (HCCL 19/1997, HKEC 176, 1998) Stone J was unwilling, in interlocutory proceedings, to accept the argument that the assured was not required to disclose a loss which was known to him prior to the making of the declaration. It appears from the judgment that no authority directly on the point was referred to the court. It might be thought that this decision is of limited precedent value.

⁷⁷⁸ This appears to be the best explanation of *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442; see *CCR Fishing Ltd v Tomenson (The La Pointe)* [1986] 2 Lloyd's Rep 513, affirmed on different grounds 69 DLR (4th) 112 (1990).

it;⁷⁷⁹ other declarations, and the declaration policy itself, are necessarily unaffected by the ability of an insurer to avoid any one declaration.⁷⁸⁰

Extension of the open cover. Different considerations will necessarily apply where the assured attempts to introduce into the open cover a class of business which falls outside its agreed limits. In such a case, the declaration is simply not binding on the insurers.⁷⁸¹

6.134

9. THE INSURER'S PRE-CONTRACTUAL DUTY OF UTMOST GOOD FAITH

(a) Bilateral nature of duty

6.135

It has long been assumed that the duty of utmost good faith is bilateral and that equivalent duties are owed by the insurer to the assured. Indeed, the original formulation of the duty of utmost good faith in *Carter v Boehm*⁷⁸² indicated that this was the case: "Good faith forbids either party by concealing what he knows to draw the other into a bargain from his ignorance of the fact and his belief to the contrary." Moreover, s.17 of the Marine Insurance Ordinance is framed in bilateral terms and isolated cases had come close to recognising the special relationship between insurers and their assureds and the importance of full disclosure by the insurer.⁷⁸³ However, the first English decision to hold in terms that the insurer owes a duty of utmost good faith to the assured was *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd*,⁷⁸⁴ a ruling approved in principle on appeal by the Court of Appeal and the House of Lords in *La Banque Financière de la Cite SA v Westgate Insurance Co Ltd*⁷⁸⁵ and also in *Wunsche Handelsgesellschaft International mbH v General Accident Insurance Asia Ltd*.⁷⁸⁶

In *Banque Keyser Ullmann* LBF and two other banks were persuaded by one B to make loans of 26.25 million Swiss francs to his companies, secured by the deposit of gemstones independently valued at 95 million Swiss francs and by a credit insurance policy for 37 million Swiss francs. N, insurance brokers were instructed by the banks to arrange the credit insurance. L, an employee of N, sought to arrange insurance in three layers: WI was to underwrite the primary layer of 9.25 million Swiss francs, and

⁷⁷⁹ In *Glencore International AG v Alpina Insurance Co Ltd* [2004] 1 Lloyd's Rep 111 it was suggested by counsel that an assured failing to make a declaration until after the loss had occurred was nevertheless entitled to recover as long as the assured had intended to make the declaration but had by oversight neglected to do so, and that the insurer was protected by the assured's duty of good faith in this regard when the declaration was actually made. Moore-Bick J rejected the notion that an insurer could be liable under a declaration made after loss and did not comment on the good faith argument.

⁷⁸⁰ *Societe Anonyme d'Intermediaires Luxemhourgeois v Farex Gie* [1995] LRLR 116; *Mander v Commercial Union Assurance Co Plc* [1998] Lloyd's Rep IR 93.

⁷⁸¹ *Inversiones Manria SA v Sphere Drake Insurance Co Plc (The Dora)* [1989] 1 Lloyd's Rep 69; *Seavision Investment SA v Evenett and Clarkson Puckle (The Tiburon)* [1992] 2 Lloyd's Rep 26.

⁷⁸² (1766) 3 Burr 1905.

⁷⁸³ *Horry v Tale & Lyle Refineries Ltd* [1982] 2 Lloyd's Rep 416; a case involving a settlement contract avoided by the assured for undue influence.

⁷⁸⁴ [1987] 2 All ER 923.

⁷⁸⁵ [1989] 2 All ER 952, [1990] 2 All ER 947.

⁷⁸⁶ (HCCL 73/1994, [2002] HKEC 423).

the remaining layers – giving a total of 37 million Swiss francs – were to be underwritten by other insurers. In January 1980 L issued cover notes for the full amount, purportedly with the authority of the insurers; the banks, having taken custody of the gemstones, thereupon advanced the agreed sums to B's companies. L had in fact acted fraudulently, in that the insurance for the two layers above WI's layer had not been arranged when the cover note was issued; by June 1980, however, the full amount of insurance had been obtained by L. By May 1980, D, an employee of WI, became aware of L's fraud, but did not report this to LBF. In the event, that fraud proved to be of no significance as matters were rectified by L in June 1980. Between August 1980 and March 1981 LBF and five other banks made further advances to B's companies, the total amount loaned being 80 million Swiss francs. L was asked to extend the insurance to cover the advances. L extended the existing layers and sought to arrange a fourth layer; L issued a cover note in respect of a fourth layer when he had not in fact managed to obtain the necessary additional cover. Subsequently B's companies defaulted on repayment of the loans and it rapidly became clear to the banks that various, apparently independent, frauds had been perpetrated on them: the sums were for all practical purposes irrecoverable from B, the gemstones proved to be virtually worthless; and the fourth layer of insurance did not exist. In 1983 LBF and the other banks brought actions against N and L for negligence and fraud respectively. N settled to the extent of their liability insurance. LBF also sought to recover under such insurance as did exist, but were unable to do so as the result of a fraud exclusion in the policies, which stated that the insurers were not liable "for any claim or claims arising directly or indirectly out of or caused directly or indirectly by fraud attempted fraud misdescription or deception by any person firm organisation or company".

The banks, unable to pursue any other line, sought damages against the insurers, representing the advances made after June 1990. Two alternative claims were presented. First, it was argued that the insurers, being aware through D of L's fraud, owed a duty of disclosure to the banks; had there been disclosure, the banks would have gone elsewhere for the additional insurance and would not have used N. Second, the banks argued that the insurers owed them a common law duty of care under which the true facts ought to have been disclosed to them. The claims by the banks were upheld at first instance by Steyn J. The Court of Appeal reversed this decision. It dismissed the negligence claim on the grounds of causation. Further, while the Court of Appeal accepted the view adopted by Steyn J that the duty of utmost good faith is reciprocal, it went on to hold that it did not give rise to a remedy in damages. The House of Lords affirmed the judgment of the Court of Appeal, but in the House of Lords the case took on a very different appearance and turned upon the wording of the fraud exception. Consequently, the many interesting issues debated in the courts below proved to be irrelevant and were not pronounced upon with any authority by their Lordships.

Before Steyn J and the Court of Appeal it was apparently assumed that the fraud exception in the policy covered the fraud not just of B but also of the broker's employee, L. This led to the conclusion that L's fraud had caused WI to reject LBF's claim on the policy, so that L's fraud had been the cause of LBF's loss. In the House of Lords it was argued, and indeed accepted by their Lordships, that a fraud exclusion in an insurance policy does not extend to fraud by the assured's broker in setting up the policy. The only relevant fraud was thus that of B. It followed that any breach of

duty by WI in failing to disclose L's fraud to LBF had not caused LBF any loss and its claim fell away. This short point of construction was in this way determinative of the entire action.

Matters have been taken a step further in New Zealand, whose version of the Marine Insurance Act 1906 (UK) omits the s.17 utmost good faith provision but is otherwise identical to the MIO. Gendall J in *Young v Tower Insurance Ltd*⁷⁸⁷ stated – admittedly obiter – that the common law recognised that there is an implied term based on the duty of utmost good faith to: "disclose all material information that the insurer knows or ought to have known, including, but not limited to the initial formation of the contract [and] act reasonably, fairly and transparently, including but not limited to the initial formation of the contract". The case was concerned with post-contractual duties and is discussed below in that context, but it suffices here to comment that there is no support in the authorities for such a wide-ranging view. That does not mean that the development is undesirable, but the jump to an implied term of utmost good faith is a significant step that required legislation in Australia.

(b) Scope of the insurers' duty

Section 17 of the Marine Insurance Ordinance provides authority for the proposition that the duty of utmost good faith is reciprocal, but ss.18 and 20 deal only with the definition of materiality with respect to the assured's duty. The meaning of materiality so far as the insurer is concerned must, therefore, be based on inference from the formulation of the assured's duty. Some guidance may be obtained from certain passages of the judgment of Lord Mansfield in *Carter v Boehm*,⁷⁸⁸ which indicate that the definition of materiality in respect of the insurer's duty is the mirror image of that operating for the assured's duty. Lord Mansfield, having stated that the underwriter must be informed of facts which increase the risk but not those which decrease it, continued:

The policy would be equally void, against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived, and an action would lie to recover the premium.

Clearly, the arrival of a ship, given as an example of what an insurer has to disclose, is something which decreases rather than increases the risk. It does not follow from this that merely because an insurer has to disclose circumstances which reduce the risk under the policy there are no other classes of fact which may be regarded as material for the purposes of the insurer's duty, although it is logical to suggest that Lord Mansfield's illustration demonstrates the extent of the insurer's duty. After all, information as to circumstances which are likely to increase the possibility of a loss can only serve to influence an insurer not to insure or to increase the premium charged, but the influence exerted by the same information on an assured would be to make him even more anxious to have cover and to pay more for being able to obtain it. It may be concluded, therefore, that as a matter of principle those circumstances which are

6.136

⁷⁸⁷ [2016] NZHC 2956.
⁷⁸⁸ (1766) 3 Burr 1905.

material and which are to be disclosed by an insurer are circumstances which decrease the risk to the assured.

It is instructive to test the approach suggested above against the facts of and the conclusions reached in, *La Banque Financière*.⁷⁸⁹ The facts alleged to be material were that the leading underwriter had failed to disclose to the banks the earlier fraud of their broker. The question here becomes, does the possible inadequacy of the insurance due to the untrustworthy character of the broker count as a factor which increases the risk? It is suggested that on principle this cannot be the case. In such circumstances, the loss suffered by the assured is the inability to recover under the policy, but this does not arise from the failure of the insurer to disclose circumstances which make the possibility of the occurrence of loss more likely, so much as from the fact that the insurance does not respond to the loss. In *La Banque Financière* the fact alleged to be material related not to the insured risk, which was the likelihood of default by the borrower, but to the circumstances relating to the setting up of the policy itself. It may be concluded, therefore, that the circumstances of *La Banque Financière* did not involve material facts irrespective of the scope of the fraud exception. Steyn J at first instance⁷⁹⁰ reached the opposite conclusion; and held that the failure by the leading underwriters to disclose the fraud of the brokers was actionable non-disclosure. The learned judge's attitude towards materiality was robust and free of technicality: in his view, a fact was material and had to be disclosed by an insurer if failure to disclose would amount to a breach of good faith and fair dealing and would influence the assured in determining whether to conclude the contract of insurance. Applying this broad test, Steyn J was easily able to decide that the leading underwriters were in breach of duty. Interestingly, the materiality or otherwise of the facts not disclosed was not argued on appeal before the Court of Appeal; and the judgment proceeds on the assumption that materiality had been made out. The approach of the Court of Appeal was nevertheless more guarded than that of Steyn J. It rejected the "good faith and fair dealing" test on the basis that this concept did not form a part of general English commercial law. It also held that an underwriter was not required to disclose all facts which might influence an assured in entering into a contract, as such a duty might require it to disclose, for example, the fact that other insurers offered similar cover but at a lower premium. The Court of Appeal refused to be drawn further than a general statement of principle.⁷⁹¹

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

Applying this test, the Court of Appeal held that the leading underwriters were in breach of their duty of disclosure. It may be concluded from this judgment that a fact will be material if it fulfils one of two requirements: (a) it relates to the scope of the

⁷⁸⁹ [1990] 2 All ER 947.

⁷⁹⁰ [1987] 2 All ER 923.

⁷⁹¹ [1989] 2 All ER 952, 990.

peril insured under the policy; or (b) it relates to the recoverability under the policy in respect of risks the coverage of which a prudent assured would have taken into account in determining whether to take out the policy.⁷⁹²

Proposition (a) is undoubtedly in conformity with general principle. Proposition (b) is more questionable, at least when measured against the judgment of Lord Mansfield in *Carter v Boehm*; and gives rise to interesting issues of whether the insurer must, for example, disclose the legal meaning of ordinary English words of coverage used in a policy in so far as the assured could not be expected to be aware of the secondary legal meaning. In *Lovett v Crown Worldwide (NZ) Ltd*⁷⁹³ it was held that the duty can never operate as a foundation for an obligation owed by the insurer extra-contractually to disclose or ensure that an insured party understands terms and conditions already settled between them by agreement. Such issues are unlikely to arise in practice because the assured is not entitled to damages where the policy proves not to cover his loss.⁷⁹⁴

The speeches in the House of Lords in *La Banque Financière*⁷⁹⁵ throw little light upon this matter. Lords Templeman, Brandon and Ackner did not comment upon the nature of the insurer's duty of disclosure. Lord Bridge cited the above-quoted passage from the Court of Appeal's judgment and did "not dissent"⁷⁹⁶ from the test there propounded. However, Lord Bridge disagreed with the Court of Appeal's conclusion that L's fraud was a material fact within this test. This was so because the fraud exclusion clause did not apply to L's fraud but only to the fraud of B. As L's fraud had thus not contributed to LBF's inability to recover under the policy, it did not affect "the recoverability of a claim" within the Court of Appeal's test of materiality, as the Court of Appeal had wrongly assumed. Had the fraud exception applied to L's fraud, Lord Bridge's speech may be taken to lend tentative support for the conclusion of the Court of Appeal that the fact in question would have been material. It has since been suggested by Rix LJ in *Sherdley v Nordea Life and Pension SA*⁷⁹⁷ that it would be breach of the insurers' duty of utmost good faith unilaterally to alter the terms of the policy between the initial negotiation stage and the making of the contract. In that case the documents initially presented to the assured provided for English law and jurisdiction, but the final wordings had changed this to Spanish law and jurisdiction. In the event

⁷⁹² A false statement as to coverage may give rise to the rather different analysis that there was an agreement between the parties on the terms suggested by the insurers so that the subsequent narrower policy wording can be rectified: see *Universal Dockyard Ltd v Trinity Insurance Co Ltd* (HK High Court, 1986). It was held in *Re Hookey Hill Rubber & Chemical Co Ltd and Royal Insurance Co* [1920] 1 KB 257, that a false statement made by the insurer's agent as to the coverage of the policy cannot give rise to remedies, but that case is based on the now abandoned distinction between statements of fact and statements of law.

⁷⁹³ HC Auckland CIV-2002-404-1877, 29 October 2004; *Gate v Sun Alliance Insurance Ltd* HC Auckland CP1218/92, 19 January 1994. But see *Fussell v Broadbase Christchurch Ltd* (2011) 16 ANZ Insurance Cases 61-913 (HC) in which, on a striking-out application, the High Court did not exclude the possibility that notice of unusual conditions may be needed or that the duty of utmost good faith may have some relevance to the manner in which certain terms ought to be interpreted. See also *King v New Zealand Insurance Co Ltd* [1993] DCR 31 (DC).

⁷⁹⁴ The impact of the argument in the text, that the Court of Appeal erred in holding that the duty of utmost good faith could extend to matters affecting the policy coverage, is reproduced by the Court of Appeal's decision that damages are not available in this situation. There is, in practical terms, no difference between the absence of a right and the existence of a right which has no remedy.

⁷⁹⁵ [1990] 2 All ER 947.

⁷⁹⁶ [1990] 2 All ER 947, 950.

⁷⁹⁷ [2012] EWCA Civ 88.

the effect of a warranty. The limitation of this possibility ought, however, to be noted. Conditions precedent themselves may be divided into two different types: (1) those which prevent the risk from attaching or which terminate the risk as a whole¹⁵⁹ unless there is compliance; and (2) those which prevent a claim being made unless the assured takes particular steps. A condition precedent of the former type is similar in its effects to a warranty of existing fact, as in either case the risk will not attach. By contrast, a condition precedent of the latter type is not a warranty. If the assured fails to comply with a claims condition expressed as a condition precedent, he has lost his claim but the policy and the risk itself are otherwise unaffected. By contrast, if the assured fails to comply with a continuing warranty, the risk terminates as of the date of breach and there can be no future liability under the policy.

(c) "Basis of the contract" clauses

7.032 **Nature of clause.** These clauses are probably the most common means of creating warranties. The proposal form will here contain a declaration, to be signed by the proposer, to the effect that all or any of the answers to the questions on the proposal shall form the basis of the subsequent contract of insurance. In this way the assured warrants the truth of his answers, so that the insurer may repudiate the policy should any of those answers – whether or not material to the risk – prove to be untrue.¹⁶⁰ Basis clauses were apparently developed early in the nineteenth century for the purposes of life assurance,¹⁶¹ and were originally found in proposal forms in conjunction with other clauses permitting the insurer to avoid the policy in the event of any material misstatement or concealment by the assured. The basis clause gradually, however, began to be used in other forms of insurance, eg burglary and theft insurance. The use of basis clauses has been condemned, particularly where the assured is under a continuing obligation, as he may not appreciate his obligations if he has not kept a copy of the proposal form.¹⁶² Accordingly, if there is any doubt, the answer to a question in the proposal form will be construed as a representation and not as a warranty,¹⁶³ especially where it is not material.¹⁶⁴

It is possible for insurers to make only some of the assured's answers warranties: in *Anderson v Fitzgerald*¹⁶⁵ only 14 out of 27 answers in the proposal were made the subject of a warranty in the policy. Even where the whole proposal is made the basis of the contract, this will not convert representations not contained in the proposal, such as the answers of the assured to questions put by the medical officer of the company, into warranties.¹⁶⁶ Further, if the basis clause applies to answers on the proposal form

¹⁵⁹ *US Trading Ltd v Axa Insurance Co Ltd* [2010] Lloyd's Rep IR 505.

¹⁶⁰ *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* [2014] Lloyd's Rep IR 114; *UK Acorn Finance Ltd v Markel (UK) Ltd* [2020] EWHC 922 (Comm).

¹⁶¹ *Duckett v Williams* (1834) 2 C & M 348.

¹⁶² See *Beauchamp v National Mutual Insurance* [1937] 3 All ER 19. The practice of incorporating the proposal form into the policy by reference has also been criticised by the judges as puzzling to the assured, who may find it difficult to fit the disjointed parts together in such a way as to get a true and complete picture of what his rights and duties are and that acts on his part may involve a forfeiture of the insurance: Lord Wright in *Provincial Insurance v Morgan* [1933] AC 240, 252.

¹⁶³ Channell B in *Wheelton v Hardisty* (1858) 8 E & B 232, 302.

¹⁶⁴ *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 429.

¹⁶⁵ (1853) 4 HLC 484.

¹⁶⁶ *Joel v Law Union* [1908] 2 KB 863.

and all other information, it is necessary to construe the assured's answer in the light of other information in the insurers' possession.¹⁶⁷

Materiality. In *Dawsons Ltd v Bonnin*¹⁶⁸ the plaintiff had taken out insurance on a lorry which he used for the purposes of his business. In answer to a question about where the vehicle would be garaged he stated that it would be kept at an address in central Glasgow, a high-risk area for the purposes of theft. In fact, the lorry was garaged on the outskirts of the city, where the risk of theft was rather less. The proposal form contained the usual basis of the contract clause. A bare majority of the House of Lords held that the insurer was entitled to repudiate the policy for the misstatement as to the garaging of the vehicle, notwithstanding that the risk had been overstated, as there was a breach of warranty. This decision confirmed earlier authorities which had indicated that materiality plays no part where a basis of the contract clause governs a misstatement and is of particular significance for the reason that the previous cases had either involved facts which clearly had been material¹⁶⁹ or in which the court had striven to find materiality where in reality none existed.¹⁷⁰

Effect of other policy terms. The effect of a basis clause may be modified by other policy terms.¹⁷¹ In *Dawsons v Bonnin*, the proposal form, as well as containing a basis clause, stated: "Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." Their Lordships were divided on the relationship between the two provisions. Viscounts Haldane and Cave held that the basis clause was not limited by the materiality provision because the two terms covered different, albeit substantially overlapping, ground. By contrast, Lord Dunedin preferred to concentrate on the basis clause itself, in disregard of the materiality provision. This difference of emphasis is potentially of some importance. The former view contemplates that a basis clause may be limited by other policy terms, whereas the latter gives primacy to the basis clause. The Haldane/Cave view has, fortunately, prevailed and there is a series of cases which demonstrate that the effects of a basis clause may be cut back by other terms in the policy. Thus, if the insurer has stated that the policy is incontestable, the basis clause cannot be relied upon,¹⁷² and if it is clear that the basis clause and the materiality provision are identical in scope, the doctrine of *contra proferentem* almost demands that the basis clause be overridden by the requirement of materiality.¹⁷³

Difficult questions of construction can arise here, and the cases turn upon whether the basis clause and any limiting clause are independent, in which case they have

¹⁶⁷ *MJ Harrington Syndicate 2000 v Axa Oyak Sigorta AS* [2007] Lloyd's Rep IR 60.
¹⁶⁸ [1922] 2 AC 413.

¹⁶⁹ *Duckett v Williams* (1834) 2 C & M 348; *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Thompson v Weems* (1884) 9 App Cas 671.

¹⁷⁰ *Yorkshire Insurance Co v Campbell* [1917] AC 218.

¹⁷¹ Assuming that such other terms have been validly incorporated into the contract: *DSG Retail Ltd v QBE International* [1999] Lloyd's Rep IR 283.

¹⁷² *Collette v Morrison* (1851) 9 Hare 162; *Wood v Dwarries* (1856) 11 Exch 493. Contrast *Wheelton v Hardisty* (1858) 8 E & B 232.

¹⁷³ See *Condogianis v Guardian Assurance Co* [1921] 2 AC 125; *Holmes v Scottish Legal Life Assurance Society* (1932) 48 TLR 306.

independent effect, or whether they form part of one single obligation, in which case the basis clause may be regarded as restricted. In *Fowkes v Manchester and London Life Assurance Co*,¹⁷⁴ the basis clause was qualified by the statement that the assured's answers were to be the basis of the contract "if it shall here after appear that any fraudulent concealment or designedly untrue statement be contained therein". It was held that the word "therein" referred back to the precise ground covered by the basis clause, and accordingly the intention of the clause was to permit reliance on the basis clause only where the assured had acted fraudulently. This decision was followed by Kekewich J in *Hemmings v Sceptre Life Association*,¹⁷⁵ in which there was a basis clause in usual form, but the policy itself contained a statement entitling the insurer to avoid the policy and retain the premiums in the event of the policy having been obtained by wilful misrepresentation. It was held that the two provisions were cumulative and not alternative, and that the declaration was restricted by the policy itself, so that accidental misrepresentation did not confer any rights on the insurer. *Hemmings* was doubted in the Scottish decision in *Unipac Scotland Ltd v Aegon Insurance Co*,¹⁷⁶ in which the basis clause set out the usual declaration that the assured had answered all questions to the best of his knowledge and belief and "that no material fact has been withheld or suppressed". The insurer was held to be able to avoid liability by proving that false statements had been made but without the need to prove their materiality: the Court of Session's view was that the basis clause contained two separate statements by the assured, one to the effect that answers had been given to the best of his knowledge and belief, and another to the effect that material facts had not been suppressed. As these related to different matters, the first to misrepresentation and the second to non-disclosure, they were independent obligations. The Court of Session was of the view that *Fowkes* was correctly decided but that *Hemmings* – which had relied upon *Fowkes* – was unsupportable as the two provisions were independent and should have been construed as such.

A basis clause will also be regarded as having been overridden by a policy term under which the insurer has undertaken that defences based on misrepresentation and non-disclosure will not be taken, a provision which is common in professional indemnity contracts.¹⁷⁷ A basis clause may also be qualified in its operation by its own terms. In *MJ Harrington Syndicate 2000 v Axa Oyak Sigorta AS*,¹⁷⁸ the plaintiffs were the reinsurers of Turkish insurers who had insured a Turkish bank under a bankers' blanket bond policy against fidelity losses. The proposal form for the renewal of the reinsurance asked whether the bank had complied with a recommendation that every employee was to take two weeks' continuous holiday per year, a standard form anti-fraud measure imposed upon banks. The proposal form also stated that the reinsureds agreed that "that this proposal, together with any other information supplied by us shall form the basis of any Contract of Insurance effected thereon and shall be incorporated therein ..." The recommendation was not complied with by inception in August 2003, and in November 2003 the reinsurers retroactively extended time for

¹⁷⁴ (1862) 3 F & F 440.

¹⁷⁵ [1905] 1 Ch 365.

¹⁷⁶ [1999] Lloyd's Rep IR 502.

¹⁷⁷ *Kumar v AGF Insurance Ltd* [1998] 4 All ER 788.

¹⁷⁸ [2007] Lloyd's Rep IR 60.

compliance until October 2003. Claims were notified in November 2003. The defence of breach of warranty was taken in November 2004. Aikens J held that it was arguable that the basis clause did not give an automatic defence, in that it referred both to the reinsureds' answers and to "other information supplied by" the reinsureds: if on inception the reinsurers had been told that the holiday provision had not been complied with, then the basis clause applied not just to the proposal form answer but also to that information and the warranty was qualified accordingly.

(d) Scope of warranties

Present and continuing warranties. Representations can never have continuing effect, even if they relate to the future,¹⁷⁹ unless they can be construed as warranties. Some difficulty has been encountered by the courts in determining whether the assured has warranted merely that a state of affairs exists at the date of the proposal or inception of the risk, or whether he has gone further and warranted that that state of affairs will prevail throughout the currency of the policy. In the absence of clear wording the answer in any given case will be based on a number of factors which may not always point towards the same solution: these will include whether imposing a continuing warranty is appropriate to the peril, whether continuing compliance by the assured is feasible, and whether the insurer requires continuing protection in the form conferred by a continuing warranty particularly in the light of the other terms of the policy. The various decisions on this issue are explicable only by their own individual and peculiar facts, although it may be that there is a presumption in favour of construing the assured's promise as directed towards present facts only; the principle of *contra proferentem* would undoubtedly justify any presumption of this nature, certainly where the assured is a consumer.

A number of cases have construed warranties as imposing continuing obligations. These include: a statement by a trader who stated that the only inflammable material stored was fuel for cigarette lights, when he later stored fireworks;¹⁸⁰ a statement by a builder that he did not use explosives in his work, when he later used explosives for the first time to undertake demolition work;¹⁸¹ a statement as to the address at which a vehicle would be garaged;¹⁸² a statement that money in transit would be kept in a safe and the key to the safe would not be kept in the building;¹⁸³ a statement that a vessel had London Salvage Association approval of location, fire fighting and mooring arrangements, when the approval subsequently lapsed;¹⁸⁴ a statement that Salvage Association recommendations with respect to a vessel would be complied with;¹⁸⁵ and a statement that oily rags were not kept loose in the assured's premises overnight.¹⁸⁶

These decisions may be contrasted with a series of others in which the warranty has been held to relate to present facts only. Where the assured has been asked to warrant

¹⁷⁹ *Shaw v Robberds* (1837) 6 A & E 75; *Benham v United Guarantee* (1852) 7 Ex 744.

¹⁸⁰ *Hales v Reliance Fire Assurance* [1960] 2 Lloyd's Rep 391.

¹⁸¹ *Beauchamp v National Mutual Indemnity Insurance Co* [1937] 3 All ER 19.

¹⁸² *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

¹⁸³ *Vaughan Motors v Scottish General Insurance Co Ltd* [1960] 1 Lloyd's Rep 479.

¹⁸⁴ *Agapitos v Agnew (No 2)* [2003] Lloyd's Rep IR 54.

¹⁸⁵ *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA (The Game Boy)* [2004] Lloyd's Rep IR 867.

¹⁸⁶ *Transhene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] LRLR 32.